

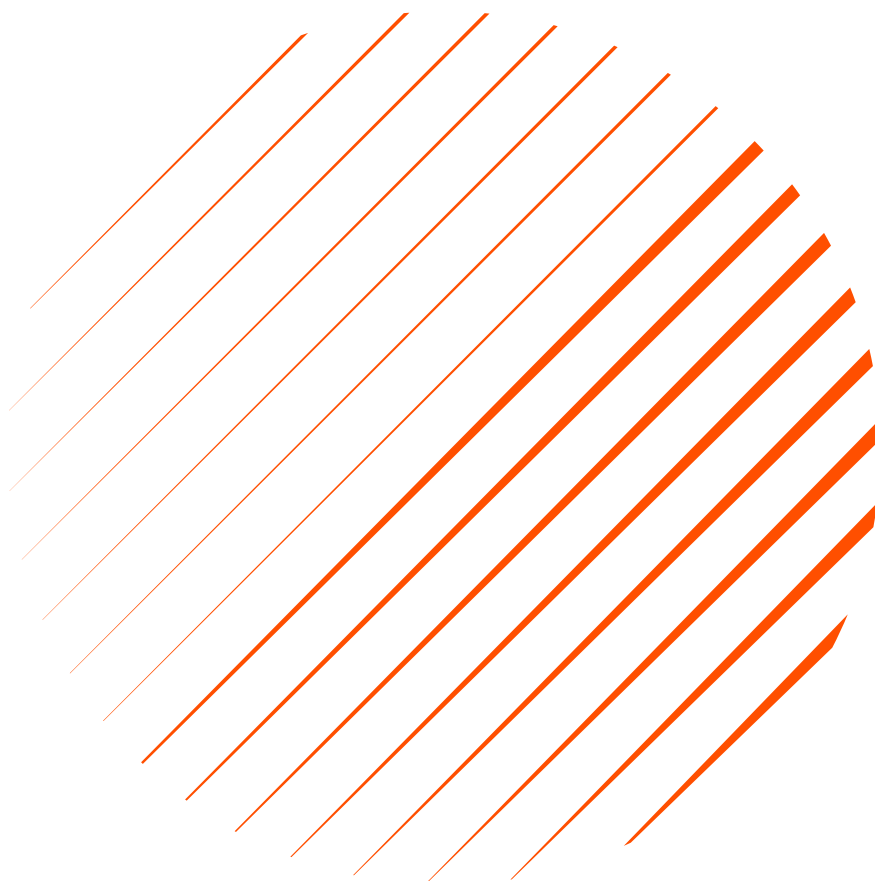
Online Advertising Regulation

Policy Briefing

Branded Content
Governance Project

June 2023

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Branded Content Governance Project

From left: Iain MacRury, Patricia Núñez Gómez,
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1. Introduction

Introduction

This document has a dual purpose. It provides a briefing on developments in UK policy concerning digital advertising regulation. It also presents initial research work for the Branded Content Governance Project, a three-year international study of the rules and rule-making processes by which content that is produced or funded by marketers is addressed in 32 countries, with an enhanced research focus on the UK and Spain. This briefing includes details of advertising policy developments in the UK but sets them in wider context, including EU law and policy, and includes a report on related policy developments in Spain.

New proposals for the regulation of advertising have been set out by the UK government and UK Parliamentary committees. In January 2023, the Branded Content Governance Project hosted a policy symposium on Online Advertising Regulation, followed by a public event to consider the options and their implications for the regulation of online advertising. Both events considered the wider framework and options for regulation but focused on the identification and disclosure of advertising across news publishing and influencer marketing. The symposium and public event involved key policy actors, academics, legal experts and industry, and addressed issues and policy/regulatory proposals affecting the relationships between media and marketing communications.

These events were hosted by the [Branded Content Research Hub](#) at the University of the Arts London (UAL), organised as part of the Branded Content Governance Project (BCG) led by researchers at UAL, University

of Stirling and Complutense University, Madrid. The BCG Project (2022-25) is a three-year international research project.

The events were also organised in association with MeCCSA Policy Network, part of the part of the subject association that represents all who teach or research in Higher Education in media, communications and cultural studies. We gratefully acknowledge the support of MeCCSA Policy Network, BCG (and Hub) project partners: Branded Content Marketing Association (BCMA) and Content Marketing Association (CMA) and our wider network of academic advisers and project partners. The Branded Content Governance Project (ES/W007991/1) is funded by two UK Research Councils, the Economic and Social Research Council (ESRC) and Arts and Humanities Research Council (AHRC). This policy briefing is produced as a publication for the BCG project and we thank the ESRC and AHRC for the support that has enabled us to produce this research output.

UK advertising policy documents

There are three linked areas the January 2023 event focused on, as does this policy briefing:

- the DCMS committee Influencer Culture report and Gov/stakeholder responses,
- the Online Advertising Programme on regulating digital marketing communications,
- and relevant parts of the Online Safety Bill.

The Online Safety Bill includes provisions to tackle fraudulent paid-for adverts but otherwise leaves the regulation of marketing communications to the Online Advertising Programme (OAP). The OAP sets out proposals and options for the regulation of paid-for online advertising. It questions the adequacy of the existing framework of regulation

and self-regulation to deal with the expanded range of actors across the advertising supply chain and sets out options for reform. The Influencer Culture report by the House of Commons Culture Committee proposes strengthening of regulation and self-regulation. In response, the Government has referred to the OAP process as the vehicle for any changes in statutory regulation.

This briefing discusses the implications of proposals (and current regulations) for the governance of online advertising across a more complex media-marketing ecology of actors and processes, and considers issues of (de) convergence and consistency in proposals affecting influencer marketing and platform/publisher disclosure of brand sponsored content.

Executive Summary

UK Online Advertising Governance Recommendations

- *Broaden the scope of the to marketing communications.*
- *Extend the Online Advertising Programme (OAP) beyond online to cover all platforms and develop a technology-neutral approach (in line with ICC Marketing Code).*
- *Include harms to media and communications in addition to the OAP harms of advertising content and placement/targeting.*
- *Ensure identification of advertising is established in law and enforced by a comprehensive, technology-neutral statutory regulator.*
- *Incorporate HFSS Food and drink marketing into a comprehensive regulatory system for marketing communications.*

The Branded Content Governance Project is in an early phase of investigating governance arrangements across 32 countries and will consult widely with policy actors and stakeholders before setting out more comprehensive policy recommendations. However the BCG project is motivated by the need to identify and address problems in governance and identifies these across existing self-regulatory

and regulatory arrangements. We believe that better regulation is likely to require a governance ecology involving incentives, guidance and constraints on actors and processes created through what are called, in shorthand, 'self-regulatory' and 'statutory' mechanisms. The roles these can and should play and the suitability of the governance system to address dynamically adaptive digital communications systems are the focus for the research project. Our research, and that of the wider network of academic advisers involved, does point to the need for a suitably strong statutory underpinning. So, for the purposes of this briefing, we can advocate that options 2 and 3 of the OAP should remain under consideration and the case for option 3 is considered below. A statutory regulatory framework provides the best mechanism for clarity and guidance on legal requirements, to work alongside various forms of industry self-regulation (advertising and other self-regulatory organisations, plus professional trade associations and networks) providing the more detailed guidance on adherence and best practice.

About the Branded Content Governance Project

The **Branded Content Governance Project**, is a three-year international research project funded by two UK Research Councils (ESRC and AHRC).

The Branded Content Research Project examines the regulation and broader governance of content that is funded or produced by advertisers. We will produce a comparative mapping encompassing North America, the UK, all EU countries and Australia, and examine practices, policy networks and trade/general media discussions in more detail in the UK and Spain. The project is led by three Universities (the University of the Arts London (UAL), University of Stirling and Complutense University, Madrid) supported by a 80+ international academic network, industry partners (including the Branded Content Marketing Association and Content Marketing Association) and industry, legal, policy and civil society participants. In summary, our project is oriented to consider 'problems' and challenges (e.g. how are evolving forms of branded content addressed in relation to identification and disclosure? What values guide governance and are these suitable? How should the effectiveness of governance structures and processes be measured and assessed?) but offer recommendations arising from research, practice and guided by cross-stakeholder dialogue.



Project Partners



Media-marketing integration

The relationships between media and advertising are changing profoundly as they converge. Brands are increasingly involved in the production of publisher-hosted content.

Such non-traditional advertising, which blends brand messages with entertainment or information, has grown worldwide at twice the rate of advertising overall, with double-digit growth forecast from 2021.

Branded content is content that is funded or produced by marketers. This includes brands' own media content but also forms of paid advertising that are 'native', blending into the non-advertising communications environment in which they appear, such as editorial-like 'sponsored content', and 'influencer marketing': paid promotions by social media communicators.

Project need

Branded content has been the focus of business and creative strategies, and of deepening controversy. Marketing that is disguised or 'native' to its editorial environment has generated most concerns, ranging from deception and reader awareness to the impact on editorial integrity, media quality and trust.

We need to examine what is happening, to ask searching questions on behalf of consumers and wider society, and to put forward well-informed proposals for how rules and practices can be improved.

Activities

This research project builds on collaboration and dialogue between the industries involved, regulators and those affected, and draws on an international network of academics.

Our research project will provide a detailed, cross-national mapping of the emerging rules and practices for branded content across North America, Australia and all EU countries with more detailed analysis of the UK and Spain. It includes comparative study of legal and regulatory measures, industry self-regulation, and public discussion within professional and general media.

The central aim is to provide important insights and recommendations for managing and regulating branded content and communications in the digital age.

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Governance

The Branded Content Governance project aims to make further contributions by examining not only the substance of rapidly evolving regulations but also the intricate processes and multifaceted experiences inherent in navigating this dynamic and complex governance system. The intensity and complexity of change in this domain challenge governance systems worldwide (Cunningham & Craig 2019; Napoli 2019)

Our focus extends to various models of governance, recognising the system's inevitable complexity while contemplating the relevance of conceptions such as “polycentric governance”, “multi-level governance”, and “network governance” (Cairney et al 2019). We strive to grasp better the practical realities of the diverse processes of multi-centric policymaking currently informing branded content and promotional communications.

So, a vital aim of the work is to continue to pursue research illuminating the interactions arising from attempts to manage, stabilise, and steer media systems for the benefit of all involved parties. Stakeholders, policy actors, practitioners, and the professions articulate and represent differing positions and solutions concerning the field's continual development. With the emergence of new online formats for promotional

communication, particularly in the area of branded content, there is a unique opportunity not only to observe but also to analyse and document experiences related to the ‘live’ policy development and formulation process.

Thus, a broader contribution that the project aims to make will arise from a thorough and extended engagement with these policy actors and the evolving branded content systems. We find ourselves in an unusually volatile period of policy formation and transformation triggered by the technological and cultural shifts tied to digitalisation (Flew et al 2019) and, most lately, AI (Gantzias 2012). Research-led reflexivity at this juncture can make an important contribution to the field. Clarity and communicability remain further priorities for any governance system, but also for analysis of any such systems. For example, it is evident from the diverse types of policy documents, proposals, and reflections on inputs from multiple organisational types – policy actors, practitioners, institutions, government bodies, professional bodies, and third-sector organisations – that the environment's complexity invites a “polycentric” approach to governance (Cairney et al 2019; Ostrom 2010). The governance focus of this work will place this inevitable complexity in intelligible frames and content, better enabling shared thinking, acting and deliberation.

2. Digital Advertising Regulation

UK policy context

This section outlines the broader UK policy context relevant to advertising governance while section 3 below discusses the three key policy initiatives (Influencer Culture; Online Safety Bill and Online Advertising Programme).

The UK Government's ambition is to be the 'best regulated economy in the world' creating 'an improved regulatory system' that balances the needs for regulation and the promotion of economic success. The government states (HM Government (2022):

Poorly designed regulations can stifle economic growth and innovation, limit market competition and disproportionately harm small businesses. But when done well and in collaboration with business, regulation can catalyse economic growth and the co-creation of new markets. The steps we are taking, including through improved regulatory scrutiny and evaluation of impacts, will help ensure that where regulation is used it is a force for good for the UK economy

The UK Government has described its overall aims as maintaining a pro-innovation and proportionate approach to digital regulation. It seeks to reassure a range of interests across business and civil society by acknowledging both the benefits of paid-for advertising and risks and potential harms. It identifies risks across advertising content, ad placement and targeting

and potential harms including misleading and fraudulent ads, ads promoting illegal activities and so-called 'legal but harmful' ads (such as those targeting vulnerable groups).

Introducing the Online Advertising Programme, the then Minister of State for Media, Data and Digital Infrastructure, Julia Lopez stated 'market participants across the advertising ecosystem (from advertisers to publishers and all those in between) have a collective responsibility to tackle the harms created to society' (DCMS 2022b).

The Government's [Plan for Digital Regulation](#) sets out an agenda to promote competition in digital markets and a post-Brexit data protection regime.

In April 2022, the Department for Business, Energy and Industrial Strategy (BEIS 2022) presented the UK Government's response to its 2021 consultation, Reforming competition and consumer policy. The consultation addressed matters including fake reviews and online exploitation of consumers. The Government stated '[c]ommissioned or incentivised reviews by consumers that are not clearly labelled and distinguishable as such can

mislead consumers'. It proposed to 'strengthen the law to deter, and facilitate enforcement against, traders who engage in unfair practices, by taking a power in legislation to add to the current list of automatically unfair practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)'. BEIS said it would consult further on adding powers to Schedule 1 to prohibit commissioning or incentivising fake consumer reviews, 'hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine' or 'offering or advertising to submit, commission or facilitate fake reviews. The measures would therefore target all actors and intermediaries, including platforms, marketers and agencies. BEIS (2022) announced it would 'continue to build its evidence base on the impact of undisclosed paid-for advertising appearing in regular results of online search rankings and strengthening the law so that it is easier for enforcement agencies such as the CMA to take action...'. The UK's proposals similar to those already introduced in the EU by the Omnibus Directive (O'Connell and Turner 2023).

There has been legislative action by Government in addition to the policy proposals discussed in section 4. In May 2022, the Government deferred the introduction of new UK-wide restrictions on paid-for online advertising of HFSS (high fat, salt and sugar) food or drink. The measures are set out in the [Health and Care Act 2022](#) and were due to be implemented on 1 January 2023. The Government announced a one-year delay to implementation, to January 2024. In December 2022, the Government announced that implementation was to be further delayed until 1 October 2025 to allow the businesses affected more time to adjust. The delay followed intensive lobbying by ITV and by commercial media, marketers and trade bodies. The Health and Care Act 2022, establishes the following new UK-wide advertising restrictions:

A 9 pm watershed for advertising of less healthy food or drink on television. Broadcasters and all on-demand programme services (ODPS) under UK jurisdiction (and so regulated by Ofcom) are liable for any breaches. A restriction on paid-for advertising of less healthy food or drink online. ODPS not regulated by Ofcom will be subject to this online restriction.

In February 2023 the Department for Digital, Culture, Media & Sport (DCMS) was replaced by the [Department for Science, Innovation and Technology](#) and [Department for Culture, Media and Sport](#). The Department for Culture, Media and Sport (DCMS) has been returned to its original departmental title (with the acronym retained throughout). The DCMS retains responsibility for the Online Advertising Programme and is expected to make a statement on future policy action, and its response to the OAP consultation, in the autumn of 2023.

In April 2023, the Government introduced the Data Protection and Digital Information (No. 2) Bill, with DSIT as the responsible Department.

The bill makes provisions ‘for the regulation of the processing of information relating to identified or identifiable living individuals; ...services consisting of the use of information to ascertain and verify facts about individuals; ... access to customer data and business data; ...privacy and electronic communications; ... electronic signatures, electronic seals and other trust services; ...disclosure of information to improve public service delivery; ...sharing information for law enforcement purposes’. The bill makes provision for the creation of an Information Commission.

In April 2023, the government introduced the Digital Markets, Consumer and Competition Bill to parliament (25 April). This would create further regulation for digital markets, review competition law and the proposals would also make significant changes to consumer protection law. The CMA will be able to award compensation to consumers and directly impose financial penalties for breach of consumer protection laws. There are some hefty potential fines of up to 10% of global annual turnover. ‘Subscription traps’, in which businesses make it difficult to exit a contract, will also be stopped. The rules about misleading and aggressive consumer practices will also be restated. The Bill also contains powers to create new laws against fake reviews, including prohibiting the commissioning of someone to write a fake review; posting consumer reviews without taking reasonable steps to check they are genuine; and offering or advertising to submit, commission or facilitate fake reviews.

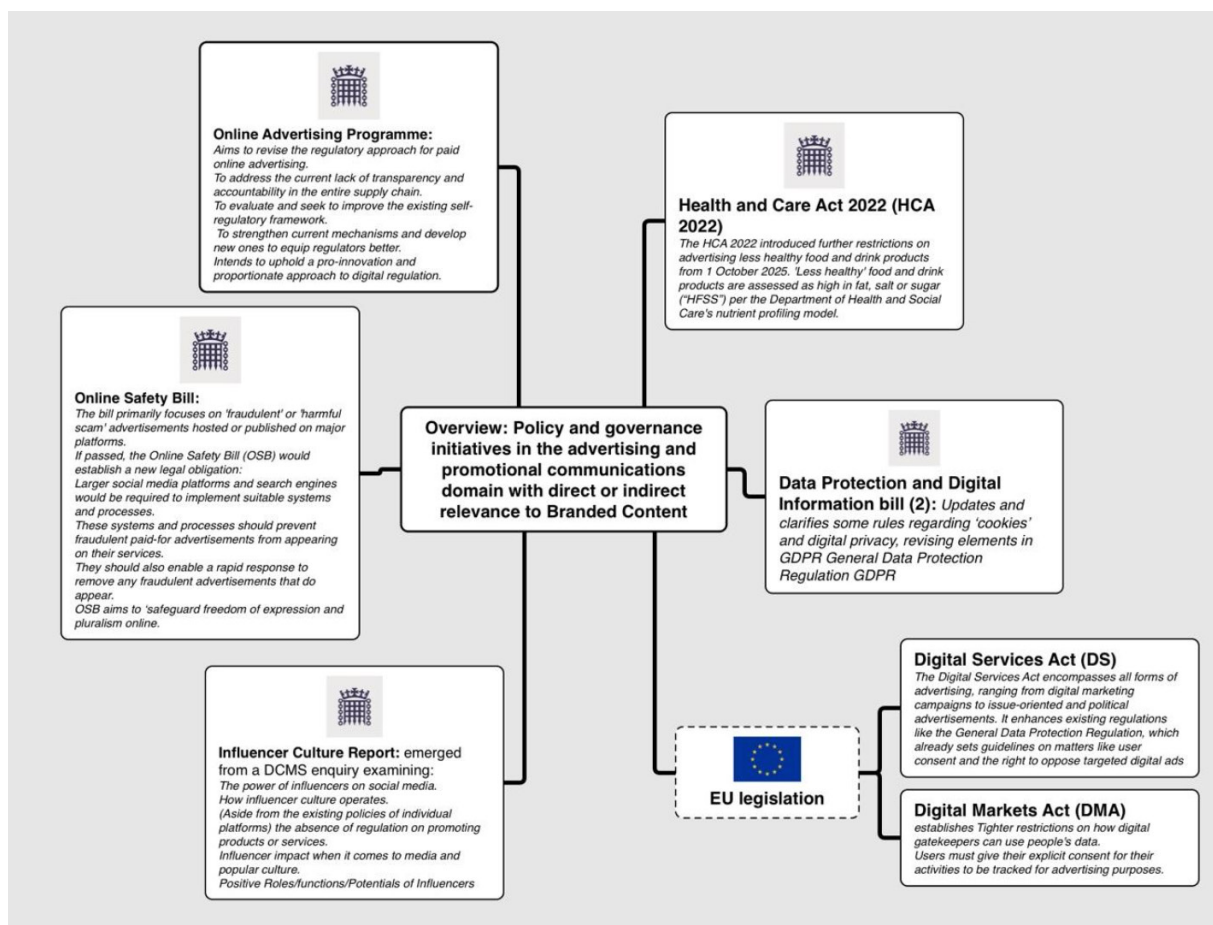
Competition, market power and consumer protection

A new Digital Markets Unit (DMU) was established within the Competition and Markets Authority (CMA) in April 2021. The DMU will oversee a new pro-competition regulatory regime for the most powerful digital firms. The DMU operates on a non-statutory basis but is expected to be given powers through forthcoming legislation, as set out in the 2022 Autumn Statement (House of Commons Library 2022). The forthcoming bill is expected to create post-EU arrangements for consumer protection as well as changes to the 1998 Competition Act and the CMA's investigation powers. For consumer regulation, the expected changes include enabling the CMA to directly enforce consumer law by imposing fines itself rather than through the courts.

The CMA also conducted a market analysis that concluded 'weak competition in search and social media leads to reduced innovation and choice and to consumers giving up more data than they would like'. The CMA estimates that Google earned 90% of total UK revenues for search advertising in 2019, while Facebook earned The CMA recommended that the Government establish a new pro-competition regulatory regime for digital markets. A CMA investigation into AI was announced in May 2023.

European Union and comparative (supra)national contexts

The EU has established the Digital Services Act (DS) and Digital Markets Act (DMA) which together ‘aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses’ (European Commission 2023).



Branded Content Governance Project

‘The intervention would inherently set a European Union standard in the governance of issues emerging on online platforms, both in relation to measures to mitigate risks and ensure online safety, and the protection of fundamental rights in the evolving online space’ (European Commission 2020: 58). ‘Online safety’ is listed as the first ‘social

impact’ of the new measures and suggests similar solutions to the UK Online Safety Bill – also focused on ‘illegal content, goods and services’ (European Commission 2020: 59).

‘Member States are increasingly introducing, or are considering introducing, national laws on the matters covered by this

Regulation, imposing, in particular, diligence requirements for providers of intermediary services as regards the way they should tackle illegal content, online disinformation or other societal risks’ (European Commission 2020b: 17).

3. UK Advertising Policy

The following section provides a summary and commentary on issues in the three key UK policy statements, from the UK Government and Parliamentary Committees

Influencer Culture Report (DCMS Committee 2022)

Influencer Culture: Lights, Camera, Inaction, was produced by the House of Commons Digital, Culture, Media and Sport Committee (DCMS Committee) following an inquiry with oral and written evidence. The report explores ‘the impact that social media influencers are having on UK culture, and how the industry operates’, offering a snapshot of the current state of the market (DCMS Committee 2022: 6). It considers the market arrangements, practices, forms and other characteristics of influencer culture, understood as a rapidly expanding creative industry with a transformative impact on commercial activities online. The report discusses influencers’ employment rights, the need to protect children (both as influencers and as the members of their online audience), and, most crucially for the Branded Content Governance Project, the activities influencers engage in as providers of marketing communication services.

The report describes ‘the rapid expansion of this [influencer] marketplace, both in scale and in technical innovation’, which has ‘outpaced the capabilities of UK advertising regulation’ (DCMS 2022: 3). In response, the Committee recommends regulatory reform. They call for strengthening of the enforcement powers of the Competition and Markets Authority (CMA) and the Advertising Standards Authority (ASA) in order to meet

the challenges of this dynamic and volatile marketplace, and to protect customer trust and user safety.

The report identifies advertising disclosure as one of the main areas affected by current gaps and anomalies in regulation (DCMS 2022: 5). The Committee point to the ‘sheer volume’ of online content that is creating challenges for monitoring and control, and express concerns about the democratisation of influence leading to amateur content creators taking on promotional activities without any supervision or understanding of regulatory requirements (DCMS 2022: 5). In their submissions to the inquiry, both the ASA and the CMA note the widespread non-compliance resulting from this environment (ASA 2021; CMA 2021). Influencers rely on deals with brands as their predominant business model and yet the effectiveness of their promotional activities depends on building trust and creating a convincing illusion of ‘authentic’ content. This is another aspect highlighted in the report, indicating further reasons for the increasingly blurry division between user generated content and commercial communications, with ‘advertorials’ figuring on top of their list of possible types of ‘paid partnership’ deals between brands and influencers (DCMS 2022: 15). They note that brands tend to offer influencers a chance to tailor the commercial message to imbue the endorsement with

authenticity, using the influencers’ own brand and personality to validate the advertising for their followers and audience (DCMS 2022: 16). Overall, the report identifies branded content as one of the predominant areas of concern in social media communications, and dedicates attention to the harm it causes to the online environment.

With confusion caused by non-disclosure and the blurring of boundaries between commercial and non-commercial content, come larger-scale problems and threats to fundamental values such as freedom of expression and democracy. Brands distort online communication and exert disproportionate levels of control within environments where internet users expect to voice and encounter genuine opinions and concerns. The influencers become the mouthpieces for the brands and tailor their content to attract investment, while their fans find themselves deceived and their attachment manipulated. Brands can suppress specific kind of messages and uplift others, transforming the online environment to fit their needs and interests. The report cites Prof. Jonathan Hardy to support that point, indicating shared care about those issues and a recognition of the need for statutory means to prevent further damage to ‘communication rights of recipients and the wider public interest’ (DCMS 2022: 16; Hardy 2022b, 2022a).

Proposals

1. A new code governing the relationship between influencers, advertisers, brands and talent agencies

The report proposes solutions which would allow to address the issues with influencer non-disclosure. Using The Incorporated Society of British Advertisers (ISBA) Influencer Marketing Code of Conduct as a starting point, they recommend developing a new, Government-recommended code regulating the relationship between influencers, advertisers, brands and talent agencies (DCMS 2022: 18; [ISBA 2022a](#)). ISBA also offers template contracts: the first one, created in 2016, proposed ‘first ever terms for the appointment of social talent’ and was designed for marketers employing talent either directly or through an agency; the second was aimed at contracting micro-influencers and was published alongside an updated version of the previous, rewritten in partnership with law firm Lewis Silkin ([ISBA 2022b](#)).

The Committee call for a new code of conduct and template contracts, which would require appropriate labelling and disclosures, and could address many of the problems they highlighted. Clarifying and unifying contractual terms would make it impossible for smaller-scale influencers entering the market to claim ignorance of the rules, while creating separate

contracts for various involved parties would clarify and regulate the relationships between the growing number of actors engaged in facilitating influencers’ relationships with brands.

2. Statutory powers for the ASA

The Committee proposes that the ASA should be given statutory powers to enforce the CAP code (DCMS 2022: 31). They recommend this should be done as a part of process of implementing new proposals for regulation set out in the Government’s Online Advertising Programme (OAP).

3. Replacing the CAP-ASA dual test of payment and control

The Committee makes significant recommendation on the identification and disclosure of marketing communications. It recommends change regarding payment and control.

‘We recommend that the remit of the CAP code be extended by removing the requirement for editorial ‘control’ to determine whether content constitutes an advertisement (paragraph 69)’ (DCMS Committee 2022: 26).

The Committee acknowledged the recommendation of the CMA for this proposal. Prof. Hardy (2021a) also argued for the removal of the dual test. His submission recommended: ‘Using

the language of the US Federal Trade Commission, material connections between sources and public content should be evident or declared in both third-party and self-published content. Payment, or ‘material connection’ related to the published content, should be declared for all third-party content (Hardy 2021a).’

4. The Committee recommend enhanced disclosure standards for advertisements aimed (predominantly) at children (paragraph 116) (DCMS Committee 2022: 40).

UK Government Response

The report was published on 9 May 2022. The Government gave its formal response in September. This occurred during a period of intense disruption in Government, during Liz Truss's brief tenure replacing Boris Johnson as Prime Minister. On most issues the Government response referred (and deferred) to the ongoing Online Advertising Programme (OAP) review as the place where many of the Committee's recommendations and concerns would be addressed. The Government also redirected the recommendations relating to the CAP code to the ASA (DCMS 2022a: 5):

The Government will bear in mind the Committee's recommendation on providing the ASA with statutory powers as we complete our analysis, as well as, where relevant, the other recommendations directed at the ASA (paragraph 17)' (DCMS 2022a: 5). 'The Government notes the recommendations addressed to the ASA, which the ASA will be responding to directly (paragraph 18)' (DCMS 2022a: 5).

The Government's short and generally non-committal response was considered by some as marking a failure of the DCMS committee to influence government (Raeside 2022).

Influencer Culture Consultation Responses

Respondent	Descriptor	Type	Who	Role	No. of pages	Month/Year	Extra info	Given oral evidence?
Twitter	Platform	Industry	Ronan Costello	Public Policy Lead – Europe, Turkey & Israel	6	Apr-22	Follow up to oral evidence	Yes
Competition and Markets Authority	Statutory Regulator	Regulators	No name	N/A	6	Mar-22	Follow up to oral evidence	Yes
Dr. Sophie Bishop	Academic	Academia	Dr. Sophie Bishop	Academic and Specialist Advisor	4	Mar-22	Specialist Advisor Evidence	No
Instagram	Platform	Industry	Tom Gault	UK and Northern Europe Public Policy Lead	8	Mar-22	Follow up to oral evidence	Yes
TikTok	Platform	Industry	Liz Kanter	Director Government Relations	4	Mar-22	Follow up to oral evidence	Yes
YouTube	Platform	Industry	Iain Bundred	Head of Public Policy, UK and Ireland, YouTube	3	Mar-22	Follow up to oral evidence	Yes
Advertising Standards Authority	Self-Regulator	Regulators	No name	N/A	2	Feb-22	Follow up to oral evidence	Yes
Dr. Stephanie Alice Baker	Academic	Academia	Dr. Stephanie Alice Baker	Senior Lecturer in Sociology, City University, London	11	Jan-22	Follow up to oral evidence	Yes
Helen Wills	Private Individual	Civil Society	Helen Wills	Influencer	1	Nov-21	Follow up to previous response	Yes
Influencer Marketing Trade Body	Trade body	Industry	No name	N/A	3	Nov-21	First Response	Yes
Influencer Marketing Trade Body	Trade body	Industry	No name	N/A	2	Nov-21	Follow up to oral evidence	Yes
Professor Sonia Livingstone and Dr. Miriam Rahali	Academic	Academia	Professor Sonia Livingstone and Dr. Miriam Rahali	Professor and Visiting Fellow in Media and Communications at the London School of Economics and Political Science	10	Nov-21	First Response	Yes
Advertising Association	Trade body	Industry	No name	N/A	9	Jun-21	First Response/ Standard Questions	Yes
Advertising Standards Authority	Self-Regulator	Regulators	No name	N/A	8	Jun-21	First Response	Yes
Billion Dollar Boy Limites	Talent Management Company	Industry	No name	N/A	4	Jun-21	First Response/ Standard Questions	No
Competition and Markets Authority	Regulator	Regulators	No name	N/A	19	Jun-21	First Response/ Standard Questions	Yes
Dr. Christine Riefa and Dr. Catalina Goanta (and many other academics)	Academic	Academia	Laura Aade, Thales Bertaglia, Sophie Bishop, Hayleigh Boshier, Angèle Christin, Daniel Ershov, Catalina Goanta, Giovanni De Gregorio, Gemma Newlands, Christine Riefa, Jerry Spanakis, Jeremy Yang and Isabelle Wildhaber	Academic	9	Jun-21	First Response/ Standard Questions	Yes
Dr. Hayleigh Boshier	Academic	Academia	Dr. Hayleigh Boshier	Senior Lecturer in Intellectual Property Law at Brunel University London, Visiting Research Fellow at the Centre for Intellectual Property, Policy and Management (CIPPM) Bournemouth University and an Intellectual Property & Entertainment Law consultant	4	Jun-21	First Response/ Standard Questions	No
Dr. Rebecca Mardon, Professor Kate Daunt, Dr. Hayley Cocker	Academic	Academia	Dr. Rebecca Mardon, Professor Kate Daunt, Dr. Hayley Cocker	Cardiff and Lancaster University	7	Jun-21	First Response/ Standard Questions	No
Dr. Sevil Yesiloglu, Dr. Joyce Costello	Academic	Academia	Dr. Sevil Yesiloglu, Dr. Joyce Costello	Senior Lecturer in Advertising and Digital Communications at University of the Arts London and Lecturer in Marketing and Strategy at Cardiff Metropolitan University	5	Jun-21	First Response/ Standard Questions	No
Dr. Stephanie Alice Baker	Academic	Academia	Dr. Stephanie Alice Baker	Senior Lecturer in Sociology at City, University of London	6	Jun-21	First Response/ Standard Questions	Yes

Respondent	Descriptor	Type	Who	Role	No. of pages	Month/Year	Extra info	Given oral evidence?
Dr. Terence McSweeney	Academic	Academia	Dr. Terence McSweeney	Senior Lecturer in Film and Television Studies at Solent University	3	Jun-21	First Response/ Standard Questions	No
Girllguiding	Charity	Civil Society	No name	N/A	10	Jun-21	First Response/ Standard Questions	No
Gleam Futures	Talent Management Company	Agency	No name	N/A	4	Jun-21	First Response/ Standard Questions	Yes
Hashtag Ad Consulting Limited	Consulting Company	Agency	No name	N/A	4	Jun-21	First Response	No
IAB UK	Trade body	Industry	No name	N/A	4	Jun-21	First Response/ Standard Questions	No
Influencer Ltd.	Market Research	Industry	Nik Speller	Director of Strategy & Partnerships	4	Jun-21	First Response/ Standard Questions	Yes
Influencer Marketing Trade Body	Trade body	Industry	No name	N/A	9	Jun-21	First Response/ Standard Questions	Yes
ISBA	Trade body	Industry	No name	N/A	5	Jun-21	First Response/ Standard Questions	No
LGB Alliance	Advocacy Group	Civil Society	Kate Harris	LGB Alliance Contact Person	8	Jun-21	First Response/ Standard Questions	No
Miss Beckii Flint	Talent Management Company/ Influencer Marketing Agency (co-ran by an Influencer)	Industry	Beckii Flint	Co-Founder, Pepper Studio	4	Jun-21	First Response/ Standard Questions	No
Mobile UK	Industry	Industry	Hamish MacLeod	Director, Mobile UK	2	Jun-21	First Response	No
Northbank Talent Management	Talent Management Company	Industry	Diane Banks	CEO, Northbank Talent Management	3	Jun-21	First Response/ Standard Questions	No
Professor Jonathan Hardy	Academic	Academia	Professor Jonathan Hardy	Professor of Communications and Media at the University of the Arts London	22	Jun-21	First Response/ Standard Questions	No
Rocket Sports Internet Limited	Industry	Industry	Will Muirhead	Chief Executive of Rocket Sports Internet Limited, an investor in, and operator of, Sports Influencer Brands on Digital & Social Media Platforms	4	Jun-21	First Response/ Standard Questions	No
Safe Schools Alliance UK	Advocacy Group	Civil Society	No name	N/A	1	Jun-21	First Response/ Standard Questions	No
The Creator Union	Proto Trade Union for Influencers	Civil Society	No name	N/A	5	Jun-21	First Response/ Standard Questions	Yes, by Nicole Ocran, founder of the Creator Union
The Institute of Practitioners in Advertising	Trade body	Industry	No name	N/A	5	Jun-21	First Response/ Standard Questions	Yes
UEA Centre for Competition Policy	Academic	Academia	Dr. Sally Broughton Micova; Dr. Scott Summers	Associate Professor in Communications, Policy & Politics and Lecturer in Business Law at University of East Anglia	5	Jun-21	First Response/ Standard Questions	No
UK Interactive Entertainment	Trade body	Industry	No name	N/A	7	Jun-21	First Response/ Standard Questions	No
VoiceBox	Social Enterprise	Industry	No name	N/A	6	Jun-21	First Response/ Standard Questions	No
Department for Digital, Culture, Media and Sport	Government	Regulators	No name	N/A	3	May-21	First Response/ Standard Questions	Yes
Facebook	Platform	Industry	No name	N/A	7	May-21	First Response	No
YouTube	Platform	Industry	No name	N/A	6	May-21	First Response	Yes

On 26th March 2021, the Digital, Culture, Media and Sport Committee opened its consultation examining the impact of influencers (DCMS Committee 2021). The call for written responses was open until 7th May 2021. Most responses listed in the table pp20-21 come from that period. The demarcated section at the top of the table covers the next stage of the consultation which started in January 2022 when DCMS Committee invited some institutions and academics to deliver oral evidence. This included a session with the representatives of Twitter, YouTube, Instagram and TikTok on the 18th January and representatives of the ASA and the CMA on the 27th January (DCMS Committee n.d. ; Herbert Smith Freehills 2022). The written responses that followed that period were responding to the evidence given during the oral evidence sessions.

There were 44 written responses to the consultation and 11 oral evidence sessions. The table captures all the written responses, including the ones published in 2022. Over 50% of responses came from the industry (this category included platforms, trade bodies, talent

agencies, market research agencies, and businesses), followed by academia at 26%, civil society (11%) and regulators (9%). The calculations cover all written responses, including repeat responses from the same institutions. The CMA and the ASA provided two written responses as well as oral evidence and the Influencer Marketing Trade Body was the only representative of the industry who submitted three responses and provided oral evidence. The length of responses averaged at 6 pages. Over 70% of responses discussed branded content – non-disclosure featured as a major point of discussion, both as an issue which needs to be addressed, and as a point of reference when arguing that the current rules or measures are sufficient, with many pointing out the unique risks that the blurring between commercial and editorial content poses to children.

Online Safety Bill

Chapter 5: Duties About Fraudulent Advertising

Chapter 2, Section 15: Duties to Protect Journalistic Content

The [Online Safety Bill](#) (OSB) follows the Government's 2019 manifesto commitment to 'make the UK the safest place in the world to be online while defending free expression' (DCMS 2022c). The bill regulates platforms and browsers and introduces statutory requirements on services to prevent users from posting or viewing harmful content, either amongst user generated posts or in search results. The focus is predominantly on illegal materials, especially those relating to terrorism or exploitation of children. Children as internet users stand out as the protected category, although the bill contains restrictions against both illegal, and what they define as 'legal but harmful', content regardless of users' age. The burden of responsibility for moderating content falls on platforms, especially those with high volumes of users, or deemed high-risk. Ofcom is responsible for enforcing these regulations (DCMS 2022b). The bill was introduced in the House of Commons on 17 March 2022. An amended bill was published in December 2022 and at the time of writing is completing the remaining stages in 2023 (UK Parliament 2023).

The aspects of the bill that are most relevant for advertising governance pertain to 'fraudulent', or 'harmful scam' advertising being published or hosted on the largest platforms (DCMS 2022b).

If enacted, the OSB would create a new legal duty requiring larger social media platforms and search engines to put in place suitable systems and processes to prevent fraudulent paid-for adverts appearing on their services, and to respond quickly to take down any that do appear.

However, the bill is explicitly limited in scope to address these issues of fraudulent advertising and not wider issues in marketing communications and marketing-media relationships. The provisions in the bill are connected to lobbying led by the financial advice site for Martin Lewis seeking to tackle the fraudulent use of impersonation and fake authorisation and endorsement. As well as delimiting the scope of advertising addressed in the bill, the proposed measures are also delimiting, designed to address only those serious cases of fraud, which have the potential to have a 'devastating impact' on internet users (DCMS 2022b). These include 'fake' advertisements

- involving personification of a celebrity, or a company, to gain credibility - which criminals can use to obtain personal data, promote damaging financial investments, or gain access to bank accounts (DCMS 2022b). Other concerns about harmful advertising are taken outside the bill to be addressed instead through the Online Advertising Programme (OAP).

The draft Online Safety Bill did not include paid-for advertisements. It only covered user-generated content (in user-to-user services) and search services. The Government argued that including paid-advertisements would extend the bill's scope inappropriately and said that it would address digital advertising in the OAP.

The government later agreed to include specific provisions on fraudulent advertising in response to recommendations from the Joint Committee, which was appointed by the House of Lords and the House of Commons to 'conduct prelegislative scrutiny of the Government's draft Bill to establish a new regulatory framework to tackle harmful content online' (JCDOSB, 2021). The Committee argued that paid-for advertising space is a prime

habitat for online scams, as it offers criminals easy access to their audiences, and a means to spread harmful misinformation more easily and with greater precision in targeting, often disproportionately affecting vulnerable demographics (JCDOS, 2021: 75-78). This was supported by submissions from Which?, Carnegie UK and the Financial Services Authority (House of Commons Joint Committee 2021), who told the Joint Committee that: ‘the problem [of online fraud] is most manifest in the paid-for space, so it does not make sense for the Bill not to deal with the very heart of the problem, which is the paid-for advertising space’.

The Joint Committee on the OSB also recommended that Ofcom should be responsible for taking action against platform service providers who consistently allowed paid-for advertisements that created a risk of harm:

We recommend that the Bill make clear Ofcom’s role will be to enforce the safety duties of providers covered by the online safety regulation, not regulate the day-to-day content of adverts or the actions of advertisers. That is the role of the Advertising Standards Authority. The Bill should set out this division of regulatory responsibility.

The Government agreed to address the ‘urgent’ matter of fraudulent advertising with ‘a standalone measure’, while stating that the OAP is the means to address any remaining issues with advertising regulation (DCMS 2022b).

The government added a new duty to the Bill requiring social media platforms and search engines to prevent paid-for fraudulent adverts appearing on their services (whether they are controlled by the platform itself or an advertising intermediary). Large social media platforms (as defined as Category 1 services in the Bill) are required to put in place suitable, proportionate systems and processes to:

- prevent individuals from encountering fraudulent advertising,
- minimise the amount of time that fraudulent advertising is present, and
- swiftly remove fraudulent advertising once they are made aware of it through any means.

According to the Government, the new legal duty will require that companies operating social media platforms and search engines “clamp down on ads with unlicensed financial promotions, fraudsters impersonating legitimate businesses and ads for fake companies”.

The detailed requirements for platform and search engine compliance will be set out in Codes of Practice drawn up by Ofcom. Under the OSB proposals, ‘Ofcom will oversee whether companies have adequate measures in place to fulfill the duty, but will not assess individual pieces of content, in keeping with the approach taken in the rest of the Bill’ (Conway 2022: 25).

The Government states that advertising is ‘largely out of scope’ of the OSB, which is concerned with user-generated content (UGC) as it appears on ‘user-to-user services’ (platforms) and ‘search services’ (browsers) (DCMS 2022b). They argue that UGC and paid-for advertising are separate entities, which should be regulated in distinct ways with ‘paid-for online advertising [being] disseminated via distinct channels compared to user generated content’ and ‘harms associated with advertising differ[ing] from those’ regulated with the OSB (DCMS 2022b). Their omission of instances when UGC becomes indistinguishable from online advertising hints at areas prone to create challenges for effective advertising regulation. The government concludes that the OSB is ‘not the right vehicle by which to regulate the many and varied services involved in the online advertising ecosystem, including ad tech and intermediaries’ (DCMS 2022b).

However, the OSB does cover all forms of user-generated content including advertising content that takes the form of organic UGC. This means that influencer marketing is within scope.

One of the main stated aims of the OSB is to ‘safeguard freedom of expression and pluralism online. The Government seeks to provide protection for ‘people’s rights to participate in society and engage in robust debate online’ (DCMS 2022c).

The legislation also wants to assure extra protection for democratic and journalistic content, which aims to support the platforms in eliminating the misleading content while preventing editorial content from being removed. The extra measures are meant to counterbalance the impact of online speech being ‘facilitated by a small number of private companies’, which gives them an inordinate level of control over what messages are being promoted or suppressed (DCMS 2022c). Platforms cannot discriminate against ‘particular political viewpoints’, or spread false information, while news

publishers’ content (including but not limited to journalistic content) is subject to special exceptions to reduce the pressures which might lead to its removal (DCMS 2022c). This journalistic exemption raises wider issues relevant to our existing concerns about the press being protected from the consequences of unethical advertising practices including non-disclosure (or even being excluded from the scrutiny affecting other actors), with influencers being more restrictively regulated than newspapers in this area.

Professor Lorna Woods in her evidence to the Joint Committee (26 May 2022) highlighted that the proposed duties linked to search engine content do not apply to ‘paid-for adverts that are posted and shared via search engines, a potential loophole that could see children targeted with types of content, such as pornography or abuse, that would otherwise have to be acted upon by platforms’ (Carnegie UK 2022: 1). On the issues of HFSS food marketing, influencers and children, see MacRury (2020).

Online Advertising Programme

The [Online Advertising Programme](#), is a UK Government programme to ‘review the regulatory framework of paid-for online advertising’, launched on 9 March 2022 by the then Department for Digital, Culture, Media and Sport. The government announced a consultation process that ran to June 2022 and, at the time of writing, we await the publication of the government’s response to the consultation and proposals. The Online Advertising Programme Consultation was published together with an impact assessment, and in July the DCMS published the Online Advertising Programme Market Insights Final Report, written by Spark Ninety.

The OAP aims to review the regulatory framework and assess whether and how the existing self-regulatory framework should be built upon. The Government aims to ‘equip our regulators to meet the challenges of the online sphere’. The OAP puts forward proposals that are intended to address both illegal and legal harms created by online advertising and includes proposals for measures aimed at advertisers, intermediaries, platforms and publishers. The OAP addresses the increasing range of actors in the digital advertising supply chain and aims ‘to bring more of the major players under regulation’ (Conway 2022: 5)

The OAP, together with the Online Safety Bill and other measures addressing competition and data protection, comprise the government’s response to the ‘challenges of the online sphere’ which include rapid development outpacing regulations, various legal and illegal harms, and the ‘evident lack of transparency and accountability’ across the

online advertising sector (DCMS 2022b). Outside the scope of the OAP are user-generated content (addressed in the OSB) and issues including privacy, data policy, political advertising, and competition issues.

The OAP reaffirms the Government’s positioning as balancing the strengthening of regulatory mechanisms while being ‘pro-innovation’ and ‘proportionate’:

It will consider how we can build on the existing self-regulatory framework, by strengthening the mechanisms currently in place and those being developed, to equip our regulators to meet the challenges of the online sphere, whilst maintaining the government’s pro-innovation and proportionate approach to digital regulation. We want to ensure that regulators have good sight of what is happening across the vast, complex, often opaque and automated supply chain,

where highly personalised adverts are being delivered at speed and scale.

The OAP focuses specifically on paid-for online advertising and addresses a wider array of harms including those caused by ‘the intensive collection, analysis and use of consumer data’, targeting, and fraudulent adverts which are the main subject of the more narrowly focused Online Safety Bill (DCMS 2022b). The government puts extra emphasis on the importance of a thriving UK economy and focuses on carefully balancing business needs with the need to tackle these issues. Consequently, it suggests strengthening the existing self-regulatory framework as its preferred solution (Lopez 2022; Dowden 2022). However, the OAP consultation aims to assess the necessary level of regulatory oversight and presents a full range of possible escalation ‘from a continuation of the self-regulatory framework though to full statutory regulation’ (DCMS 2022b). The underlying principle of the process is to apply a ‘holistic’ approach

developed through an in-depth understanding of the digital landscape and its inhabitants. Instead of focusing solely on advertisers, the approach intends to distribute responsibility amongst various actors making up the media ecosystem and regulate user-generated content as well as organisations across the whole supply chain, including platforms, to address wide-reaching problems affecting the online sphere and create a 'pro-competition regime' for digital markets (DCMS 2022b).

Analysis of OAP and government approach

The approach of the OSB is towards a systemic approach (Carnegie UK 2022) that focuses on obligations for service providers

This differs from the focus on advertising content of the current self-regulation of advertising.

The OSB also focuses on prevention. The Advertising Standards Authority, the SRO for advertising, while actively promoting prevention, is more oriented to adjudications or other action in response to actual breaches of the CAP codes.

Responses to the OAP Consultation

The Information Commissioner's Office agrees with the government's assessment that 'a lack of transparency and accountability are key drivers of harm across online advertising'. The ICO (2022: 1) welcomes measures designed to address these issues but argues that the government 'should undertake further analysis of the role existing regulatory regimes, such as that of the ICO, play in addressing harms arising from online advertising and ensure that reforms are only pursued where regulatory gaps are clearly identified, or where evidence demonstrates that an increased level of regulatory oversight is necessary.

The Information Commissioner's Office (ICO), and non-governmental organisations such as Privacy International (PI), set out similar concerns regarding privacy protection, ad targeting and data processing, and both highlight the need to address connections and overlaps between advertising regulation and data protection legislation (ICO 2022; PI 2022). The ICO does not set out a formal opinion of which of the three options for regulation should be adopted but sets out their remit and role as advisors to the Government, sharing their expertise and highlighting possible issues which might pose challenges to the creation of a coherent and well-integrated regulatory framework.

The responses to the OAP Consultation have not yet been published by DCMS. The table below provides a list of self-published submissions that have been examined for this report.

Respondent	Type	Who	Role	No. of pages	Option Recommended
Advertising Association	Trade body	Allesandra Bellini; Philippa Brown; Stephen Woodford	President; Chairman; Chief Executive	21	Not answered, but they are very critical of option 3.
Advertising Standards Authority (System)	Regulator	No name	N/A	19	Not answered, but they are very critical of option 3.
BILETA (British and Irish Law, Education and Technology Association)	Association	Dr Edina Harbinja, Dr Mark Leiser, Mr Gavin Sutter, Dr Zoi Korkida	Academic	16	Selected option 2, and advocated for statutory regulation of advertisers, platforms and intermediaries.
Carnegie UK	Charity	Maeve Walsh	Contact person for Carnegie UK	2	Not answered.
IAB UK	Trade body	No name	N/A	35	Not answered, but they are very critical of option 3.
ISBA	Trade body	Stuart Macnaughtan	Contact person for ISBA	24	Selected option 1, would consider option 2, strongly oppose option 3.
Money Saving Expert	Content provider	No name	N/A	5	Selected option 3.
Privacy International	Charity	No name	N/A	16	Mixed model - they advocate backstopped regulation for all or some higher risk areas of harm for advertisers and publishers, and statutory regulation for platforms and intermediaries.
Professor Jonathan Hardy	Academia	Professor Jonathan Hardy	Professor of Communications and Media at the University of the Arts London	19	Selected option 3 but advocates a mixed system involving statutory and self-regulation.
Sustain	Advocacy Group	No name	N/A	12	Selected option 3.
The Information Commissioner Office	Regulator	No name	N/A	8	Not answered.
The Institute of Alcohol Studies (IAS)	Independent Institute	No name	N/A	11	Selected option 1, but strongly support statutory regulation of advertisers, platforms, intermediaries and publishers.
The University of Sheffield and King's College London	Academia	Dr Jiahong Chen and Mr Perry Keller	Lecturer in Law at University of Sheffield and and Reader of Media and Information Law at King's College London	4	Not selected, but advocates for statutory regulation of advertisers, platforms, intermediaries and publishers.
Which?	Content provider	Tim Stacey	Contact person at Which?	16	Not selected, but advocates for statutory regulation of platforms, and intermediaries.

Responses to the OAP Consultation continued

The following summary is based on self-published responses to the OAP Consultation and will be updated once the list of respondents and responses have been published by DCMS when it makes its formal response to the Consultation expected in autumn 2023. The responses to the OAP consultation can be broadly divided into those who support the maintenance or adaption of advertising self-regulation (and favour Option 1) and those favouring a strengthened statutory regulatory component (and favour Option 2). The former group includes most industry trade associations representing marketers, marketing agencies and marketing services, as well as the self-regulatory organization the ASA. Those advocating Option 3 include civil society and some academic respondents. While, there are strong differences expressed between advocates of options, there is also some commonality. Most of the institutions and individuals who responded to the consultation did not fully endorse the framework as set out by the government. This includes concerns about definition, scope, evidence, and interpretation.

Advocates for building on existing self-regulation: ASA, AA, IAB UK, ISBA

The Advertising Standards Authority (ASA), Advertising Association (AA), and International Advertising Bureau (IAB UK)

all set out concerns with the Government's proposed framework. On this basis of disagreement with the framework they chose not to endorse a specific option while, simultaneously, strongly rejecting option 3, statutory regulation. The IAB called for Option 3 to be removed from the options under consideration (IAB UK 2022: 8). The following section provides a more detailed analysis of the IAB's arguments. The ASA asked for 'a narrower' consultation, with greater focus, that would allow for 'a more detailed inspection of the opportunities and constraints' of any future government proposal (ASA 2022: 4).

The ASA, AA and IAB all argued that option 3 would undermine the current self-regulatory system and defended the latter's effectiveness overall, and in adjusting to the changeable online environment. They emphasized to Government the need for governance to be led by industry expertise and knowledge of the sector to address the most relevant problems in most effective ways. The AA claims that option 3 would 'seriously weaken the ASA's authority' and accuses the Government of undervaluing its leadership and the adaptability (AA 2022: 2). The Incorporated Society of British Advertisers (ISBA), a member of AA, chose option 1, and expresses 'extreme concern at the possibility that Ministers might rip up the system of self-and co-

regulation of advertising content and placement that has proven to be a world-leading success story' (ISBA 2022c: 4).

All these respondents emphasized the need to differentiate between legitimate industry activities, and the illegal harmful activities of criminal actors, to claim that the remit of the ASA only encompasses already compliant businesses. ISBA claimed that there are 'very high levels of compliance with the CAP and BCAP Codes for paid-for advertising by the legitimate actors' (ISBA 2022c: 10).

Overall, the UK's main self-regulatory body and trade bodies present a relatively unified position in their responses. The AA, IAB, ISBA are all members of the Committee of Advertising Practice (CAP). CAP is co-located with the Advertising Standards Authority, the independent self-regulator that enforces the CAP codes.

Advocates for strengthened statutory regulation

Those expressing support for option 3, stronger statutory regulation include an independent academic submission by Professor Jonathan Hardy, University of the Arts London, the food and health advocacy group Sustain, and online content provider MoneySavingExpert. Sustain represents 'over 100 national public interest

organisations' and seeks to limit High Fat Salt/Sugar (HFSS) advertising (Sustain 2022: 1). MoneySavingExpert is a consumer website campaigning for financial justice (MoneySavingExpert 2022: 3). Both organisations describe the self-regulatory system as ineffective: Sustain calls it 'inappropriate', its enforcement measures weak, and questions the system's transparency and impartiality, while MoneySavingExpert claims the industry created 'almost Wild West situation' online (Sustain 2022: 3, 10 – 12; MoneySavingExpert 2022: 3). Sustain argues that the industry protects 'their own interests over public health and other considerations' and wants online advertising and television regulation to be aligned (Sustain 2022: 3). Both institutions see platform regulation as a blind spot in need of an urgent intervention (MoneySavingExpert 2022: 4; Sustain 2022: 10). The Institute of Alcohol Studies (IAS), and the University of Sheffield and King's College London did not select option 3 but advocate for statutory regulation of all actors listed in the OAP: advertisers, publishers, intermediaries, and platforms (IAS 2022; Chen and Keller 2022). IAS believes statutory regulation would be most effective at protecting children and vulnerable people, but 'in absence of statutory regulation, Permutation 1 is the strongest and most consistent option' (IAS 2022: 10). Chen and Keller do not select any option but explain

their doubts resulting from a 'gap between data protection's core of rights-based regulation and the ASA's standards-based methods', leading to 'legal uncertainties' (Chen and Keller 2022: 5). The arguments made by Prof Hardy for statutory regulation to provide a more effective and coherent response to converging media-marketing inform the discussion of policy issues in the next section. Hardy's submission also advocates a mixed approach that combines a reconfiguration of self-regulation, co-regulation, and statutory regulation. That mixed approach is also reflected in other submissions.

Expressed between advocates of options, there is also some commonality. Most of the institutions and individuals who responded to the consultation did not fully endorse the framework as set out by the government. This includes concerns about definition, scope, evidence, and interpretation.

Mixed approaches: focus on platforms and intermediaries

The remaining responses (excluding Carnegie UK which does not choose any of the opinions, nor express options about their preferred regulatory solution, and the ICO, discussed above), tend to favour a mixed model: a rebalanced combination of self-regulation, co-regulation, and statutory regulation.

Both British and Irish Law, Education and Technology

Association (BILETA) and Privacy International (PI), a charity protecting 'the human right of privacy', focus on invisible advertising practices as one of the reasons why the ASA system is no longer sufficient: BILETA lists the many forms of hidden advertising to argue that digital marketing requires stronger statutory measures to keep advertising recognizable. Privacy International claims that the industry perpetuates invisible harms such as targeting adverts 'based on sensitive or illegally collected personal data' and is only interested in policing 'ineffective ads', rather than 'deceptive and misleading content' (BILETA 2022: 8-9; IP 2022: 11).

Which?, the UK consumer advice and advocacy NGO, argues that the ASA cannot 'match the scale of the problem' when it comes to fraudulent adverts (Which? 2022: 3). Each institution matches listed actors to their regulatory recommendation, and each suggests stronger measures. Only BILETA chooses an overall option and is only one to select option 2 (BILETA 2022: 11). Overall, even institutions supporting a mixed model and unwilling to apply statutory regulation to all sectors, tend to highlight platforms and intermediaries as two groups which require a statutory intervention and extra measures to address their negative impact on the online environment.

Policy Developments in Spain: online advertising

Although the *Spanish Law 34/1988 of 11 November 1988, General Advertising*, is in force, there is no specific regulation on digital advertising in Spain, but it is affected by a set of national and European regulations. In this regard, the most relevant regulations for digital advertising in Spain are those relating to digital services, data protection and consumer protection.

In relation to current legislation on digital services, the *Directive 2000/31/EC on Electronic Commerce* stands out, the regulation of which is the general regulatory framework for all activities carried out on the Internet and which, according to Article 2, are ‘normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’. Commercial communications are also included in this Directive as they are defined as ‘all forms of communication intended to directly or indirectly provide goods, services or the image of a company, organisation or person engaged in commercial, industrial, craft or regulated professions’. Furthermore, Article 6 requires such commercial communications to be clearly and unambiguously identifiable, as well as games, competitions, or commercial offers. This directive has been transposed into Spanish law in *Law 34/2002, of 11 July, on*

Information Society Services and Electronic Commerce (LSSI).

In Spain, the most recent legislation on digital services corresponds to the new *Spanish General Law 13/2022, 7 July, on Audiovisual Communications* concerning the transformation of the *European Directive 2018/1808 on Audiovisual Communication Services* and, at the Spanish level, the improvement of the *Law General 7/2010, March 31, on audio-visual communication*. The spirit of the new law provides a legal framework for greater security and flexibility due to the continued growth of the audiovisual sector for all players operating within it (traditional, on-demand and/or broadcast television, or Internet/IPTV services), and those who are trying to achieve similar audience goals share the same standards. It also serves to promote European audiovisual production. The goal of the new GLAC Title V is to transform one of the key aspects of Directive 2018/1808, which is the obligation of services whose primary function is to enable and provide the exchange of user-generated video. These services must take measures to protect all users, especially minors, from content that is harmful to human moral and/or physical development. According to the new GLAC, the regulation of these services lies in the impact that videos make when they ‘instruct,

entertain, or confirm the opinions of other users and influence them’.

In addition to the above, there are two new European regulations that will be mandatory from the end of 2022, including in Spain, such as the DSA (*Digital Services Act*) and DMA (*Digital Markets Act*), which have been explained in previous sections of this guide. It should be noted that, regarding online advertising, the DSA aims to increase liability and obligations in the face of possible illegal or harmful online advertisements on platforms with more than 45 million users. On the DMA side, in terms of online advertising, it is worth highlighting the transparency to which service intermediaries are obliged to adhere in terms of remuneration and access to independent measurement instruments.

On the other hand, data protection regulations have had the greatest impact on online advertising in Spain. The framework regulation for the protection of privacy and the processing of personal data is the *General Data Protection Regulation, GDPR, (Regulation 2016/679 of the European Parliament and of the Council of April 27, 2016)*. About online advertising, cookies are considered to fall under the regulation as the traces they leave behind can help to define profiles of individuals. For its part, the *Spanish Law 3/2018*

*of December 5, 2018, on the Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), modifies the age consent from 13 to 14 years, and incorporates an active treatment by the responsible party, who must provide basic information on the use and treatment of these to users, as well as the need to carry out a study of the possible risks and design a contingency plan. Also noteworthy is the *ePrivacy Directive 2009/136/EC*, which establishes the use of cookies with the user's prior consent as to the purposes for which the data will be processed. In this regard, the 2017 *ePrivacy Regulation* is being negotiated in the EU, which, among other aspects, aims to regulate data in digital communication. In addition, in the Spanish context, the LSSI also affects the regulation of digital commercial communication and that related to the collection and use of personal data. In fact, this law also affects informed consent so that users are aware of the purposes of their data.*

Branded content regulatory developments in Spain

According to article 121.1 of the new GLAC, commercial communication is all information that, through image or sound, directly or indirectly promotes goods/services/images of a real natural or legal person doing an economic activity and has 'user-generated videos in exchange for remuneration or similar remuneration'. These commercial communications 'must be clearly distinguished from editorial content by optical and/or acoustical and/or spatial mechanisms' and must not have audio levels that exceed the content average. In addition, commercial communications (under Articles 122 and 123) that violate human dignity, encourage any form of discrimination or humiliation against any group, deceive or contain information hidden or subliminal communications, incite conduct harmful to health by prohibiting the communication of any derivative works, drugs, or health care products or alcoholic beverages under certain requirements or levels of alcohol are prohibited. In addition, commercial communication regulates gambling, betting, esotericism, and science. Article 124 specifically provides for the protection of minors in commercial communication from any physical, mental, or moral harm, and from being deceived. Concerning the types of audiovisual commercial communication in branded content, section 129 states that the product location is 'all forms of audiovisual communication

that includes, shows, or refers to a product, service, or trade name within a program or a video generated by a user in exchange for remuneration or similar compensation.' Product placement is allowed, except in the news or in current affairs, religious, and children's programs, if it does not influence the independence and responsibility of the provider; does not encourage direct purchase or specific references to the product; it is not overly prominent; and it is appropriately identified such as at the beginning, after interruptions, and at the end of the communication.

Various social networks fall within the scope of this law as they are 'video sharing services on online platforms' whose purpose is to make available a wide range and variety of videos created by others. Although the new LGCA does not aim to regulate social networks, it is administered in Spain by the National Market Competition Commission and sets out a series of obligations related to:

- User protection: Article 88 states that providers of video-sharing services on online platforms must implement measures to protect users from audiovisual content (including commercial) that can harm the physical, mental, or moral development of the user as well as protect him or her from content that encourages any type of violence, hatred and/or

discrimination as well as any type of crime according to and without prejudice to the provisions of the Spanish Penal Code.

- Commercial communications: service providers shall ensure that this content complies with the terms of commercial communications (Articles 121 to 125), including age verification, except for the time limits set out in Article 123 (Articles 4 and 5) for alcoholic beverages. In addition, the Service Provider will formulate features that allow users or content creators uploading videos to indicate whether the videos contain audiovisual commercial communications and to clearly notify receiving users of commercial content within those videos. It also regulates how gambling and gambling-related audiovisual commercial content is distributed.

The law also specifically designates 'video bloggers, influencers or opinion leaders' as 'relevant influencers' who use video sharing services on online platforms they are very influential figures, especially among young people, and because they attract the attention of advertisers. Subject to Section 94.2, to be considered a relevant influencer they must:

- Get rewarded for sharing videos.

- Be responsible for editorial content.
- The content/service is intended for many potential impact users.
- The function of the content/service is 'information, entertainment, education' for distribution purposes.
- The service or content is 'provided through the Spanish electronic communication network'.

Relevant influencers should consider the general principles of audiovisual communication in Title I of the new GLAC and the fundamental obligation to protect minors and consumers. According to Article 39, they must be registered with the National Register of Audiovisual Communication Service Providers of the Spanish Ministry of Economy and Digital Transformation. Pursuant to Section 94.1, relevant influencers who participate in video sharing on online platforms are considered 'audiovisual communication service providers' and must comply with all obligations contained in GLAC. This includes promoting content description mechanisms, highlighting the need to comply with commercial communication obligations under Article 89, especially with respect to audiovisual commercial content.

Self-regulation in Spain

It is necessary to mention the emphasis placed on self-regulation and codes of conduct to which everyone within the audiovisual world is urged to follow, including video sharing service providers on online platforms (social networks) or the industry (advertisers or brands), among others. The purpose of these codes is to protect all users, focusing on various groups, content, or topics referred to in Article 15.4 of the GLAC, as well as to establish necessary mechanisms of supervision, control, and penalties.

In Spain there are several associations that promote self-regulation of the advertising sector. In fact, the most relevant ones, such as Autocontrol or the Spanish Association of Advertisers, have drawn up one of the most important codes within the sector, focused on online advertising and the activity of influencers, which details how they should make their collaborations with brands transparent. The application of this Code is entrusted to the Spanish advertising self-regulatory body, Autocontrol, whose Advertising Jury will be responsible for resolving any complaints that may arise due to non-compliance with the ethical rules contained herein.

4 RECOMENDACIONES PARA IDENTIFICAR LA PUBLICIDAD DE INFLUENCERS

La Asociación Española de Anunciantes (aea) y AUTOCONTROL, comprometidas con una **publicidad responsable**, han acordado un **Código de Conducta sobre el Uso de Influencers en la Publicidad** con el **Ministerio de Asuntos Económicos y Transformación Digital** y el **Ministerio de Consumo**, en el que se recomienda que las menciones o los **contenidos digitales publicitarios** divulgados por los influencers, sean...



1 EXPLÍCITOS Y CLAROS

Usar indicaciones genéricas **claras**, como:



"Publicidad"
"Patrocinado por"
"Regalo de (marca)"...

Y que **no pasen desapercibidas** mezcladas con el resto del mensaje, desaconsejando expresiones como:



"Info"
"Legal"
"Colab"...

2 TAMBIÉN CUANDO SE COMPARTE

La indicación **debe mantenerse** o añadirse cuando el influencer **comparte o "repostea"** el contenido en otras redes, plataformas o páginas web.



3 ADECUADA AL MEDIO Y MENSAJE

Escrita y/o verbal dependiendo del medio y del mensaje.



4 VISIBLE

Directamente visible sin necesidad de acciones por parte del usuario. Preferiblemente al inicio del mensaje de forma que sea claramente percibida (por ejemplo, en el título o foto o inicio del texto).

*Los seguidores deben saber que es **publicidad***



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4. UK Advertising Governance: policy issues and proposals

Overview

The Government's Online Advertising Programme considers three options for advertising regulation: the same as now, strengthened self-regulation or statutory regulation. The OAP is significant in placing the option of stronger statutory regulation (option 3) under consideration. The main intention may be to promote a strengthening of self-regulation (in line with options 1 and 2) but the OAP nevertheless gives policy consideration and credibility to the option of statutory control.

How far the government is seriously considering option 3 for the OAP is unclear. However it is evident that the threat of option 3 (statutory regulation) helps to support the case for a multifaceted strengthening of self-regulation and statutory underpinning (option 2) as well as diminishing the case for (largely) 'status quo' continuity in option 1.

The OAP Impact Assessment (DCMS 2022d: 2) states 'In order to avoid action by the statutory regulator, under option 2 online actors will likely put in place systems allowing greater detection and removal of malicious ads'. They predict that what should follow, is better moderation of content overall, and a reduction in harm of various kinds, including 'mistargeted advertisements' (with a focus on who they reach rather than the means used to reach them (DCMS 2022d: 2).

There is already a complex interface between statutory and non-statutory powers. Ofcom granted the CAP-ASA powers to act as the regulator for advertising content across its services but directly controls various aspects of advertising and sponsorship and retains its statutory powers and oversight obligations. Yet, overlaying the complexity of actual regulatory arrangements is a deep-rooted framing and contestation over statutory vs self-regulation. This borrows some of the framing of classic liberal/libertarian debates on the press between 'government control' and 'press freedom' but in UK advertising debates the focus is less on government control than on the merits of 'self-regulation versus state regulation'.

This section begins with a summary and analysis of responses to the OAP consultation including analysis of one detailed submission made by the Internet Advertising Bureau. This is followed by sections that examine various components of the discussions about the adequacy of existing (or planned) regulations and the suitability of the policy options outline in the OAP.

Analysing responses to the OAP

Internet Advertising Bureau response

This section discusses in greater detail the arguments made in one submission to the OAP, that of the Internet Advertising Bureau (IAB UK). The Internet Advertising Bureau (IAB) offers a detailed and considered response that illustrates key arguments made by the wider advertising industry in favour of self-regulation. The IAB proposes that option 3 (statutory regulation) should be removed as an option in policy deliberation and sets out a case to build on Option 1. This section summarises the main arguments and highlights issues, problems and challenges to them.

The IAB commits to ‘supporting government to ensure that together, we develop an effective and flexible framework and that world-class consumer protections remain at the heart of UK digital advertising regulation’. The IAB recommends that ‘Government takes option 1 as its starting point and focusses its efforts on how existing self-regulation and non-regulatory tools can be further developed and optimised’.

The submission proposes that Option 3 be removed from policy discussion and consideration altogether. ‘We see no case for the continued inclusion of an option that is based on replacing existing regulation with the “full statutory approach” envisaged in option 3, and this should be excluded from the policy options going forward, in order to focus collective efforts on more proportionate and targeted approaches’. The IAB thus seeks to nullify the threat of option 3 and, in academic jargon, remove this policy option from ‘regulatory space’ (Hancher and Moran 1989: 271–299), the discursive and non-discursive space in which regulatory issues are identified, framed, and enunciated, and move it out of the sphere of ‘legitimate controversy’ (Hallin 1986).

Evidence-based policymaking

The IAB argues that a) policy should be evidence-based and that b) the evidence-based case for regulatory intervention (option 3 but also parts of option 2) have

not been met:

Where additional analysis identifies gaps in the existing regulatory framework - comprised of the ASA system and industry-led, digital-native codes and standards - we would support targeted responses that are evidence-led, meet a demonstrable need, are proportionate and above all, are tailored to individual harms’.

The first issue concerns the guiding principles for regulation. The principles that regulatory action should meet tests of being evidence-led and supported, meeting a demonstrable need, proportionate and targeted, are well-established and, most importantly, agreed across the broad spectrum of policy actors. The importance of evidence support is unquestioned. However, there are important issues for policy-making concerning the way evidence is produced and used, including how evidence can serve as a barrier to access and voice for

participants in policy networks. To clarify, this is not an argument to diminish the importance of evidence-based support but it is an identification of how the call for evidence can be used. The demand to support policy advocacy with evidence can be entirely justified and necessary, but it can also serve to delimit who and how policy actors can engage in policy consultation, for instance where consultation questions concern market and economic data that is produced by or available to only certain policy actors. The argument advanced by the IAB is that policy should be guided by industry expertise. A contrary argument is not that such expertise should be diminished but rather that the importance of the sector/regulatory issues requires independent production and analysis of market data. Further, the issues of the OAP concern communications and the cultural and societal implications of online advertising so it is important that policy discussion is not restricted to industry actors but engages all policy stakeholders.

The IAB calls for 'further analysis...to fully understand the prevalence and impact of harms that arise as a direct result of digital advertising'. The IAB also calls for analysis to address a 'gap': 'to understand where existing measures already address these harms, and where there are gaps that warrant further exploration'. We agree. That is one of the core research purposes

to which the Branded Content Governance project seeks to contribute.

The IAB seeks to remove option 3 from consideration, arguing option 3 is included 'without an evidence based case having been made that a full statutory approach is warranted or would provide benefits that cannot be achieved via other routes and that outweigh the likely costs'. An alternative view is that the OAP (as with the OSB) seeks to establish a regular framework suitable for anticipated developments. The case for option 3 arises from the failures within existing self-regulation, on which there is a substantial, if also highly contested, evidence base (discussed below). The case is also anticipatory and assesses whether self-regulation can command the emergent actors in the advertising market. The IAB, ASA and others can make a strong case that emergent self-regulatory mechanisms may be effective. Yet the case to remove option 3 is not strong. There is sufficient evidence of failure in the application and reach of existing self-regulation. There is also legitimate debate about the sufficiency of industry initiatives to address wider consumer and societal concerns.

The IAB states: 'Any framework will be comprised of different component parts and there is no one solution to the range of potential harms set out in the [OAP] consultation. An effective framework needs to be based

on a range of different tools and approaches suited to individual harms, which, while needing to work together coherently, do not need to be identical'. Again, we agree. This is integral to our conception of the governance of dynamic, adaptive systems, such as digital communications and digital advertising.

The IAB calls on government to support business leadership and innovation: 'The OAP must also ensure that the innovative environment that digital advertising has created is supported and incentivised, not hindered, by any new regulatory framework'. Yet, if business innovation and growth must be safeguarded, it is not clear how consumer protection fits within this injunction. This is 'resolved' in the statement that follows: 'Specifically, it must encourage investment in initiatives that raise standards and serve to demonstrate the credentials of responsible players in the market, including by encouraging buyers to recognise these initiatives when they choose where to invest their advertising budgets'. The call to promote 'initiatives that raise standards' is surely welcome by all policy stakeholders. Yet, the IAB opposes options that would strengthen statutory enforcement.

As an industry lobby, the IAB's orientation is as expected, but the OAP should address wider concerns. IAB sets out a case for 'industry-led regulation'. This is 'proactive', and 'can respond

at pace to emerging issues and market needs, whether by iterating existing standards or developing new ones to address gaps'. More broadly, the IAB argues industry-led initiatives, and the bodies and industry groups that oversee them, are able to understand problems, set objectives, agree standards, and identify how they should work in practice, in a way that prescriptive, rules-based statutory approaches would not be able to achieve.

Again, we agree, but this account is incomplete and insufficient. The list does not refer explicitly to enforcement, compliance, reporting, and accountability to users and the wider public. These are all areas in which the claims for self-regulatory sufficiency are weaker. The case that is being diminished and displaced by the IAB's framing that of legally enforceable statutory underpinnings where self-regulation is lacking. Versions of 'self-regulation vs statutory' have structured discussions and arrangements for advertising regulation in Britain for over 70 years, since a dual system for broadcast and non-broadcast advertising was created from the 1950s. There is potential to develop an approach that builds on common values to 'raise standards' and which incorporates and balances benefits from self and statutory regulation. We hope that the comparative research and analysis for the Branded Content

Governance project can make a valuable contribution to regulatory design.

There is undoubtedly a positive case for self-regulation as a leading agency in regulation. The IAB argues that 'flexibility also allows CAP and the ASA to update its rules and guidance on a rolling basis, far quicker and with more specificity than it would be possible to do under statutory regulation'. We agree. The flexibility and responsiveness of self-regulation are vital assets. The issue, however, is whether self-regulation has sufficient effectiveness to provide the requisite levels of protection for consumers and communication users. If there are problems in reach, scope, rules and enforcement, then there is a case to examine whether and how governance arrangements should be strengthened, including by enhanced statutory rules and enforcement. The OAP is right to consider the governance of digital advertising in full and to consider what range and combination of governance arrangements are suitable for rapidly developing digital communications markets.

The issue of statutory regulation and enforcement arises when the performance of industry-led regulation fails to meet societal needs, but also when there are inherent limitations to entrusting the entire regulatory system to interested parties especially where there are incentives, inducements or other drivers

increasing the kinds of behaviour requiring regulation. That is the case for various kinds of brand sponsored content, where the incentives to integrate or disguise marketing communications are strong. That requires at the least safeguards, and in stronger form regulatory actions, on disclosure, separation of advertising and non-advertising content, and other rules and restrictions on marketing communications.

The IAB calls on the Government not to adopt what it calls a 'mischaracterisation' of digital advertising in relation to targeting. It quotes from the OAP which states '[t]he discrepancies between broadcast and online advertising regulation including the lack of a 9pm watershed equivalent for online advertising were noted by respondents. Although the 9pm watershed was viewed as imperfect, respondents did feel it was effective in providing a degree of insulation from adult TV content and advertising which was lacking in an online sphere'. The IAB argues 'It is misleading to suggest that a 9pm watershed is more effective at protecting children than are digital advertising targeting tools and technologies'. However this response ignores key dimensions. First the watershed is a rule enforced by statutory regulation rather than self-regulation, with fines among the tools for enforcement. Second, rule adherence is relatively straightforward but also, crucially is readily accessible

to service users to identify. By contrast, targeting of ads online are comparatively much harder to identify. The assessment of regulatory effectiveness would need to take account of multiple factors include the scope for monitoring of rule-adherence by the regulatory authority, the capacities of complainants to identify and act on infringements and the influence on the behaviour of the media, marketing and other actors involved in advertising placement decisions.

According to the IAB 'Regulatory intervention is only justified where the market fails to address harm, or to promote outcomes that the market alone cannot achieve efficiently. This is explicitly recognised in the Digital Regulation Plan (DRP) and should be a foundational principle for the OAP as it progresses'. This self-styled injunction is not supported by the historical record of communications regulation. The IAB may wish to advance a market-liberal interpretation for communications regulation but UK regulation has always retained a mix of public service, social market and consumer protection rationales. Market liberal or neoliberal approaches have been increasingly influential since the 1980s in the UK, and within the EU countries and institutions, but it has also coexisted with other public interest values. The historical record to the present is one that includes positive regulation for communication in the public interest.

ASA Response to OAP

The ASA ‘strongly opposes’ option 3, ‘full statutory approach’, a solution which it argues would make it ‘financially unviable’ for the ASA to continue as a self-regulator and would have ‘the effect of forcing the ASA system to withdraw from the regulation of paid online ads’ (ASA 2022a: 3). Option 3, they claim, would ‘dismantle the wider framework of advertising regulation in the UK’. They describe option 3 as ‘unwarranted, disproportionate and clearly at odds with the public interest’ (ASA 2022a: 3). They argue that option 2 ‘co-regulation’ is a ‘high cost’ solution with a negative impact on the regulated industry and point to government’s own impact report to claim that the benefits of implementing this option would be small. The ASA states that the DCMS’s Impact Assessment for the OAP (DCMS 2022*) ‘predicts a “small” reduction only in harm arising from non-identified ads and misleading ads; however, no evidence is provided to substantiate how’ (ASA 2022a: 4).

The noted “small” reduction is in an area of special importance for the Branded Content Governance Project, as it concerns rules to ensure the effective disclosure of marketing communications so that the principle of identification can be achieved across the changing forms and formats for advertising.

The ASA requests the government to consider a more narrowly focused consultation which could

be more precise in its assessment of possible outcomes and would allow for a more detailed response (ASA 2022a: 4).

They emphasise a value of a well-integrated system, pronouncing themselves ready to deal with a converging media environment and arguing that options 3 and 2 are a threat to the existing, effective solutions: ‘Any proposal to unstitch the regulation of paid online ads from our wider work must be considered in the light of these interdependencies and the damaging consequences for consumer protection that would result’ (ASA 2022a: 5).

The ASA refers to its Intermediary and Platform Principles (IPP) pilot to argue that it offers an ‘agile’ and adaptable system, which can respond to new challenges and implement the OAP’s refocusing on platforms, extending their responsibilities for the harms resulting from the content they host. The pilot was an ASA and IAB UK collaboration, which aimed to strengthen the ties between the regulator and the leading digital players, including Adform, Amazon Ads, Google, Index Exchange, Meta, TikTok, Twitter and Yahoo, to secure advertiser compliance (ASA 2022b). The cooperation involved sharing of information and aimed to offer the ASA a greater insight into the activities of these businesses, allowing them to identify areas of good practice and possible regulatory gaps. Despite reaffirming its

focus on advertisers as the main actors whose non-compliance can impact the online advertising environment, and reiterating the value of their existing approach, they use this initiative to signal their readiness to respond to the new requirements outlined in the OAP. They also do this by putting emphasis on their five-year strategy, ‘More Impact Online’, which involves a shift towards a more ‘proactive’ approach involving data science and innovative software, which would give them ‘the capability to police and enforce ads at pace and scale’, a solution ‘more suitable to the digital age’ (ASA 2022a: 8).

Commentary: Issues and policy options

Scope of advertising considered in the OAP

The OAP proposes delimiting its scope to paid-for communications. There appears to be obvious merit in doing so, to focus on paid advertising and not broader areas of communication covered in the OSB and elsewhere. However, there are objections on various grounds. First, this would move us back to the regulatory confusion that existed before the ASA included marketers' 'owned media' marketing communications in scope from 2011. Second, ongoing hybridisation of advertising forms, innovation in marketing arrangements and types of transactions, and convergence across paid (advertising), earned (public relations), owned and shared makes the category of 'paid' less secure and so a broader approach to online marketing communications is required. Third, this broader approach should include all forms of branded content as these are fast-evolving and, in many cases, replacing more traditional forms of paid-for advertising.

The ASA/CAP advertising self-regulatory system has always asserted that its non-broadcast rules apply to marketing communications but not to editorial content, news, or public relations material in 'earned' media, justified on the grounds of non-interference with freedom of expression and editorial freedom. This approach was tested with the growing complaints about communications on marketers' websites ('owned' media) which fell outside the Code. From March 2011, the ASA's digital remit was extended to include marketing communications in marketers' owned media, covering for the first time claims directly connected with the supply or transfer of goods or services appearing in non-paid-for space on a company's own website. The CAP rules are limited to claims 'directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities' (CAP 2010).

If marketers' claims in owned media remain out-of-scope then this creates problems in each of the options for regulation set out in the OAC. Under Option 1, the ASA would have at the least additional 'soft law' requirements for online advertising that would not apply to marketers' own communications. So, instead of coherence and integration there would be regulatory bifurcation, introducing uncertainty and risking undermining the regulatory provisions for marketers' claims. Marketers' claims in owned media were the source of rapidly increasing levels of consumer complaints, which gave rise to the 2011 measures. Marketers claims in owned media are also a source for many of the harms identified in the OAC. Under options 2 and 3, there would be regulatory measures for online advertising that did not apply to marketers' owned media. That would be a damaging and retrograde step back to the position before 2011. The 2011 revisions themselves are valuable but also limited. The CAP Code does not apply to much

that is commonly regarded as 'content marketing' in which no explicit marketing claims ('directly connected with the supply or transfer of goods or services') are made.

Hardy (2022b) recommends the scope of the OAC should be broadened to 'marketing communications'. As defined by the ICC (2018: 8) marketing communications comprises 'advertising as well as other techniques, such as promotions, sponsorships as well as direct marketing and digital marketing communications, and should be interpreted broadly to mean any communications produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour'.

The ICC Marketing Code covers all forms of advertising and marketing communications, including digital advertising and social media. It is technology and media neutral. It applies to the entire marketing ecosystem, guiding communications practitioners, advertising agencies, publishers, media owners, contractors and other participants including market influencers, bloggers, vloggers, affiliate networks, data analytics and ad tech companies as well as those responsible for preparing algorithms and the use of artificial intelligence for marketing communications purposes.

On identification

The International Chamber of Commerce (ICC) established its first code of advertising in 1937. A new rule on identification was added in the 1966 Code. Rule 9 'Identification of advertisements' states:

Advertisement should be clearly distinguishable as such, whatever their form and whatever the medium used; when published in a medium also containing news and editorial opinion, an advertisement should be so presented that the consumer can readily distinguish it from editorial matter' (ICC 1966).

The current version of the ICC Code (2018), Article 7 'Identification and Transparency', states:

Marketing communications should be clearly distinguishable as such, whatever their form and whatever the medium used. When an advertisement, including so-called "native advertising", appears in a medium containing news or editorial matter, it should be so presented that it is readily recognisable as an advertisement and where appropriate, labelled as such.

The true commercial purpose of marketing communications should be transparent and not misrepresent their true commercial purpose. Hence, a communication promoting

the sale of a product should not be disguised as, for example, market research, consumer surveys, user-generated content, private blogs, private postings on social media or independent reviews.

The origins of the principle of identification of advertising lie in both consumer protection and media protection. For the latter, advertising material should be identified and distinguished from non-advertising material to protect the qualities of media including the independence of news and editorial, and the artistic autonomy and integrity of creative works. The importance of transparency for media integrity and trust is also recognised in codes of practice for public relations. This reflects longstanding action by international public relations associations to outlaw the payment or bribery of journalists by third parties. It is also articulated more broadly in upholding the quality and integrity of media. For instance, the International Public Relations Association (1961/2009) says its members should 'not engage in practice which tends to corrupt the integrity of any channel of communication'.

The principles of identification and of separation of media and advertising have come under increasing pressure but are upheld across a range of formal regulations and professional governance arrangements. There

are harms arising from paid for content that is unacknowledged as marketing communication. There are also harms when editorial autonomy is undermined, especially in contexts where it is valued and expected by users. So, the harms of online advertising need to be considered in the broader context of communications, and of media-advertising relationships, and not solely in respect of marketing communications materials and their content and placement.

The OAP (3.3.1) does include non-identified advertising amongst the key harms caused by the content of advertising, stating 'All advertising content must be obviously identifiable as such, and must be actively disclosed as advertising in scenarios where it is unclear to the audience that they are being advertised'. This is very welcome. The OAP also notes DCMS Select Committee inquiry into influencer culture, which has recommended strengthening regulation of advertising disclosure. The OAP states 'As with other advertising content, influencers are required to disclose when they are advertising in scenarios where that fact is unclear to consumers' (OAP 3.3.1). However, the OAP is narrowly focused on influencer marketing and does not discuss how problems labelling and identification that affect brand sponsored content in publishing and native advertising across digital and social media.

Advertising Self-regulation in the UK

The Advertising Standards Authority (ASA) is a self-regulatory agency that enforces advertising codes written by the Committee of Advertising Practice (CAP). Established in 1962 the CAP-ASA self-regulation has expanded with each new media, but now faces mounting challenges over the reach, effectiveness and suitability of its powers across online and social media.

Compliance effectiveness in self-regulation

A report prepared for the House of Commons Library (Conway 2022: 16) states:

A criticism of the current self-regulation approach to online advertising is that the ASA has relatively restricted powers based around 'naming and shaming' and banning offending ads. A further criticism is that whilst parties involved in preparing or publishing ads have a role to play in ensuring the ads are honest and responsible, "there are limited circumstances in which online service providers are held by the ASA to exercise primary control over the creative content and audience targeting of adverts".

Scope of self-regulation and 'new' actors

The ASA has launched its Online Platforms and Network Standards (OPNS) According to the House of Commons Library briefing (2022:*) the OPNS 'may go some way to addressing the problems of lack of transparency and accountability in online advertising, by holding intermediaries and platforms responsible for their part in ensuring the CAP Code for advertisers is effectively overseen'. However, it notes that the OPNS 'is still under development'.

The system of UK advertising self-regulation has been a qualified success during the period when the main parties were marketers, agencies and media companies operating in contexts of institutional standards, accountability, professionalism and legal support. However, those conditions do not pertain across the range of online communications, as the OAP identifies.

Self-regulation and 'backstop powers'

The ASA can refer non-broadcast advertisers to Trading Standards who can consider using legal sanctions. Since 2013, trading standards are acting as legal backstop for the ASA. These so-called 'backstop powers' are significant but delimited. The grounds for referral to Trading

Standards are limited to instances of 'misleading advertising' as set out in the Consumer Protection from Unfair Trading Regulations 2008.

It is argued that the category of 'misleading advertising' covers most of the types of breaches of CAP-ASA rules in influencer marketing According to the House of Commons Library (Conway 2022):

Regarding influencer marketing, ...[t]he types of breaches that are likely to occur would involve "misleading advertising", which falls under the Consumer Protection from Unfair Trading Regulations 2008. The ASA can refer non-broadcast advertisers who continue to break the rules on misleading advertising to Trading Standards who can consider legal sanctions to bring them into line.

The IAB states in its submission 'There are already statutory backstops in place to support the CAP Code/ASA enforcement...' However, it is important to note that the statutory backstop is not a general provision to underpin the CAP codes, but apply only where conditions of 'misleading advertising' or other specific conditions are met.

The backstop powers were undertaken by National Trading Standards (NTS) from 2014, with

Buckinghamshire & Surrey Trading Standards (BSTS) commissioned by NTS to provide the backstop from 2019. According to the ASA (2019) agreement with (BSTS):

BSTS agrees to provide a legal backstop for the ASA in relation to: misleading, aggressive or otherwise unfair non-broadcast advertising, impacting England and Wales which falls within the scope of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and any amendments; and misleading and impermissible comparative advertising that falls within the scope of the Business Protection from Misleading Marketing Regulations 2008 (BPR5) and any amendments; which may also encompass advertising that is fraudulent within the meaning of the Fraud Act 2006.

National Trading Standards (n.d) summarises the scope for references as follows:

National Trading Standards acts as the legal backstop for the [Advertising Standards Authority](#). Government sees law enforcement around misleading advertising as a last resort, and favours self-regulation.

National Trading Standards receives funding for the [ASA legal backstop](#) to handle

referrals from the Advertising Standards Authority (ASA) where the ASA's sanctions have not deterred a marketer from continuing with misleading advertising. It does not receive direct complaints from the public. Buckinghamshire and Surrey Trading Standards deliver this legal backstop on behalf of National Trading Standards.

It is the ASA's decision whether or not to make a referral to Buckinghamshire and Surrey. It is then Buckinghamshire and Surrey Council's decision whether or not to investigate or take any enforcement action. On the rare occasions where some form of Court action is required to resolve the matter, additional funds can be claimed to support criminal cases.

Trading Standards can exercise its powers independent of any referral from the ASA. Evidence of usage of trading standards as backstop

The ASA made its first referral to Trading Standards in May 2014. The backstop role had been previously fulfilled by the Office of Fair Trading, who took action against Ryanair following serial breaching of ASA adjudications. National Trading Standards (n.d) cites a case from 2018 in which 'A man who said he could cure diseases such as cancer and diabetes using just blood tests

and food has been fined a total of £2,250 and handed a Criminal Behaviour Order...'. In 2020, the ASA agreed a new approach to handling complaints about ads for property raffles with National Trading Standards Estate and Letting Agency Team (NTSELAT) (National Trading Standards 2020). There does not appear to be a public record of referrals and this information is required in order to assess the scope and effectiveness of the current powers.

There are further questions concerning the use and effectiveness of enforcement mechanisms. The CMA does not pursue individual enforcement action but rather investigates activities sector-wide. Action would also be pursued through the courts, with uncertain outcomes arising in part from the lack of specificity in the legal instruments.

Identification and disclosure: CAP-ASA and CMA

The CAP-ASA has been active in strengthening self-regulation on disclosure. In part, this has responded to the work of the CMA which has set out its guidance and warned creators and industry actors on legal compliance for influencer marketing, endorsements and testimonials. The initiatives taken by the CAP and ASA are significant and welcome. The ASA has committed to a targeted workstream focusing on non-

disclosed influencer ads. However, there are problems in scope, reach, rules and enforcement.

As discussed above the maintenance of an anomalous 'dual test' of payment and control by CAP-ASA, alongside the legal requirement for disclosure based on payment alone is only one element of self-regulation but it is indicative of, and arises from, a broader set of problems.

Payment alone does not bring brand sponsored content into the current CAP/ASA approach. A dual test is applied to paid-for editorial like content in publications: whether the content is paid for, and whether the content is controlled by the marketer. The CAP/ASA allows payment to the publication to cover stories, without requiring disclosure to readers, provided that the editorial content is not 'controlled' by the brand. As the IAB UK (2018: 1) advises its members:

Editorial content that a brand has paid to be associated with but over which the publisher has full editorial control does not fall within the remit of the CAP Code or this guidance. This content may, however, be subject to other legislation, regulatory codes or industry codes.

Content supplied or paid for by brands can be published without identification to notify readers, or

ASA oversight, where no 'control' over editorial is exercised by marketers. This lacks sufficient transparency and provides a means whereby if publishers and advertisers have an interest not to disclose sponsored content, they can rest upon a claim of the publisher retaining editorial control that is difficult for regulators, much less readers, to assess.

In addition, the CAP Code does not apply to PR-sourced material that is deemed to be editorial matter. The CAP/ASA rules do not cover so-called 'organic' mentions, namely 'earned' media coverage as distinct from 'paid' (or transactional) advertising. This is becoming increasingly untenable, as all kinds of transactional relationships can evade the rules by placing the transaction at some distance from the endorsement made. The ASA is seeking to expand evidence of marketer control in recent influencer marketing adjudications, yet is resisting the moves to ensure any payment and any material connection, including previous paid partnership, is declared effectively. The paid/earned division is becoming increasingly blurred as reciprocal deals, bartering, and other transactional arrangements abound across digital publishing and influencer marketing. The regulatory divisions between advertising, editorial and public relations have been established in the discursive, regulatory, and institutional organisation of UK communications governance.

These are proving to be insufficient to address converging media and marketing.

Regulatory convergence and anomalies

Overview

Branded content is a fast-growing area of online marketing communications that needs to be incorporated into forward-facing regulation. Across digital media new forms of integrated advertising are developing rapidly. Boundaries between media and advertising are being tested, crossed, redefined, and erased. The emergence of these new forms and practices of integrated advertising raise a host of issues ranging from consumer awareness to editorial independence and creative autonomy.

The traditional divisions established in the 1960s for the ASA meant it regulated advertising but not editorial, public relations or sponsorship. Those divisions have importance and merit and inform profession practices and identities. However, the divisions across advertising and editorial have come under pressure due to multiple factors (Hardy 2022a). The divisions between paid and earned have become increasingly blurred across the range of transactional arrangements between marketers, agencies and ad-dependent media and communication vehicles. Likewise the divi-

sions between paid media (ads in third-party publications/media vehicles) and owned (self-publishing by brands) have become increasingly blurred through corporate convergence, joint deals, and emerging marketing forms and formats.

Increasingly brands seek endorsements from influencers who can reach desired audiences in far greater numbers than traditional media across their YouTube, Instagram, Snapchat and other social media channels. A huge industry has built up around managing celebrities' and micro-celebrities' media plans to bring in advertiser revenue, with agencies such as Izea, MyLikes and Ad.ly managing paid endorsements.

Both the ASA and the US Federal Trade Commission (FTC) have updated their rules and issued guidance (Hardy 2018, 2022a). However, in both the US and UK the rules do not cover so called 'organic' mentions, namely 'earned' media coverage as distinct from 'paid' (or transactional) advertising. This is becoming an increasingly grey area, not least

since all kinds of transactional relationships can evade the rules by placing the transaction at some distance from the endorsement made. As this example illustrates, the regulatory framework needs to be overhauled to deal more effectively with the ongoing convergence of 'paid' (advertising), 'earned' (public relations; editorial), 'owned' (brand-owned communications) and 'shared' (social).

News publishing

The standards for news and periodical publishers should be at least as high as those that apply to social media influencers, many of whom self-publish and operate outside of the professional, institutional and governance arrangements found in news and periodical publishing. For instance, the CMA-CAP (2020: 4) guidance states:

If you have any sort of commercial relationship with the brand, such as being paid to be an ambassador, or you're given products, gifts, services, trips, hotel stays etc. for free, this is all likely to qualify as 'a payment [or other reciprocal arrangement]'. There's nothing wrong with getting paid to create content, but you need to be upfront about this with your audience.

That level of disclosure for influencers, who may be 'amateur' and individual self-publishers, exceeds the current practices of professional news and periodical publishers in the UK, where junkets, gifts, supplied goods, affiliate marketing and other 'reciprocal arrangements' are not consistently, clearly, and explicitly disclosed to readers. Such good practice for disclosure would also align with developments in the regulation of influencer marketing. The ASA has ruled that influencers who promote brands outside of contracted campaigns should nevertheless disclose their relationship to the brand to

users who can then better assess their communications about the brand. This has arisen in cases where influencers and marketers/agencies have claimed that promotions were 'organic' and not paid or controlled by brands, but where the ASA has ruled that disclosure was required.

The obligations for social media creatives and influencers to declare payments, gifts, affiliate marketing links and other relationships with sponsors are clear but are not matched across UK journalism. The self-regulator Impress has long held that paid for editorial should be disclosed to readers and has recently updated its code. Yet, the majority of national news publishers are members of IPSO which does not address brand sponsored content in its Editors' code. Currently, a teenage creator on TikTok, working without professional or legal support, has a greater obligation to reveal 'incentivised content' than the professional publishing sector. In the current debates on the Online Safety Bill, advocates for newspaper industry call for a carve out on the basis that the industry has sufficient safeguards for standards in place already. Is it right that news publishers have weaker requirements than influencers to disclose brand sponsored and commercially 'incentivised' content? Broader question: Should converging media have converging marketing regulations?

Press regulation

Press responses towards advertising regulation need to be understood in broader contexts. First, the greater ‘threat’ is for publishers to be included in new regulations for platforms. ‘Press publishers, for example, state that due diligence obligations should only concern very large online platforms, and should not cover hosting services such as comments sections on newspapers’ websites’ (European Commission 2020: 46). The argument is, once again, focused on freedom of expression, but the outcome is the press seeking to evade the restrictions affecting very large platforms despite their content often breaking the same rules.

Restrictions on non-traditional advertising (native advertising, sponsored content and other branded content) would diminish an important revenue stream on which most commercial publishers have come to rely. Amid falling display advertising and subscription revenues, brand sponsored editorial content has offered publishers the potential for increased earnings, and marketers a means to tackle ad-avoidance and boost engagement (Harms, Bijmolt, and Hoekstra 2017). Sponsored content was the second most important revenue generator (44%), after advertising (70%) and ahead of subscription (31%), according to a worldwide newsroom survey (ICFJ 2017). Since then, the continuing structural decline in advertising revenue, has intensified efforts to diversify revenue streams and

develop readers’ share of revenue. These trends were exacerbated by, but pre-date, precipitate falls in advertising, and other, revenues in 2020–2021 arising from the Covid pandemic. A survey of 200 “digital leaders” in 29 countries in December 2018, found that native advertising (75%) was among the top three most important revenue sources for news publishers, with subscription (78%) behind display advertising (81%), yet native fell to 8% as the main revenue priority for the year ahead (Newman 2019: 5, 23). In the following year’s survey, covering 43 countries, reader subscription was considered the most important revenue source (76%) followed by display advertising (66%) and native advertising (61%); yet, opinion was split, with 44% considering that subscription models could only work for a minority of publishers (Newman 2021: 13–14). So, editorial-like content funded by brands has not assuredly advanced as the saviour of journalism, yet most news publishers continue rely on advertising as their main funding source. As that funding diminishes, the struggle to attract marketers increases the drive to offer embedded “native” forms of advertising, including sponsored editorial content (Hardy 2021b).

The UK press should be included in statutory regulations of marketing communications. The proposed press exemption in the Online Safety Bill should be rejected, as the Media Reform Coalition (2022) has argued. At the same time, the definition of who is

and who is not a journalist should not be a matter for Government and that proposal in the OSB should be rejected as it would constitute state regulation of the press through the backdoor (Kirconnell-Kawana 2022).

Audiovisual

The older regulatory system was organised by industry or delivery mechanism and supported divergent rules. The main structuring division was between broadcasting (statutory) and press (voluntary). The ASA was established in a context where broadcasting regulation remained separate (under ITA, IBA, ITC) and where the advertising/editorial division was established on the basis of the ASA not venturing into matters of freedom of expression and press self-regulation. From 2004, Ofcom's co-regulatory arrangements with the ASA were designed to create a 'one-stop shop' for consumer complaints and joined broadcasting to the lengthening list of advertising forms and ad-carrying vehicles covered by CAP/ASA self-regulation. This arrangement was renewed in 2014 to run to 2024. Ofcom designated the ASA in 2010 as co-regulator for on-demand programme services (ODPS), renewed in 2020 to 2024. In 2021, Ofcom consulted on extending co-regulation by the ASA to video sharing platforms (VSP).

The anomalies of the pre-digital era persist and create ongoing inconsistencies. For instance, paid product placement is subject to significant restrictions on programme type, product type, and form. There must be no editorial interference, no undue prominence, and 'promotion' is restricted, albeit unclearly. Ofcom's rules (9.1–9.5) apply to all commercial references that appear within programmes,

'irrespective of whether a reference is featured solely for an editorial reason or as a result of a commercial consideration. These rules help maintain a clear distinction between editorial and advertising content by limiting the impact commercial arrangements can have on editorial content.' So, for Ofcom, the rules apply based on the presence of commercial references in output, irrespective of transactional relationship, agency, purpose, or motivation (although those considerations are relevant to the application of rules). By contrast, the non-broadcast CAP Code requires that readers only need to be made aware of sponsored content when marketer 'control' is exercised. For CAP/ASA, the presence of commercial references is not governed by rules except where it falls within the scope of marketing communications.

The Government's stated aim in the broadcasting White Paper, Up Next (4.8) is to 'consider how to create a more level playing field between broadcast and online advertising, including on the issue of platform liability, as we consider what measures could be introduced to improve accountability and transparency'. The CAP/ASA's dual test of payment and control for branded content opens up regulatory gaps, as discussed above. Further, the burden of regulation arguably falls too heavily on the consumer. Whereas the Ofcom Broadcasting Code prohibits 'undue prominence' in commercial references so that

viewers can complain about the overt content they see. For non-broadcast output, a complaint would have to be based on the possibility that undisclosed brand control over editorial might have occurred, but most complainants will have no access to the actual arrangements negotiated between brands, agencies, and media. For a system that currently relies heavily on notification of code breaches via complaints, that is problematic. There is a palpable risk that power shifts back to the parties to the transaction, and away from regulators and public alike. The impact assessment on option 2 is apposite here: 'This approach still relies on user reporting of adverts that may not meet the standards set out in the CAP codes and so it may only have a small impact on the level of harmful adverts' (DCMS 2022d: 49).

Recommendations

The governance of marketing and communications becomes ever more complex as the range of actors, platforms, forms and formats proliferate and change rapidly. There are strong grounds for governance arrangements to be multiple, multi-layered and adaptable, corresponding to the dynamic and adaptive techno-market systems they seek to regulate. There will always be a strong case for self-regulation and positive, ‘best practice’ recommendations to remain a frontier for effective governance arrangements. However, there is also a strong need for a statutory regulatory ‘backstop’ for all. An effort has been made through Ofcom-ASA co-regulation to strengthen ‘backstop’ powers and enforcement around the broadcasting and post-broadcasting audiovisual landscape (ODPS) and converged platforms (VSPs). Yet, the differential treatment of ‘publishing’ and ‘audiovisual’ creates anomalies and is not sustainable. Further, the division between self-regulation and statutory regulation which has structured this differential treatment is not sustainable.

As Carnegie UK (2022: 2) argues in the context of the OSB:

Whichever regulator has the lead for the new regime, there must be provisions for it to cooperate with other regulators in order to share information and evidence, horizon scan for new risks

and harms, and effectively enforce sanctions.

Carnegie (2022: 2) refers to this as a ‘system of regulatory interlock’. They call for this coordination or cooperation function to be established on a statutory footing and note that the OSB lacks powers or duties on Ofcom to cooperate with domestic regulators (although it has a proposed duty to cooperate with overseas regulators).

The concept of a ‘regulatory interlock’ is a valuable one to apply to advertising regulation. We would extend this across the full range of governance actors and arrangements. There needs to be an interlocking across the range of ‘self-regulatory’ and ‘statutory’ regulatory agencies.

The Branded Content Governance Project is in the first year of a three-year research project in which we seek to put forward recommendations for governance arising from comparative analysis of regulations in 32 countries and further in-depth research on the UK and Spain, together with interviews and policy discussion with industry actors and policy stakeholder. We have not yet reached the stage to set out recommendations from our research but we do promote solutions that recognise the complex variety of forms of governance and how these can be developed to work together effectively and to interlock to provide benefits and protect

important values and outcomes across industries and societies.

For many decades, the debate on advertising regulation in the UK has been framed and structured around ‘statutory versus self-regulation’. We argue that a broader approach to identifying, supporting and measuring governance effectiveness can show how a combination of rule-shaping processes, including ‘statutory’ and ‘self-regulatory’ can work together. We therefore welcome the opening up of discussion on how this may be achieved that the OAP presents.

As one important element in governance overall, a statutory regulatory framework provides the best mechanism for clarity and guidance on legal requirements, which can work alongside industry self-regulation (CAP/ASA, plus trade associations and networks) providing the more detailed guidance on adherence and best practice to those working within and across specialist sub-sectors of marketing communications and media. A specialist statutory regulator would be responsible for all marketing communications and their interconnection (and integration) with other spheres of regulation, notably communications and data, but also other areas including health, children’s welfare and education (digital/media literacy, etc.).

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Appendices

Appendix 1 – Summary of CAP, ASA and CMA activities (2022-23)

CAP-ASA

The Committee of Advertising Practice published updated guidance on Influencer Marketing in March 2023 (CAP 2023b, 2023b). This is the third revision of guides first published in 2018.

In March 2023, the ASA updated its guidance on disclosure of advertising, and affiliate links, by newspapers and publishers.

CMA

The CMA produced updated guidance in November 2022, revising guidance originally published in January 2019. *Hidden ads: Being clear with your audience* (CMA 2022a) provides advice for content creators (influencers) about how to label commercial content to comply with consumer protection law. The CMA explains the requirements for disclosing when there is a direct business connection with a brand and providing upfront, prominent disclosures when posting reels, stories or other video content. The CMA (2022b) also published information aimed at businesses, addressing how brands can comply with consumer protection law, and the appropriate steps they should take to reduce the risk of hidden advertising.

Appendix 2 – Branded Content: General legal and regulatory framework: UK

<p>Are there general rules on identification of marketing communications?</p>	<p>UK law, incorporating European legislation, requires identification in certain contexts under the The Consumer Protection from Unfair Trading Regulations 2008, which incorporates the EU Unfair Commercial Practices Directive. The CMA enforces European law which says that if the trader pays for a promotion that must be identified.</p> <p>There is no comprehensive, general rule on identification set out in law. However, the advertising self-regulatory system stands on the principle that ‘Marketing communications must be obviously identifiable as such’ (Rule 2.1 CAP Code). The Committee of Advertising Practice Code (‘CAP code’) recognises the ICC code on identification of marketing communication. In Article 7 (Identification and Transparency), The ICC Code states that all marketing communication must be recognisable as such (ICC 2018).</p> <p>GALA (2019: 959) states: ‘both the CAP and BCAP [UK Code of Broadcast Advertising] Codes reflect the principle that advertising and editorial must generally be kept separate and that advertising should be readily recognizable as such, whether by visual or aural representations, or through the use of the appropriate disclosures’.</p>
<p>Are there general rules on identification of marketing communications?</p>	<p>The Ofcom Broadcasting Code, the CAP codes (CAP and BCAP), and the Consumer Protection Regulations, all contain rules which aim to assure marketing communications are recognisable as such but vary when it comes to how strict they are regarding the identification of the sponsor of the message (GALA 2019: 967).</p> <p>Broadcasters face stricter, statutory regulations in this area, with Ofcom proving the most specific in its handling of the issue. Section 9 of the Ofcom Broadcasting Code aims to ‘ensure that the principles of editorial independence; distinction between advertising and editorial content; transparency of commercial arrangements; and consumer protection are maintained’ (Ofcom 2020). It contains a definition of ‘sponsored programming’, which includes ‘advertiser-funded programmes’, and specifies that under the rule 9.19, ‘sponsorship must be clearly identified by means of sponsorship credits’ (Ofcom 2020). The credits must make clear ‘the identity of the sponsor by reference to its name or trade mark; and the association between the sponsor and the sponsored content’ (Ofcom 2020).</p> <p>The CAP code simply states under the rule 2.1 that ‘marketing communications must be obviously identifiable as such’ (ASA 2014). The BCAP code’s 2.1 rule goes further by referring to native advertising and insisting on ‘quick’ identification: ‘advertisements must be obviously distinguishable from editorial content, especially if the</p>

	<p>use a situation, performance or style reminiscent of editorial content, to prevent the audience being confused between the two. The audience should quickly recognise the message as an advertisement' (ASA 2010: 12).</p> <p>The Consumer Protection Regulations also contain rules which might lead to the identification of the advertiser becoming necessary, although this is a context-dependant requirement based on the CPRs' three prohibitions: one against '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)' (Paragraph 11 of Schedule 1, which lists universally prohibited practices); second against '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.' (Paragraph 22 of Schedule 1), or under provision 6 of <i>The Consumer Protection from Unfair Trading Regulations 2008</i>, which prohibits any misleading omissions, which include omitting or hiding material information or presenting them in a 'manner which is unclear, unintelligible, ambiguous or untimely' (paragraphs a-c). Paragraph d is especially relevant as it concerns cases when 'the commercial practice fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise' (The Consumer Protection from Unfair Trading Regulations 2008).</p>
Are there (general) disclosure or other obligations when integrating advertising content with other content?	<p>There are no general rules regarding these areas. Instead, there are sectoral rules that have developed around a specific medium, or mode of delivery for media and communication service, some of which apply rules across more than one platform (GALA, 2019: 968-969).</p> <p>The general principles such as honesty and transparency apply, but their individual implementation varies, with product placement, advertorials, social media disclosures, and other forms of integrated advertising content functioning under the separate remits of Ofcom, the ASA, being treated differently in the CAP and BCAP Codes, by other regulatory agencies such as the press regulator Impress, and under the CPRs.</p>
What are the rules governing the use of endorsements and testimonials in advertising?	<p>According to GALA (2019), the advertisers must be able to prove that a testimonial or endorsement is relevant to the product or service, genuine and not misleading (if offering factual information) and published with consent of the person offering it. They also must hold the person's contact details. No endorsement can claim support of an institution, which did not give it or use its symbols. Also, 'testimonials and endorsements by celebrities using social media must make clear whether they are paid for or part of an overall commercial arrangement with an advertiser' (GALA 2019: 962).</p>

Publishing

<p>Rules/governance arrangements across sector (news publishing; magazines; other – brand owned; contract publishing; digital native)</p>	<p>The UK press regulation system involves the Press Recognition Panel (PRP), an independent body which issues accreditation to the regulators of the press (and other publishers), if they fulfil the criteria as specified in the Royal Charter (PRP n.d.) This results in a press system being regulated without a statutory body directly overseeing its activities. Instead, the Parliament supported the creation of independent self-regulatory bodies, which can draw statutory advantages from the Press Recognition Panel accreditation (House of Lords 2015: 5). The two institutions which are the main regulators of the press in the UK are the Independent Monitor of the Press (Impress) and Independent Press Standards Organisation (IPSO) (see 5.12 and 5.14 for more details). Overall, publishing, as a sector, is overseen by self-regulatory institutions, with advertising in the press being predominantly regulated by the Advertising Standards Authority.</p> <p>Publishing falls under the CAP Code as the category it encompasses, non-broadcast advertising, includes ‘adverts published in the press, in leaflets, in magazines, in direct mail, or displayed on posters or billboards’, as well as ‘commercial email and text messages and paid for space on the internet’ (Conway 2020: 4). Advertorials are listed separately in section I g (ASA 2014: 5) From 2011 on, the ASA’s remit also includes marketing communications on companies’ own websites and in other third-party space under their control, such as social networking sites like Twitter and Facebook. (Conway 2020: 4). The parts of social media and company’s own website which do not qualify as marketing communications remain outside of the ASA’s remit. These include ‘editorial content, news or public relations material, corporate reports, investor reports and heritage advertising’ (GALA 2019: 960).</p>
<p>How is branded content described and ordered in governance?</p>	<p>The Independent Monitor of the Press (Impress) specified rules regarding their members’ obligations towards transparency in clause 10 of their Standards Code. Clause 10.1 states: ‘Publishers must clearly identify content that appears to be editorial but has been paid for, financially or through a reciprocal arrangement, by a third party’ (Impress 2023: 67). The expanded version of the clause emphasises the importance of disclosing any material connections and ensuring that all paid-for and sponsored content is clearly identified and recognisable to readers (Impress 2023: 68). The following clause, 10.2, states that ‘declarations of significant conflicts of interest must be made promptly (at the earliest opportunity) and with “due prominence” (Impress 2023: 68). The clause defines ‘a significant conflict of interest’ as any ‘perceived benefit’ to a journalist or a publisher, which could influence the type of content produced or the article’s content (Impress 2023: 68).</p> <p>In contrast, the Independent Press Standards Organisation (IPSO) has no rules no rules concerning advertising in their Editor’s Code of Practice.</p> <p>The CAP code contains rules concerning branded content. Section III k of the Code offers a definition for an ‘advertorial’: ‘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’ (ASA 2014: 8). The distinction is especially significant as editorial content is excluded from the Code, which means that ASA can only intervene once they positively identify a piece of branded content. The Online Publications Media Panel advises on the proper distinction between editorial and advertising in online publications. The Panel was established ‘at the instigation of the Council of the Advertising Association and with the endorsement of CAP’ to meet the challenge of policing ‘the boundary</p>

	<p>Panel was established ‘at the instigation of the Council of the Advertising Association and with the endorsement of CAP’ to meet the challenge of policing ‘the boundary between advertisements and other marketing communications and other forms of content, on websites and other non-paid for space online under the control of an online publication’ (ASA n.d.d). Also, rule 2.4 of the CAP Code specifies that ‘marketers and publishers must make clear that advertorials are marketing communications; for example, by heading them “advertisement feature” (ASA 2014: 15).</p> <p>Section II r of the CAP Code specifies that its remit does not cover sponsorships but does cover ‘marketing communications that refer to sponsorship’ (ASA 2014: 7).</p>
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Social Media (Influencer marketing)

Rules/governance arrangements creator/user content and platform use	<p>he Competition and Markets Authority (CMA) is responsible for protecting people from unfair trading practices and enforcing the Consumer Protection Regulations (CMA n.d.). The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) is the UK implementation of the EU Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council). In part 1, clause 2(1), the UK legislation defines ‘traders’ as ‘any 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’ (The Consumer Protection from Unfair Trading Regulations 2008). The definition applies to influencers when they ‘accept instructions to endorse a product and when they are paid, incentivised or in any way rewarded to endorse or review something in their posts’ (CMA 2021b). The CMA’s understanding of incentivisation is broad and includes ‘money, commissions, discounts, leases or loans free of charge or in more favourable terms than those offered to the general public, gifts of any products’ (CMA 2022b). Any connection with the brand, such as brand ambassadorship should be disclosed and made clear in individual posts without assuming the audience’s familiarity with the arrangement. The CMA’s understanding of what constitutes a relationship with the brand is broad and includes a requirement for the influencers to keep declaring an association with a brand for a year if they received a gift or a loan (CMA 2021b).</p> <p>Platforms, brands and social media agencies can also qualify as traders under the CPRs, according to the CMA, which means that they are responsible for taking ‘reasonable and proportionate steps to tackle illegal incentivised endorsements’ (CMA 2021b). Any of the parties involved, if acting as traders, are bound by the CPRs, and specifically the rules prohibiting: ‘the use of editorial content in the media to promote goods and services without making clear in the content that the promotion has been paid for by a business’ (Schedule 1, Paragraph 11), and ‘creating the false impression that content has been authored by a consumer (Schedule 1, Paragraph 22) (The Consumer Protection from Unfair Trading Regulations 2008). Part 2, Clause 6 also prohibits ‘misleading omissions’ which involve hiding ‘material information’, which include any context necessary for the consumer to take ‘an informed transactional decision’ (The Consumer Protection from Unfair Trading Regulations 2008). The CMA argues that conversion rate is much higher for consumers who perceive a promotional post as editorial content, or a genuine recommendation from an influencer whose opinion</p>
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	<p>they trust (CMA 2021b). This means that whenever influencers fail to label their promotional content in clear and prominent ways, they are likely in breach of the CPRs. The CPRs also require traders to disclose “material information” and not to mislead consumers. Material information is likely to include clear signposting that a post is an advert meaning that, if influencers fail to disclose the commercial nature of an incentivised endorsement clearly and prominently, they are likely to be in breach of the CPRs’ (DCMS 2022b: 24).</p> <p>As mentioned before, from 2011 on, the ASA’s remit includes marketing communications on companies’ own websites and in other third-party space under their control, such as social networking sites like Twitter and Facebook. (Conway 2020: 4). As a non-broadcast form of advertising, social media adverts fall under the CAP Code. The Code involves a principles-based approach, which means that it is neutral regarding the specifics of the format and the medium, targeting influencers regardless of the platform they use and the type of the advert they produce (DCMSC 2022a: 26). However, the content must meet its definition of an advertorial, which includes a dual requirement: the dissemination of the material must take place in exchange for a payment (or ‘other reciprocal arrangement’) and the content must be controlled by the marketer rather than the publisher (ASA 2014: 8). A recent report from Digital, Culture, Media and Sport Committee, Influencer Culture: Lights, Camera, Inaction, challenges this arrangement and recommends ‘that the remit of the CAP code be extended by removing the requirement for editorial “control” to determine whether content constitutes an advertisement’ (DCMSC 2022a: 26).</p> <p>The CAP code has a list of exclusions which help to assess whether specific marketing communications on websites and social media fall within its remit (CAP Code, II c). The content is included if it originated in the UK, was produced by a marketer registered in the UK, or targets the UK audience. The rules apply differently depending on whether the content was paid or non-paid for (brand’s own). ASA’s remit remains limited by the national borders despite an international nature of online publication. If the marketing communications fall beyond its remit, the next reference point is the European Advertising Standards Alliance (EASA), which can help to address complains which cross-national borders, but are confined within Europe.</p>
How is branded content described and ordered in governance?	<p>The CMA describes branded content as ‘hidden advertising’ (CMA 2022b; CMA 2022c). The category encompasses incentivised advertorials and endorsements, and affiliate links. Because, as mentioned above, influencers, marketing, bands, and platforms can meet the definition of ‘traders’ as per the CPRs, the CMA makes them jointly responsible for assuring that commercial content is distinguishable from editorial content, properly labelled and easily recognisable.</p> <p>Influencers integrate advertising into non-commercial editorial content which makes ad identification challenging to consumers (CMA 2021b). Internet users tend to be interested in the lifestyle and product choices of the influencers they follow, seeking a feeling of connection through access to their ‘genuine’ experiences and opinions. This means a paid endorsement of a brand can be easily misconstrued as an expression of personal approval, and consumers are likely to perceive influencer content as ‘authentic’. Influencers use the editorial control and their own branding to their advantage, tailoring the commercial content to match their other posts with greater effectiveness than possible for traditional media. Brands can enhance this process by carefully matching their products to the right influencers. Considering the increased</p>

	<p>effectiveness of ads when perceived as ‘organic’ content, and the influencers’ understanding of their ability to blur the lines between genuine and commercial content as an asset which elevates their value as providers of marketing services, both sides have an incentive not to label advertising prominently and consistently (CMA 2021b). The CMA’s updated guidance targets these issues and puts more responsibility on the platforms (CMA 2022b; CMA 2022c).</p> <p>The CMA’s updated guidance for social media platforms lists six principles, which make them responsible for: (1) informing users, and especially content creators about disclosure requirements, (2) providing tools, which allow users to label their content as advertising, (3) taking ‘appropriate, proportionate’ and ‘proactive’ steps to prevent hidden advertising from being published (using technology and algorithms), (4) offering users an ‘easy’ and ‘effective’ means to report ‘suspected’ hidden advertising, (5) informing the brands about the legal requirements related to hidden advertising, (6) taking action when their terms and conditions are violated (CMA 2022c).</p> <p>The CMA’s updated guidance for businesses explains that brands’ promotional content must be labelled as advertising if it results from the brand’s marketing activities, or is published on the behalf of the brand, or is published in return for any reward or incentive (regardless of whether that was formally or informally arranged). Those conditions apply even if the brand does not control the content, or make any explicit demands from the influencer (CMA 2022a)</p> <p>Apart from disclosing commercial content, social media endorsements and any activities promoting a business or influencers’ own brands or products, influencers also need to label affiliate links as advertising (CAP and CMA 2020). Affiliate links are connected to products or services, and track and reward any traffic the influencer brings to the page, which means they constitute a form of payment and qualify as advertising.</p> <p>The ASA’s description of branded content is narrower as it must meet the conditions for advertorial, which involves the dual test of payment and control, as discussed above (CAP and CMA 2020).</p> <p>Both the ASA and the CMA put emphasis on labelling with advertising needing to be ‘obviously’ identifiable as such according to the CAP code, and ‘clearly’ identifiable according to CMA’s advice (ASA 2014). Both institutions recommend that the identification should be visible regardless of the platform and medium used, and encourage using clear, descriptive words such as ‘Ad’, ‘Advert’, ‘Advertising’, ‘Advertisement’, or ‘Advertisement Feature’ rather than any more complex and, as a result, confusing labels (CAP and CMA 2020).</p>
Are there any special rules governing the use of social media for advertising purposes?	<p>In its report published in 2019 (GALA 2019: 969) stated that there are no special rules governing the use of social media for advertising purposes. Since then the guidance to legal compliance produced by the CMA has produced rules for social media marketing. CAP-ASA has produced guidance on influencer marketing in September 2018 updated in February 2020 and again in March 2023 (CAP and CMA 2023).</p>

<p>Is an advertiser responsible for advertising claims made in user generated content?</p>	<p>The advertisers become responsible for user-generated content if they ‘adopt and incorporate’ it on their website or into their social media accounts (GALA 2019: 970). The possible forms of adaptation and incorporation include the advertiser soliciting UGC, moderating it, or editing and prominently displaying it. Soliciting UGC content might involve, for example, advertisers encouraging users to praise the product to create promotional materials with an organic feel. The advertisers also become responsible for UGC if they moderate it before posting – this concerns pre-moderation, especially, with post-moderation remaining a ‘grey area’ (GALA 2019: 970). Any editing or displaying UGC in ways which make it more prominent than it would be otherwise also shifts the responsibility for the post from the users to the advertisers.</p>
<p>Are there any key court or self-regulatory decisions regarding the use of social media and user generated content for marketing communications?</p>	<p>In 2012, the Office of Fair Trading (OFT), the predecessor to the Competition and Markets Authority (CMA), investigated Groupon regarding concerns about its trading practices. The investigation resulted in them forming a view that ‘there were specific examples of Groupon’s practices which appeared to be in breach of the CPRs, the UTCCRs and DSRs’, in particular ‘reference pricing, advertising, refunds, unfair terms, and diligence of its interactions with merchants’ (CMA 2021a). The unfair promotions Groupon engaged in included ‘astroturfing’, which involved an employee of the company posting comments posing as a consumer (GALA 2019). In 2021, the CMA has opened an investigation into Groupon suspecting it might have breached its 2012 agreement (CMA 2021a).</p> <p>In 2016, the CMA investigated two companies, Social Chain and Woolovers Limited. The first company engaged in undisclosed advertising, which was posted on Twitter, YouTube and Instagram. It used its own social media accounts and ‘widely followed’ social media personalities to promote films, games and apps with no indication of the posts being advertising. The ads appeared amongst UGC, and the CMA judged it ‘might have been difficult for readers to distinguish from other posts, conversations and jokes it appeared alongside’ (CMA 2016). The second company ‘cherry-picked’ positive customer reviews and published them on its website. Woolovers staff were not allowed to approve any reviews below 4 stars. Nearly a half of all reviews remained unpublished as a result (CMA 2016).</p> <p>In 2017, the ASA upheld a complaint against Flat Tummy Tea for breaking the rules about clearly identifying marketing materials. The company entered into a financial agreement with a make up influencer, Sheikhbeauty, whose post on Instagram announced a promotion on behalf of Flat Tummy Tea without labelling the message as advertising (ASA 2017b).</p> <p>Also in 2017, the ASA upheld a complaint relating to an Instagram post created by the face of Diamond Whites, Marnie Simpson. Although the actress had a long-standing association with the brand, her post was not labelled as an ad, and the ASA ruled that for the marketing content to be obviously identifiable, the audience would need the contextual information about the agreement, which was not clear from the post itself (ASA 2017a).</p> <p>Since then, the ASA identified and responded to many breaches of these rules. In 2021, they noted widespread non-compliance amongst influencers, especially those using Instagram, the most mentioned platform in non-disclosure complaints (ASA 2021).</p>

Appendix 3: News Media Analysis

This document was prepared for the symposium, *Regulating Online Advertising: What Next?* (Tuesday 31 January 2023). It presents an analysis of three articles published in the last month (end Dec 2022-January 2023) that highlight issues and problems in the labelling and identification of branded content.

1. Evening Standard, 17 January 2023: 'The secret to travelling for less in 2023', p11

This article appeared in the print edition on 17 January, with an expanded [online article](#) on the *Evening Standard* (ES) website published on 26 December 2022, 'Cheap holidays: how to travel for less in 2023'.

Description

The byline is Suzannah Ramsdale, the *Evening Standard's* Digital Head of Lifestyle, who oversees 'all fashion, beauty, tech, health and wellness content online'.

The photo image of the journalist is used across other articles, reinforcing the coding of this article as the product of journalism. The journalistic voice is dominant in column one and then marks a passing over of 'voice' to the featured TikTok creator, Chelsea Dickenson: 'Read on for her top cheap holiday hacks...' (ellipsis in original). The following three paragraphs of text are Chelsea's tips, provided by the founder of Cheap Holiday Expert, and described in the photo caption as having an 'army of TikTok followers'.

EVENING STANDARD TUESDAY 17 JANUARY 2023 11

IN ASSOCIATION WITH **TikTok**

The secret to travelling for less in 2023

Tight budget? No problem. TikTok's @cheapholidayexpert shares her tips and tricks for affordable travel this year.
By **Suzannah Ramsdale**

Get your wings
"Work backwards and think about your flight last," Chelsea says. "It can often be worth paying an extra £30 for a flight if everything else is cheaper. People get really obsessed with finding cheap flights but they're a one-off cost, and actually your accommodation and your food and drink costs are way more important."

Chelsea uses Airbnb and Booking.com to search entire continents for the cheapest four- or five-star hotels.

It's surprising what comes up and it gives you a really quick snapshot at the type of places that are available and the bargains available," she adds. "The true bargains come when you're flexible and can change your destination and your dates."

Now it's time to think outside the box. "You'll get more for your money because less people are going there," Chelsea says. She rates Romania and Bulgaria as great-value destinations, and for a European city break, you can't beat Poland. "They have such amazing architecture, culture and history."

Chelsea's challenge
It all started in 2017 when Chelsea came across a study which said the average Brit spends £1,400 per year on holidays. She decided to set herself a challenge: she would go on 10 holidays for half the cost. She set herself rules to make it more challenging. She had to visit at least three continents, two trips had to be long holidays, and she must fly business class once. "It was really good because you often see and hear about travel hacks but how often do you actually make yourself do them?" It kicked started this whole thing.

So how did Chelsea manage to do it – and can you use some of her tips to travel for less in 2023? Read on for her top cheap holiday hacks...

Value for money
It's all aboard the sleeper train! Think about it: a sleeper saves a night's accommodation in a hotel. "New routes keep getting announced and there are more for 2023 and 2024," says Chelsea. "I did the night train from Vienna to Paris where beds start at €49. It's unreal value."

Whether it's plane, train or automobile that gets you to your money-saved holiday destination, Chelsea's advice is to always have a pre-paid travel card on board that gives you 0% on non-star items, spending abroad.

She recommends Revolut, Wise, Monzo, Starling and Chase. "Be careful you anything from pennies to hundreds of pounds. It all adds up."

On track for serious savings
Chelsea always encourages people to travel by train and not by plane. "It taps into a sense of adventure that you don't get when you fly." The TikTok travel guru also advises using SeatGuru to bid on first class upgrades on trains. "You can bid up to 30 minutes before your train and can get upgrades for £10," she adds. "No one knows about this app and it blows my mind," says Chelsea about the Rovers & Rangers rail pass. "It's like InterRail, but for the UK. There are 100 different versions of the pass. I did the Explore South Wales Pass, recently for £45.55. We used it twice, hop on, hop off service for a week. It allows for spontaneity and would be brilliant with kids. There is also no price inflation ever, it will always be that one price, so really good for summer holidays."

Wish you were here: Cheap Holiday Expert founder Chelsea Dickenson shares invaluable tips for brilliant budget breaks with her army of TikTok followers

THE TRUE BARGAINS COME WHEN YOU'RE FLEXIBLE AND CAN CHANGE YOUR DESTINATION AND YOUR DATES

MORE WANDERLUST TIKTOK CREATORS TO FOLLOW

- @sarahotyin**
Known for her expertly-researched guides, vlogs and day-by-day itineraries, Sarah also talks openly and honestly about her experiences travelling as a solo black woman
- @travellingtuesday**
A solo female traveller who produces beautiful content for everywhere from Jordan to Venice, as well as tips on safety and how to make friends when you're flying solo
- @polladotpassport**
This Kiwi in London travels the world one meal at a time. She'll tell you which Belgian waffles are best – Brussels or Liège – and spills on the best hidden restaurants in LA
- @lifeofjazz**
Your go-to for useful destination guides, itineraries and round-ups. @lifeofjazz always has her eye out for a mega deal – and, lucky for us, she's happy to share her finds

searching for travel tips?
do it with TikTok
TikTok
To learn more

Labelling and Links

Both print and online articles carry the statement ‘in association with [TikTok logo]’ at the top of the page. The print item (17 January) is a full page of content that contains the article and photo images, a separate box presenting four TikTok creators, and a QR code scan box linking to TikTok travel. The four creators are identified by their TikTok handles, with photo images and site description.

The online article (26 December) contains details of ‘More TikTok creators’ including photo image and caption text (with TikTok business page name) and TikTok handle, so that there are at least two references to each creator. However, these are not hyperlinked. There is one hyperlink at the end of the article, with a paragraph of italics text reading:

Don’t do it yourself, do it with TikTok. To learn more visit <https://www.tiktok.com/tag/travel>

Issues (1) regulation and compliance

Both print and online articles are described as ‘in association with TikTok [logo]’. This is one of the more common terms used by UK news publishers to indicate brand sponsored content. However, it is one of many terms used, which is in itself a cause of confusion for readers. It is a term that lacks, if not obscures, clarity about the provenance of the content and the

relationships involved: publisher, journalist, brand sponsor, those featured in the content, their own communications and relationship to the others.

The QR code box would allow the identification of those who acted on the promotion in the *Evening Standard* to reach the TikTok travel page. This would enable an affiliate marketing arrangement to operate between ES and TikTok. The same affiliate link can also be created from those selecting the hyperlink to TikTok travel from the online (and mobile) versions of the article. However, if such affiliate marketing arrangements were in place, the reader/user for both articles is provided with no explicit information.

The publisher and brand may be expected to argue that the brand association is evident and sufficient. On the contrary, it can be argued that the QR code link is not ‘labelled’ in any form, while ‘in association with’ is unclear and evasive.

This labelling also illustrates the divergence between the requirements for identification of marketing communications, and for labelling that content, that apply to social media and to professional news publishing. Such content, published by social media creators would likely be found in breach of the CMA and CAP rules and guidance.

Issues (2) Broader concerns

This example of branded content does illustrate core issues addressed in academic analysis and criticism. The article merges advertising and editorial. This is designed to communicate more effectively on behalf of the sponsor by creating a vehicle that is accessed, and engaged with, more readily than advertising, overcomes resistance and provides a richer content offer. The article draws from the values associated with editorial (trusted, independent journalism oriented to informing and serving the needs and interests of users) to apply these to the brand sponsor. Academic criticism focuses on many dimensions including the disguising of marketer control, interest, intent and influence on the content. Hardy (2022a) argues that problems fall into three main areas

1. Identification and disclosure of marketing communications
2. Impact of brand-sponsored content on media quality (editorial independence, integrity, aesthetic autonomy)
3. Marketers’ share of voice – problems arising from brand/sponsor control and the ability of those able to pay for content to influence communications content, services and environments.

Key concerns include the selectivity that comes from brand-sponsored content. While the form and expectations in these articles draw on journalism ('open' to relevant sources, perspectives) the influence of brand sponsorship creates content that is 'closed', subject to various forms of 'control' arising from relationships involving 'payment' (or other economic consideration and transfer of value between the parties).

The ES articles are timed (Dec/Jan) for the period when people plan holiday breaks for summer or other times. Chelsea's tips include using trains but flights are predominant (with 9 mentions). Such content is common across travel reporting, but one might expect to see qualities in more 'journalistic' articles that are absent in this branded content, such as reference to the 'externalities' of travel/'cheap' holidays in ecological damage. Similarly, Airbnb is referenced without any acknowledgement of problems and controversies, and the article enthuses 'for a European city break, you can't beat Poland', with no reference to Russia's invasion across its border with Ukraine. While the 'artificiality' of branded content is often more prominent in the exclusionary focus on the sponsor brand here we get multiple brand references, by the creator, journalist and 'anonymous' layout and presentation of content. This may be attributed to TikTok

creating an environment and business model for marketers, and to the 'authentic' voice of the creator(s) identifying valued services for their followers, which also reinforces the qualities of TikTok's offer.

A broader concern is how divergences in rules and rule-adherence impacts on the normalisation of practices (among producers and users) in each of the areas affected. The ES articles show 'professional' news publishing performing its separation from the requirements placed on social media marketing. Such behaviour also 'normalises' a lack of disclosure, whose influence on the governance (cultures, practices and rules) of other communications activities has not yet been fully examined. We hope our Branded Content Governance Project can help in addressing this, both through our own primary research and by drawing on wider scholarship.

2. Evening Standard, 26 January 2023

'The A-list skincare guru's tips'

The print article appears on p17 of the newspaper, in a section called 'The Insider'

The byline is Chloe Street who is the *Evening Standard's* Fashion Editor, overseeing fashion and beauty content. The content is presented as an editorial feature article, profiling the business founder of Sturm, Dr Barbara Sturm.

Description

The print and online articles show the common features of 'a story developed with public relations', here the business's in-house communications team and/or external PR consultancy.

The article includes elements and indicators of journalism (a video call interview between journalist and business founder) with copy that appears PR supplied. The content may well be claimed as 'independent' editorial but it is also all compatible with content that would be approved by the brand (whether as successful 'earned' media or 'paid' media). Both articles promote the company, display and feature branded products, promote workshop events taking place in Covent Garden (the next day from publication) and include website and contact details (with the online version also including hyperlinks to the company's Instagram pages).



While such PR (co) produced content has a long history, the content also has all the core features of brand-funded, 'sponsored content' as produced by or for publishers. The term advertorial is associated with content that is not only 'paid for' and 'controlled' by the brand but usually also supplied by the brand. The expansion of branded content in publishing has included this 'advertorial' type, but also content that is brand-funded but produced on behalf of the brand by the publisher. Such publisher-hosted content can then be subdivided into the various types of structures/practice-arrangements for its management, creation and use. Brand-sponsored content is associated with the dedicated and 'separated' units many publishers created, such as the *New York Times*' T-Brand Studios, and the *Guardian*'s Guardian Labs. However, there is a spectrum, ranging from outsourcing (content recommendation providers), through 'hybrid' units and contractors, to production by 'in-house' staff working across editorial and supplied/sponsored content.

The online version ([here](#)) is longer and contains a third-party endorsement for the brand, a crafted 'testimonial' statement:

For Newby Hands, Global Beauty Director at Net-a-Porter, it's this down to earth approach that makes Sturm so appealing, and so

successful: "Barbara has always been very connected with women and what they want for their skincare and this woman-to-woman approach is so powerful," she says. "Her brand is ultimately about great products that deliver, look good and are a joy to use, created by a passionate founder who truly embodies her brand."

The articles contain the following images:

Print article

1. Founder given graphic focus and aligned (colour) with 2. a photographic image of three products (logo shown three times).

Online version

1. Founder (different image – with product displayed – although logo out of focus)
2. Founder image (same photo image used in print version but here full portrait, with background)
3. Products - indicating 'science' - three products with logos placed among unbranded 'science lab' vessels – coding science, lab, purity (liquid is the colour of water but contains 'bubbles', most likely 'photoshopped')
4. Sturm staff (New York)

5. Instagram image (and link) – clicking on photo images/ Instagram link takes you to brand Instagram [page](#).

Labelling and Links

The print article is presented as normal editorial written by an ES editor/journalist.

The online article includes a general statement on affiliate marketing links that appears beneath the headline and the subheading. The subheading includes the journalist's byline and codes 'journalism': 'As she opens the doors to her first Goop-style festival in Covent Garden, the German skincare supremo gives Chloe Street a few pointers'. The disclaimer is set in a shaded box, and so is 'up front', but set in much smaller font size than any of the accompanying article headings or text. It reads: 'The Evening Standard's journalism is supported by our readers. When you purchase through links on our site, we may earn an affiliate commission'

Issues (1) regulation and compliance

The 'general' disclosure in the online article does not identify for the reader any specific arrangement made between ES and the brand featured. The placement of the statement suggests a relationship exists between this article and affiliate marketing arrangements but does not clarify these.

Issues (2) Broader concerns

As with the first ES example, there are concerns arising from the gaps between what might be expected of journalism and of content subject to forms of brand 'control' linked to 'payment'. The founder, Dr Barbara Sturm, who is 50, is described by the journalist as having 'the sort of skin glow reserved for teenagers', yet Sturm also states she has 'been getting Botox since she was 30'. While the article includes some misgiving (Sturm now 'thinks she started too young'), it promotes injectables as a 'fix' for depression: 'She believes a gently needled face can have mental health benefits'. I claim no expertise, but one might wish for carefully balanced independent journalism here. The scientific credentials of Dr Sturm are reported but it is not clear how expertise and claims match up across the full range of products. While the extent of multi-sourced opinion, 'impartial' assessment and review varies across 'independent' journalism, there are evident risks that brand-aligned content, such as this, will not do so in a reliable and sufficient manner.

These issues (compliance and broader) connect in concerns about what kind of 'transaction' lies behind the print/online articles. If this is PR 'earned media', the brand has been remarkably successful. If this is 'paid' (the article arises from payment or other economic consideration) then the content

should be identified as such to readers (in accordance with the UK Consumer Protection Regulations incorporating EU law; CMA authority). The dual test applied by the Advertising Standards Authority is sponsor payment and sponsor (editorial) control. So, if the article was 'paid' but not editorially 'controlled' by the brand, both publisher and brand may expect not to be subject to identification requirements by the ASA (applying the CAP code). There is no definitive way to determine from a review of the contents alone whether there was brand control. However, if investigated, one would expect that a review of the content might well show PR-supplied content (about the brand, workshop, testimonial, and the various images of products, staff team and founder). If we now add the affiliate marketing reference (online article only) and hyperlinks, there is a relationship that appears to go beyond editorially justified product information, to a transactional exchange.

So, is this earned media only? Is this paid media without brand control? Is this paid media with brand control? How should affiliate marketing be identified (with suitable consistency) across all 'versions' of this specific content, and across media forms and platforms?

The level of interaction involved here between publisher (journalist) and brand has not historically been used as a key marker for

differentiating between 'paid' advertising and the supply of material for 'earned' media articles, even when publishers charged for 'colour separation' costs, and other transactions, to monetise PR supplied content. However, such interactions for social media would likely be regarded as evidence of a commercial relationship requiring disclosure.

3. Daily Express Thursday 29 December: 'You really can eat what you love...and lose weight', p32.

This article appears in the 'Express Yourself' section of the printed newspaper

This appears as a normal editorial feature article. However, there is no journalist/author byline, instead the author is announced in the subheading as Slimming World: 'Losing weight can be a challenge [...] Here, Slimming World sorts out the facts from the fiction'.

Labelling and Links

After the article text there are two bullet points inviting readers to join/sign up to their local Slimming World Group and containing the main website and telephone number. The article is not labelled as paid content/advertorial although it has all (and only) the elements of an advertorial.

The Express has 'teamed up' with Slimming World. An [online article](#) (28 December 2022) is labelled an 'Advertorial for SLIMMING WORLD', with the headline 'Join Slimming World for FREE with this great offer - claim now to kickstart your journey'. The Express also has a [page](#) dedicated to curating its articles for the brand.

The print article appears in a section titled 'Express Yourself'. This originated in 2020 and was relaunched in September 2022, as follows:

EXPRESS Yourself is Express.co.uk's search for authentic voices from Britain's streets, front rooms, workplaces, schoolrooms,



expressyourself

You really can eat what you love...and lose weight

Losing weight can be a challenge, not helped by all the misconceptions that surround it. Here, Slimming World sorts out the facts from the fiction

Myth: I'll have to go hungry
Busted: For many of us weight loss equals hunger. In reality though, feeling hungry – and feeling miserable as a result – is counter-productive when it comes to achieving weight loss goals as it's unsustainable. Slimming World has more than 150 low energy dense foods that mean they're low in calories but filling which can be eaten freely – with no weighing, counting and measuring. The idea is that you'll never have to go hungry and you'll be able to follow your calorie intake without actually counting them.

Myth: I'll be told what to eat
Busted: A lot of people expect they'll have to stand on the scales in front of a whole group of their fellow Slimmers and, worse still, that their weight will be read aloud. Thankfully this isn't the case at all. New members are encouraged to set their own target weight to ensure it's something they're comfortable and happy with. You'll be weighed confidentially so you will know your weight except you and the person weighing you, and it'll be done privately within the back of your member pack – not shouted at in a public setting.

Myth: I'll have to do loads of exercise
Busted: While all regular activity is good for your physical health, Slimming World's approach to losing weight is based on the science of how the body burns fat. It's not about doing more exercise than you can manage. Instead, it's about changing your diet to make sure you're getting the right balance of nutrients to support your metabolism and keep your energy levels up.

Myth: It doesn't work for vegans
Busted: According to Slimming World, the beauty of being a vegetarian or vegan is that it's easy to adapt and personalise to the way you like to eat. Whether you're a vegetarian or vegan, you can still enjoy all the benefits of Slimming World. Foods such as pasta, rice, potatoes, eggs, fruit and vegetables are at the heart of the plan and a quick chat with your Counsellor will offer up more veggie and veggie-free alternatives (which you can eat body on the plan like soya, lentils, beans and pulses, and dairy free milk and yogurt substitutes, too).

Myth: I don't need a group to lose weight
Busted: While losing weight is easy to do on your own, it's much harder to do when you're surrounded by people who are struggling with food and drink that they might not like as much as you. Being surrounded by people on the same journey means group members can offer support and encouragement when you're struggling with food and drink that they might not like as much as you. Feeling that real sense of belonging and genuine care helps members come back week after week so they can get to where they want to be. Plus, research of 1.1 million dieters found that regularly attending a

Myth: I'll have to put my life on hold
Busted: A huge barrier to losing weight is the simple fact that it's so easy to do anything about it. And while making changes isn't always easy, remaining motivated certainly isn't easy in the long term. Weight loss doesn't

Get in touch!
 expressyourself@express.co.uk

Join your local Slimming World group or sign up online for member resources, guidance and support.

and just about anywhere and everywhere we can find them.

In the 29 December article, the space for ‘authentic voices’ is used for a brand voice: Slimming World.

Issues (1) regulation and compliance

The publisher and brand may be expected to argue that the identification of the ‘author’ as Slimming World (and the contact information at the end) might be sufficient to ‘make clear’ to readers that this was brand-supplied content. However, there is no disclosure in the form of labelling or statement to clarify that this is paid content (brand supplied/sponsored content).

The publisher and brand might argue that the content was not paid media. However, the evidence of an extensive marketing arrangement between the Express and Slimming World makes a claim for earned media difficult to sustain.

If the article is paid content then it breaches UK (EU) law if that is not made clear to readers. There could be no defence in this instance that the content was not controlled by the marketer, since the entire article is attributed to the marketer as author. The article would therefore appear to breach both CMA and ASA requirements, unless the disclosure provided was deemed to be sufficient.

Issues (2) Broader concerns

Once again key issues arise in the gap between what might differentiate journalism from brand voice. The creation of a form of ‘native advertising’, blending promotion with the newspaper’s editorial environment, created a privileged space for brand voice. The brand is granted the additional credibility of ‘independent journalism’ to advance its claims.

The article highlights the credentials and credibility of Slimming World. Its 50 years’ experience, backed by the ‘latest scientific research’, supports an approach that is ‘in line with government healthy eating guidelines’. The credentials of Slimming World are indeed well established, and it is a leading market actor. The article ‘busts’ six myths, providing some valuable and timely information that might be regarded as ‘public interest’ reporting. However, myth 5 is that ‘I don’t need a group to lose weight’. Busting this myth is obviously integral to SW’s business offer. I am no expert on this topic but express unease about the implications of this brand wisdom for readers. Slimming World is not the only way to lose weight. Even if the benefits of group support are demonstrated, there are other groups on offer and independent experts may query the suitability of such forthright advice being applicable to all those seeking to slim as the article suggests. A brand voice is not the same as

an independent article presenting options to readers, as the [Guardian](#) did around the same time.

Conclusion

All three articles involve relationships between news publishers and marketers that are not declared in ways that are clear and explicit. They highlight inconsistencies in the labelling and identification of the same content by the same publisher across different platforms (here print and online). They highlight inconsistencies in the labelling and identification of content within news publishing such that values including clarity and consistency are not met. These problems are reinforced when set alongside the extensive research showing poor levels of comprehension by readers/users of brand sponsored editorial (see below). These examples highlight too the differences and anomalies across social media marketing and publishing. The regulatory focus on social media marketing has led to relatively clear requirements to ensure content produced in association with marketers is adequately identified to users. These examples from news publishers suggest that the same is not true for the contemporary communications produced by this nearly 350-year-old media form.

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**Branded Content
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