

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Philippa Anna Attrill

**TOWARDS THE DEVELOPMENT OF PHOTOSHOP LAW AND  
ITS ENFORCEABILITY WITHIN THE EUROPEAN UNION**

Master's thesis

Programme HAJM08/21, specialisation in Business Law

Supervisor: Thomas Hoffmann, PhD

Tallinn 2023

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 17,757 words from the introduction to the end of conclusion.

Philippa Anna Attrill ....09.05.23....

(signature, date)

Student code: 213857HAJM

Student e-mail address: phattr@ttu.ee

Supervisor: Thomas Hoffmann, PhD

The paper conforms to requirements in force

.....

(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

.....

(name, signature, date)

# TABLE OF CONTENTS

ABSTRACT.....	4
INTRODUCTION.....	5
1. DEFINING PHOTOSHOP LAW: THE SCOPE OF REGULATION TARGETING HARMFUL ADVERTISING PRACTICES.....	8
1.1. Background.....	8
1.2. What is Photoshop Law?.....	12
1.2.1. Terms Associated with Photoshop Law.....	13
1.2.2. The Fundamental Features of Photoshop Law.....	14
1.3. Why the Subject of Photoshop Law Should be on the European Union’s Agenda.....	15
2. A COMPARATIVE REVIEW OF THE EXISTING NATIONAL FRAMEWORK.....	19
2.1. Photoshop Law: Direct Initiatives at the National Level.....	19
2.1.1. Single EU Member State Initiative: France.....	20
2.1.2. Non-EU Initiatives.....	22
2.1.2.1. Israel.....	22
2.1.2.2. Norway.....	23
2.2. Self-Regulation in the Fashion and Advertising Industry.....	24
3. THE OVERLY SIMPLISTIC APPROACH OF EXISTING LEGAL INITIATIVES.....	28
3.1. The Lack of Harmonisation of Law.....	28
3.2. The Harmful Irony of the BMI Measurement Requirement.....	30
3.3. The Application of the Law and the Reality of its Enforceability.....	32
3.4. The Contentious Debate Surrounding the Efficacy of Disclaimer Labels: Consumer Attitudes.....	34
4. COMPETING LEGAL INTERESTS AND THE BALANCE OF RIGHTS UNDER PHOTOSHOP LAW.....	37
4.1. Right to Privacy and Freedom of Occupation.....	37
4.2. Copyright Law and Personal Image Rights.....	42
4.3. Consumer Protection under Unfair Commercial Practices Rules.....	47
5. RECOMMENDATIONS FOR FURTHER DEVELOPMENT AT EU LEVEL.....	52
5.1. Suitability of the Unfair Commercial Practices Directive.....	52
5.2. Proposal for an Amendment to the Unfair Commercial Practices Directive.....	54
5.2.1. Qualifying Hidden Photoshopping Under the Unfair Commercial Practices Directive.....	54
5.2.2. Amendment to the Unfair Commercial Practices Directive.....	57
CONCLUSION.....	59
LIST OF REFERENCES.....	62
APPENDICES.....	71
Appendix 1. Non-exclusive licence.....	71

## **ABSTRACT**

A prominent lack of self-regulation underlies the fashion, advertising, and influencer marketing industries in terms of the manipulation of models' bodies with the use of photo-editing tools, which is accompanied by rising concerns over the possible adverse effects on consumers' own body image. In response, certain countries have attempted to address the issue through consumer protection legislation and advertising regulation, leading to the development of rules referred to as "photoshop laws". Feasible proposals for addressing the issue at EU level are limited; the current work therefore aims to identify an optimal solution for adopting a photoshop law that fits into the framework of existing consumer protection legislation. To that end, the research is guided by the primary research question: how might advertising regulation aimed at promoting consumer protection be developed to consolidate the enforceability of "photoshop law" at EU level?

An exploratory approach is taken, whereby academic literature and primary sources of law were consulted to develop theories about how a prospective photoshop law may be fairly balanced against conflicting legal rights.

A balance must be struck between a number of fundamental rights at stake, including those of the person receiving the image (consumer), the person who authored the image (photographer) and the person photographed in the image. Under this thesis, the obligation to attach a disclaimer label to digitally-retouched images in commercial communications is elected as the most preferable requirement for adoption at EU level in terms of its rationale and proportionality to the legitimate aim pursued.

Keywords: photoshop law, advertising regulation, consumer protection, fundamental rights

## INTRODUCTION

The fashion, advertising, and influencer marketing industries are notorious for their use of aesthetically pleasing, curated and typically staged images depicting models wearing or using the products advertised. Such imagery has been the subject of much debate surrounding authenticity of the models and the products concerned and, consequently, the trustworthiness of the advertising industry as a whole. A paucity of self-regulation underlies the industry in respect of the alteration of models' bodies with use of photo-editing tools, which is accompanied by rising concerns over the possible adverse effects on consumers' body image. This research aims to examine how the European Union's advertising regulation could be developed to address these issues, which thus far have only been addressed at national level in limited jurisdictions.

The term "photoshop law", or "body image law"<sup>1</sup>, may be used to refer to various efforts to regulate the negative effects of digitally retouched photos on consumers' body image. The thesis will clarify the notion of "photoshop law" to delimit its application in the context of this research. In general, such efforts may include imposing a minimum weight requirement on models to be employable or requiring advertisers to include a disclaimer alongside images of persons whose bodily proportions have been photoshopped.<sup>2</sup> Given the law's preoccupation with imagery, personal image rights are called into question and issues concerning ownership and how rights may be exercised to alter and disseminate the image arise.<sup>3</sup> As such, the problem with adopting "photoshop law" is exacerbated by the conflicting rights between all parties involved in a commercial communication, including the advertiser, the photograph subject (i.e. the model) and consumers.

The prominent lack of self-regulation has been addressed by various regulatory developments in certain countries, which have targeted the issue through advertising and consumer protection regulation. To date, such solutions are only available at national level leaving the application fragmented and unharmonised at EU level and fostering opportunities to circumvent any such

---

<sup>1</sup> Bromberg, M., Halliwell, C. (2016). All About That Bass and Photoshopping a Model's Waist: Introducing Body Image Law. *The University of Notre Dame Australia Law Review*, 18(1), 1-19.

<sup>2</sup> *Ibid.*, p. 2; Krawitz, M. (2014). Beauty is only photoshop deep: legislating models' BMIs and photoshopping images. *Journal of Law and Medicine*, 21(4).

<sup>3</sup> Knoll, S.B. (2020). Photoshop & The (Virtual) Body of Models. *Laws*, 9(1), 1-14.

action. Current research acknowledges the existence of the problematic gap in harmonisation, but feasible proposals for addressing the issue at EU level are limited.

Given the lack of research on photoshop law, particularly with regard to its treatment in the EU, the aim of this study is to develop and propose a recommendation for possible amendment to relevant EU secondary law that would comprise a minimum standard for Member States. The study will address existing rules within various legal systems for the purpose of identifying and communicating the strengths and weaknesses, with a view to using these existing solutions as a basis for a proposal to augment the content of existing EU law. Ultimately, the recommendations presented herein will serve as a minimum standard for Member States (MSs) to follow and promote harmonisation within the Union. In the EU context, the question therefore arises: how might advertising regulation aimed at promoting consumer protection be developed to consolidate the enforceability of “photoshop law” at EU level? The study requires evaluation of selected national legislation and analysis of how this may be applied to existing EU-level consumer protection legislation.

Current research on photoshop law mainly discusses the issues directly arising from existing legal initiatives and the challenges of enforceability, as well as the general issue of limited range of regulation. The contribution offered herein is a comparative review of existing solutions within various jurisdictions, delivering a comprehensive overview of the legal considerations, and serving as the basis for a proposal to develop EU law. This study will thereby provide a practical solution, as well as advance research efforts in this area and contribute to a field with limited available literature. Supplementing existing law with the proposal set forth herein would potentially be an ideal solution for lawmakers, as the recommendation fits into a legal framework already well-established.

The principal method of research is exploratory, whereby academic literature was collected with the use of deductive and inductive coding methods initially using keywords and terms based on the preliminary literature overview, and grouping all secondary sources and scholarly articles into themes. Research began with the collection of articles from peer-reviewed journals and a set of preliminary questions was compiled in order to determine key variables that would provide the bases for discussion in the thesis with the object of answering the primary research question. Legislative initiatives of the various systems were analysed to identify themes in their strengths and weaknesses to evaluate how these may be addressed with a view to fitting such solutions into established EU legislation. As a fundamental challenge is the limited existence of legislation

on the subject matter, existing initiatives from various European systems, as well as Israel, were examined for the purpose of conducting an exhaustive comparative assessment. The broad selection is justified on the grounds that currently only very few jurisdictions have introduced concrete solutions that can be used as comprehensive bases for development.

The preceding considerations have introduced the contextual background of the research and the research question, as well as outlined the research methods and objectives. Chapter I of this work provides a review of literature to identify key concepts and common understandings of the ambiguous term “photoshop law”. The definition presented therein aims to delineate the concept in such a way that encompasses the various general understandings, in order to appropriately apply the term in the context of this research and its objectives. In the second chapter, academic literature and primary sources of legislation are reviewed to identify the existing framework that may be used as a starting point for development. The first section of that chapter discusses direct initiatives taken by various countries to directly address the relevant industries and promote consumer protection. The second section will examine self-regulatory initiatives and assess the extent to which these are helpful in the context of this research. Chapter III presents and analyses the shortcomings of existing legal initiatives to identify the particular deficiencies with a view to proposing a viable solution. The fourth chapter discusses and analyses the interrelationship between different rights and the competing legal interests at stake in the development of photoshop law. Finally, the fifth chapter aggregates the preceding chapters’ findings for the purpose of formulating and substantiating the proposal to amend EU secondary law presented therein. Finally, the study will be synthesised and the research question directly answered in the Conclusion chapter of the thesis.

# **1. DEFINING PHOTOSHOP LAW: THE SCOPE OF REGULATION TARGETING HARMFUL ADVERTISING PRACTICES**

To convey the current state of regulation and its potential to address the issues stemming from poor self-regulation in the fashion, advertising, and influencer marketing industries, it is first necessary to define the nascent concept of “photoshop law” and thereby delimit its scope and applicability. Although a considerably novel concept, a marginal understanding exists as to the general concepts associated with the law; however, sufficient comprehension is fundamental for the purposes of this paper.

Uniform understanding of the matters photoshop law seeks to regulate is imperative for the successful application of the rights and obligations it could potentially confer. To that end, the purpose of this chapter is two-fold: it seeks to provide a comprehensive overview of photoshop law by detailing its inception and development thus far as well as provide a rationale as to why the subject matter should be on the European Union’s agenda.

## **1.1. Background**

The emergence of “photoshop law” can be accredited to sociocultural issues that have escalated over recent decades, largely due to the development and widespread exposure to media in multiple forms, including magazines, television commercials, social media, inter alia. This large-scale exposure has been linked to the exacerbation of existing problematic social constructs such as thin-ideology.<sup>4</sup> For years, images of models in advertisements have garnered significant attention for persistently depicting flawless figures that are oftentimes the product of heavy digital retouching. This problem has been further aggravated by the evolution of social media and so-called “influencers” who are often sponsored by various companies and make earnings on

---

<sup>4</sup> In this context, “thin-ideology” refers to the cultural valuation of thinness being the ideal body type for women, where “thin” typically means having a slender physique with little body fat. See: Culbert, K.M., Racine, S.E., Klump, K.L. (2015). Research Review: What we have learned about the causes of eating disorders - a synthesis of sociocultural, psychological, and biological research. *Journal of Child Psychology and Psychiatry*, 56(11), 1141-1164, p. 1146.

commission.<sup>5</sup> Influencers, like the traditional advertising industry, often resort to excessive use of digital-retouching tools to alter their appearance on shared images.<sup>6</sup> As a result of these undesirable developments, the rationale behind the development of legal means to respond to growing concerns was well-justified; thus, the conception of “photoshop law”.

The effects of different media exposure on mental health is a phenomenon that has long been investigated boasting a considerable amount of empirical research and literature. To convey the significance of the issue photoshop law seeks to regulate, it is necessary to brief the research on the proliferation of eating disorders (hereinafter: EDs) that may be associated with exposure to media pushing the thin-ideal construct.<sup>7</sup> Different EDs are characterised individually but, for the purpose of this paper, general reference is made to EDs collectively, as they share several common signs, including body dissatisfaction, dietary restrictions, and overvaluation of body weight and shape.<sup>8</sup> The aetiology of EDs has been examined in numerous studies producing divergent results but generally finding that ED causation is linked to a complex interplay of biological, sociocultural and psychological factors.<sup>9</sup> Genetics predispose some individuals to internalising certain sociocultural influences to which they are exposed in their environment, potentially triggering the onset of an ED.<sup>10</sup> In this paper’s context, sociocultural influence refers to media exposure, which is widely believed to contribute to the development of EDs due to the intrinsic emphasis placed on thin-ideology.<sup>11</sup> This is particularly prolific in Western countries, often associated with greater exposure to media promoting thin-ideology, where it is considered

---

<sup>5</sup> “Influencers” are defined in the Cambridge Dictionary as “person[s] who [are] paid by a company to show and describe its products and services on social media, encouraging other people to buy them.”. See: Cambridge Dictionary. (n.d.). Influencer. In Dictionary.Cambridge.org.

<sup>6</sup> *Hiding Photoshop retouching will be illegal for brands and influencers, in Norway but not only.* (2021, July 16). Dress Ecode.

<sup>7</sup> See: Latzer, Y., Adatto, R., Neumark-Sztainer, D. (2022). Addressing eating disorders through legislation: The Israeli ‘Models’ Law’ - process, enactment, and dilemma. *Dialogues in Health*, 1, 1-6; Hildesheimer, G., Gur-Arie H. (2015). Just Modeling? The Modeling Industry, Eating Disorders, and the Law. *International Journal of Feminist Approaches to Bioethics*, 8(2), 103-138; Abbadessa, G. (2018). Airbrushed: Photoshop’s Harmful Effect on Girls and the Need for Legislative Controls on Advertising. *New England Law Review*, 53(1), 25-54.

<sup>8</sup> Culbert et al., *supra nota* 4, p. 1141; EDs include anorexia nervosa, bulimia nervosa, and other disordered-eating syndromes (Abbadessa, *supra nota* 7); Bromberg, M., Cardaci, N. (2022). ‘Feel[ing] Unpretty Too’: Do Body Image Laws Measure up in the Post-COVID-19 World? *Journal of Law in Society*, 22(1), 94-116, pp. 97-98.

<sup>9</sup> Hildesheimer et al., *supra nota* 7, p. 108; Culbert et al., *supra nota* 4, pp. 1141-1142.

<sup>10</sup> Culbert et al., *supra nota* 4, p. 1146; Bildfell, C. (2018). Legislating Away Illness: Examining Efforts to Curb the Development of Eating Disorders through Law. *Dalhousie Journal of Legal Studies*, 26, 37-78, p. 42.

<sup>11</sup> It has been concluded by a number of researchers that media indeed contributes to the development of EDs. See, for example: Culbert et al., *supra nota* 4; Bildfell, *ibid.*, pp. 45-45; Bromberg et al. (2016), *supra nota* 1, p. 5; Latzer et al., *supra nota* 7, p. 1; McBride, C., Costello N., Ambwani, S., Wilhite, B., Austin, S.B. (2019). Digital Manipulation of Images of Models’ Appearance in Advertising: Strategies for Action Through Law and Corporate Social Responsibility Incentives to Protect Public Health. *American Journal of Law & Medicine*, 45(1), 7-31; Anne E Becker et al, ‘Eating Behaviours and Attitudes Following Prolonged Exposure to Television Among Ethnic Fijian Adolescent Girls’ (2002) 180:6 *Brit J Psychiat* 509 at 511 referenced in Bildfell, *ibid.*

commonplace for women to be unsatisfied with their bodies.<sup>12</sup> Further, studies have found that although EDs are found within Western and non-Western regions, cultural idealisations of thinness have been associated with increased rates of prevalence.<sup>13</sup> Essentially, the development of EDs is not associated with any one specific factor and it therefore cannot be assumed that media is a direct cause of this development.<sup>14</sup> Media's role is its influence in reflecting social and cultural norms - the women represented therein are most often exceptionally thin, reinforcing the often unrealistic standard women feel they should adhere to.<sup>15</sup> Media serves as a constant reminder to women of what they should look like or what they should aspire to look like.

Research has demonstrated an association between the thin-ideal imagery relentlessly imposed on society and ED risk owing to elevated body-image concerns, which is one of the main risk factors.<sup>16</sup> Personal body image, which can be simply described as the perception one has of their physical appearance and the feelings that result from that perception<sup>17</sup>, has been linked to personal-comparison behaviours individuals might engage in when viewing certain media.<sup>18</sup> Based on this theory, when one is exposed to images of others portraying the idealised standard, their self-comparison standards and self-perceptions are altered resulting in greater body dissatisfaction.<sup>19</sup> These comparisons are detrimental to the mental and physical health of the individual engaging in them, and the danger is intensified when the images used for comparison are not real depictions but the product of digital alterations. Advertisements, for instance, have typically featured models that have been edited to satisfy the idealised beauty standard, thereby creating unattainable standards for the average viewer.<sup>20</sup> Such imagery may have detrimental

---

<sup>12</sup> Bildfell, *ibid.*, p. 43.

<sup>13</sup> Latzer et al., *supra nota* 7, p.1; Culbert et al, *supra nota* 4, p. 1146.

<sup>14</sup> Hildesheimer et al., *supra nota* 7, p.108; Bildfell, *supra nota* 10, pp. 43,46; Most factors associated with the development of EDs can only be considered contributors, or correlates. Culbert et al., *supra nota* 4, p. 1158.

<sup>15</sup> Bildfell, *supra nota* 10, p. 42; Latzer et al., *supra nota* 7, p. 2; Bromberg et al. (2016), *supra nota* 1, p. 4; Bromberg, M., Hay, M., Fitzgerald, T., de Freitas, C. (2019). "You Are Beautiful, No Matter What They Say": Applying An Evidence-Based Approach To Body Image Law. *Issues in Law & Medicine*, 34(2), 183-205, p. 1844.

<sup>16</sup> Rodgers, R.F., Laveway, K. (2021). Retouchée au Féminin: The Gendered Nature of the French Law Mandating Labeling of Digitally Modified Images. *Laws*, 10(3), 1-9, p. 2; Bromberg et al. (2019), *supra nota* 15, p. 187; Bromberg et al. (2016), *supra nota* 1, pp. 3-4.

<sup>17</sup> "[Body image is] the perception that a person has of their physical self and the thoughts and feelings that result from that perception". See: Australian Government Department of Health, NEDC Fact Sheet - Body Image, National Eating Disorders Collaboration referenced in Bromberg et al. (2019), *ibid.*, p. 184).

<sup>18</sup> This process may be understood as the "social comparison theory". See: Latzer et al. *supra nota* 7, p.2; Taylor, C.R. Cho, Y.N., Anthony, C.M. Smith, D.B. (2018). Photoshopping of models in advertising: A review of the literature and future research agenda. *Journal of Global Fashion Marketing*, 9(4), 379-398, p. 383.

<sup>19</sup> *Ibid.*; Vermeir, I., Van de Sompel, D. (2014). Assessing the What is Beautiful is Good Stereotype and the Influence of Moderately Attractive and Less Attractive Models on Self-Perception, Ad Attitudes, and Purchase Intention of 8-13-Year-Old-Children. *Journal of Consumer Policy*, 37, 205-233, p. 207.

<sup>20</sup> Danthinne, E.S., Giorgianni, F.E., Rodgers, R.F. (2020). Labels to prevent the detrimental effects of media on body image: A systematic review and meta-analysis. *International Journal of Eating Disorders*, 53 (5), 647-661, p. 649.

effects on individuals who engage in physical comparisons and lead to negative feelings and potentially unhealthy weight control practices.<sup>21</sup> Moreover, viewers of such media may be unaware that the photos were edited and believe that such standards are attainable by submitting themselves to dangerous practices to achieve the desired appearance.<sup>22</sup>

While it is clear that a definitive causal relationship cannot be assumed, there is strong evidence that a correlation exists between media's influence and consumers' potential development of EDs. Some experts assert that the mere prevalence of EDs is enough to warrant authoritative intervention to at least attempt to prevent the spread of such disorders.<sup>23</sup> Due to the connection between EDs and the media, particularly with regard to fashion, it was surmised that the advertising industry should bear the responsibility, due to its influential and calculated nature. It was theorised that mandating the use of disclaimer labels would be a potential solution to combat the negative effects of unrealistic thin-idealised imagery. A strong argument for the use of disclaimer labels follows from the results of an experimental study, which revealed that participants who had viewed images in fashion magazines with disclaimer labels reported lower levels of body dissatisfaction than those who viewed the same images without the disclaimer label.<sup>24</sup> Although subsequent research has both upheld and contradicted these findings, the possibility of resorting to such measures has not been categorically dismissed and several industry participants have voiced their support for such requirements.<sup>25</sup>

In response to the increasing concerns surrounding the media and advertising industry and their link to detrimental health concerns amongst the public, attempts at regulating these industries' activities through legislation began to come to fruition.

---

<sup>21</sup> Latzer et al. *supra nota* 7, p. 2; Bromberg et al. (2022), *supra nota* 8, p. 103; *Ibid.*

<sup>22</sup> For example, a 2016 study found that exposure to retouched selfies on social media led to lower body image perceptions amongst adolescent girls, who also rated the attractiveness of the retouched photos more positively than the unedited ones and believed the edited photos were realistic. See: Chiu, A. (2021, July 08). Why experts say Norway's retouched photo law won't help fight body image issues. *The Washington Post*.

<sup>23</sup> Bildfell, *supra nota* 10, p. 47.

<sup>24</sup> See: Slater, A., Tiggemann, M., Firth, B., Hawkins, K. (2012). Reality Check: An Experimental Investigation of the Addition of Warning Labels to Fashion Magazine Images on Women's Mood and Body Dissatisfaction. *Journal of Social & Clinical Psychology*, 31(2) referenced in Sieczkowski (Sieczkowski, C. (2012, April 11). *Supermodels Without Photoshop: Israel's 'Photoshop Law' Puts Focus On Digitally Altered Images [PHOTOS]*. International Business Times).

<sup>25</sup> Bromberg et al. (2019), *supra nota* 15, pp. 194-196; For example, see influencers' comments in response to the requirements: Grant, K. (2021, July 06). *Influencers react to Norway photo edit law: 'Welcome honesty' or a 'shortcut'?* BBC.; Ghimire, S. (2021, August 04). *What Is Norway's New Photo Retouching Law?* [Newsletter]. MakeUseOf.; Chiu, *supra nota* 22.

## 1.2. What is Photoshop Law?

The background and rationale for implementing laws targeting the advertising industry and its harmful practice of displaying excessively thin models provides some insight into the conception of “photoshop law”. Due to its novelty, however, its sphere of application and its efficacy remain largely unclear and the law is therefore likely to be misunderstood by laypersons. It is important to delineate these aspects to avoid general misconceptions, whereby the public, as well as policymakers, overestimate its potential to govern the intrinsic issues it seeks to address. Moreover, this may lead individuals to erroneously believe that the problem has been sufficiently addressed and therefore requires less attention.<sup>26</sup>

Photoshop law can generally be understood as law that has been implemented to limit advertisers' surreptitious manipulation of models' bodies in photos to make them appear more generically attractive or fit the thin-idealisation. It must be noted that the objective of such law is not to vilify digital manipulation of photos as such but is rather to counter the adverse effects associated with exposure to photos that have been excessively manipulated. Specifically, digital manipulation is not in itself inherently bad but the intrinsic message it sends that people must conform to a certain standard to be considered attractive is problematic and potentially harmful.<sup>27</sup> The increasingly normalised use of tools such as Photoshop to edit photos has been significantly blown out of proportion to the point where the models depicted no longer look like themselves.<sup>28</sup> The danger therein lies in the fact that models are used to represent an ideal standard of living and being, which individuals seeking the same acceptance and perceived success will often feel compelled to emulate.<sup>29</sup> Advertising establishes standards that subsequently become expectations which can lead to adverse comparisons and health-harming behaviours driven by the desire to fit the “conventional” ideal. Insofar as beauty ideals reflected in advertisements were considered unrealistic, it was surmised that such practices could be considered misleading to the public, and advertisers could therefore bear the brunt of the responsibility.<sup>30</sup> Hence, the conception of regulation to modulate excessive photo-manipulation practices heavily applied in the fashion, advertising and media industries.

---

<sup>26</sup> Bildfell, *supra nota* 10, pp. 70-71.

<sup>27</sup> Knoll, *supra nota* 3, p. 11.

<sup>28</sup> Hildesheimer et al., *supra nota* 17, p. 121.; Abbadessa, *supra nota* 7.

<sup>29</sup> Knoll, *supra nota* 3, pp. 1-2.

<sup>30</sup> O’Neil, A. (2014). A Call for Truth in Fashion Pages: What the Global Trend in Advertising Regulation Means for U.S. Beauty and Fashion Standards. *Indiana Journal of Global Legal Studies*, 21(2), 619-641, p. 629; Abbadessa, *supra nota* 7.

### 1.2.1. Terms Associated with Photoshop Law

Different terms have been used in literature to refer to the various regulation aimed at industry practices deemed harmful to consumers' body image, including "photoshop law"<sup>31</sup>, "body image law"<sup>32</sup>, "models' law"<sup>33</sup> and "law for restricting weight in the modelling industry"<sup>34</sup>. After a review of articles from various disciplines and media references, this chapter posits that the associated terms each refer to the legislative efforts made by various jurisdictions to combat the negative effect of media on viewers' self-perceptions and the prevalence of EDs. As the name suggests, the term "photoshop law" is typically used to refer to laws passed to monitor the use of digital photo-editing tools to alter the appearance of models in advertisements. Specifically, advertisers are compelled to disclose to viewers, by means of a disclaimer accompanying the photo, if the advertisement imagery has been digitally enhanced.<sup>35</sup> The disclaimer serves to inform viewers the advertisement has been altered, the objective of which is to promote transparency and encourage consumers to appraise the appearance of models in advertisements more cautiously. In essence, the inclusion of such a label is presumed to interrupt the psychological processes associated with appearance comparisons by emphasising to the viewer that the appearance portrayed in a particular image does not reflect reality.<sup>36</sup> "Photoshop law" may be used as an umbrella term for not only the limitations on photo-retouching, but also for the efforts to limit the featuring of physically underweight models in advertisements.<sup>37</sup> This additional limitation prevents advertisers from photographing models that are physically underweight as another means to prevent widespread dissemination of harmful imagery to potentially vulnerable audiences. These laws may specify how to determine whether a model is underweight, typically calling for use of the Body Mass Index (BMI)<sup>38</sup> measurement, which takes into account the individual's weight and height measurements, the value of which places

---

<sup>31</sup> Knoll, *supra nota* 3; Bromberg et al. (2016), *supra nota* 1; Abbadessa, *supra nota* 7; Bromberg et al. (2019), *supra nota* 15.

<sup>32</sup> Bromberg et al. (2016), *supra nota* 1; Bromberg et al. (2019), *supra nota* 15; Bromberg et al. (2022), *supra nota* 8.

<sup>33</sup> Latzer et al., *supra nota* 7.

<sup>34</sup> Hildesheimer et al., *supra nota* 7; Latzer et al., *supra nota* 7.

<sup>35</sup> Semaan, R.W., Kocher, B., Gould S. (2018). How Well Will this Brand Work? The Ironic Impact of Advertising Disclosure of Body-Image Retouching on Brand Attitudes. *Psychology & Marketing*, 35 (10), 766-777, p. 771; Knoll, *supra nota* 3, p. 11.; O'Neil, *supra nota* 30, p. 633; Bromberg et al. (2016), *supra nota* 1, p. 1; Abbadessa, *supra nota* 7; Bromberg et al. (2019), *supra nota* 15, p. 191; Latzer et al., *supra nota* 7, p. 2; Hildesheimer et al., *supra nota* 7, p. 120; Danthinne et al., *supra nota* 20, p. 649; Vandenbosch, L., Fardouly, J., Tiggemann, M. (2022). Social media and body image: Recent trends and future directions. *Current Opinion in Psychology*, 45, 1-6, p. 3.

<sup>36</sup> Rodgers et al., *supra nota* 16, p. 6; Abbadessa, *supra nota* 7; Tiggemann, M. (2022). Digital modification and body image on social media: Disclaimer labels, captions, hashtags, and comments. *Body Image*, 41, 172-180, p. 174.

<sup>37</sup> For reference, see: Hildesheimer et al., *supra nota* 7; Knoll, *supra nota* 3; O'Neil, *supra nota* 30; Bromberg et al. (2016), *supra nota* 1; Bromberg et al. (2019), *supra nota* 15; Latzer et al., *supra nota* 7; Bildfell, *supra nota* 10.

<sup>38</sup> O'Neil, *supra nota* 30, p. 633; Bromberg et al. (2019), *supra nota* 15, p. 190; Latzer et al., *supra nota* 7, p. 2.

the individual on a spectrum ranging from underweight to obese.<sup>39</sup> Employment of models may be conditional on the issuance of a medical certificate, which certifies that a model is fit for work, the evaluation of which is based largely on the model's BMI.<sup>40</sup> This method seeks to monitor the modelling and advertising industry so as to ensure that only healthy models are displayed in public advertisements; however, the application of this requirement has faced notable controversy, the intricacies of which are detailed under Chapter III.

“Body Image Law” is another term created by scholars researching the prospective improvement of initiatives to regulate matters associated with body image issues.<sup>41</sup> These researchers contend that Body Image Law (BIL) encompasses those regulations comprising photoshop law, as presented above, as well as bills and any other governmental or industry action aimed at improving the body image of the public at large by various means.<sup>42</sup> As BIL incorporates a broad scope of initiatives, its sphere of application extends to multiple industries and its potential reach is significant.<sup>43</sup>

For the purposes of this paper, the term “photoshop law” shall be used to refer to the laws aimed at curbing negative effects on body image triggered by certain practices in the advertising and modelling industries. Specifically, photoshop law shall not be understood as encompassing all existing initiatives that do not constitute legally binding measures, as these initiatives shall be referred to separately and distinctly.

### **1.2.2. The Fundamental Features of Photoshop Law**

Photoshop law can be defined by its twofold objective to serve as a protective mechanism for consumers against potentially harmful advertising, as well as regulate and protect the health of

---

<sup>39</sup> U.K. National Health Service. (n.d.). *What is the body mass index (BMI)?*; World Health Organisation. (2010, May 06). *A healthy lifestyle - WHO recommendations*.

<sup>40</sup> For example: Article L7123-2-1, Subsection 2, Section 1 of Chapter III, Title II, Book I, Part 7, Legislative Part of the Labor Code (Created by Law No. 2016-41 of 26 January 2016 - article 20) referenced in Bromberg et al. (2019), *supra nota* 15, p. 190; Article 2(a) of The Law for Restricting Weight in the Modeling Industry, 5772-2012 translated in Hildesheimer, *supra nota* 7, p. 136.

<sup>41</sup> Bromberg et al. (2016), *supra nota* 1, p. 2.

<sup>42</sup> For an inclusive list of the measures considered to fall within the ambit of BIL, see: *ibid.*; Bromberg et al. (2022), *supra nota* 8, p. 105.

<sup>43</sup> BIL is also said to constitute a category of health law due to its objectives of improving general public health and curbing body image issues, which are associated with mental health. Further, BIL also belongs to fashion law, which includes multiple areas, such as intellectual property law and employment law to name a few. See: M del Pilar Lopez and E Monge, ‘The Luxury of Fashion Law’ (2013) *World Intellectual Property Review* 83, 83 referenced in Bromberg et al. (2016), *supra nota* 1, p. 2.

models working in the industry.<sup>44</sup> Each law has its own particularities, as detailed in Chapter II; however, there are a number of important commonalities.

The laws typically delineate who and what the regulations apply to; specifically, they define who the advertiser is, who the model is and what their activities include, and what type of public communication constitutes an advertisement.<sup>45</sup> Such clarifications are important, as the existing disclaimer label requirements apply exclusively to photos used in commercial advertising.<sup>46</sup> Additionally, some of the laws expressly provide that only changes made to features of the body require disclosure, which affords advertisers a reasonable level of discretion to make minor enhancements, such as lighting adjustments or the use of colour filters, without having to reveal the fact.<sup>47</sup> Precision and clarity are particularly important to ensure legal certainty and allow those concerned to modulate their behaviour accordingly; if advertisers misunderstand the extent of restrictions, they may unwittingly breach the law.

### **1.3. Why the Subject of Photoshop Law Should be on the European Union's Agenda**

The restrictions imposed by photoshop law evidently rest on the assumption that the advertising industry, and thereby the modelling industry, plays a pivotal role in contributing to the development of EDs.<sup>48</sup> The emergence of the law has been largely based not only on public health concerns but also on principles of consumer protection; in particular, the right not to be deceived.<sup>49</sup> The manipulation of images constitutes a form of asymmetric information, as the advertisers know what has been altered whilst average consumers remain oblivious to the artificiality.<sup>50</sup> To that end, the excessive alteration of photos may be considered deceptive by nature, due to the lack of transparency and honesty on the part of the advertiser. Further still,

---

<sup>44</sup> Hildesheimer, *supra nota* 7, p. 106; Bildfell, *supra nota* 10, p. 58.

<sup>45</sup> Abbadessa, *supra nota* 7; Chiu, *supra nota* 22; Ghimire, *supra nota* 25.

<sup>46</sup> Applies to commercial advertising in any format, i.e. online, physical print, social media posts, inter alia. See: Abbadessa, *supra nota* 7; Article R2133-4 of Section 2, Chapter III, Title III, Book I, Part 2, Regulatory Part of the Public Health Code (Created by Decree No 2017-738 of 4 May 2017- article 1) referenced in Bromberg et al. (2019), *supra nota* 15, p. 191.; Bildfell, *supra nota* 10, p. 51; Chiu, *supra nota* 22.

<sup>47</sup> Abbadessa, *supra nota* 7; For example, the French Photoshop Law does not expressly prohibit skin retouch (Bromberg et al. (2019), *supra nota* 15, p. 191), whereas the Norwegian law necessitates the use of a disclaimer label for skin complexion retouches in photos. See: §2 Lov om kontroll med markedsføring og avtalevilkår mv. (markedsføringsloven) (Article 2 of the Norwegian Marketing Act).

<sup>48</sup> Hildesheimer et al., *supra nota* 7, pp. 104, 118; Bildfell, *supra nota* 10, p. 49.

<sup>49</sup> Semaan et al., *supra nota* 35, p. 771.

<sup>50</sup> Bromberg et al. (2019), *supra nota* 15, p. 203.

such enhancements may be used as a strategy to appeal to consumers at large due to their tendency to prefer, and inclination to be persuaded by, more physically attractive sources.<sup>51</sup> However, consumers with superior media literacy, and those made expressly aware of the modifications, may feel negatively towards the advertiser upon discovering that an image has been modified.<sup>52</sup> Irrespective of ambiguity surrounding the psychology behind consumers' behaviour and responses, advertising is a significant part of brands' business and consumers' daily lives, the regulation of which is therefore an avenue worth exploring to tackle body-image issues.

Body-image issues are associated with EDs, which may generally be considered a public health problem that the EU is also not exempt from, though accurate numbers are not available.<sup>53</sup> However, based on the limited but relevant data, increases in the prevalence of EDs amongst Western nations have been observed over the last several decades.<sup>54</sup> Although the European Commission (EC) has stated it does not collect data on EDs as such, individual Member State data may be used to deduce the existing conditions in the EU.<sup>55</sup> In general, Europe demonstrates a considerable prevalence of EDs, with Spain and Austria presenting some of the highest rates on the continent.<sup>56</sup> Further, more recently, studies emerging in the wake of the Covid-19 pandemic reinforce that the problem is ongoing; however, it remains largely unaddressed at both national and EU level.<sup>57</sup> Failing to address risk factors associated with the early development of EDs can lead to unfavourable consequences for society further down the line. Neglecting EDs from a public health standpoint allows these disorders to escalate and become societal burdens, thereby warranting the development of policy initiatives to effect change.<sup>58</sup> Non-policy initiatives, such as educational programmes, have proven useful but insufficient to address the issue and effect significant change. Accordingly, the need to go beyond such programmes and consider more concise measures, such as implementing legislation, is sufficiently justified.<sup>59</sup>

---

<sup>51</sup> Semaan et al., *supra nota* 35, p. 766; Vermeir et al., *supra nota* 19, p. 206.

<sup>52</sup> *Hiding Photoshop retouching will be illegal for brands and influencers, in Norway but not only.* (2021, July 16). Dress Ecode ; Semaan et al., *supra nota* 35, p. 768.

<sup>53</sup> Research suggests that the global coverage of mental health disorders is significantly deficient due to a lack of quality evidence-based data. Bromberg et al. (2019), *supra nota* 15, p. 186.

<sup>54</sup> Latzer et al., *supra nota* 7, p. 1; Hildesheimer et al., *supra nota* 7, p. 104.

<sup>55</sup> European Parliament. (2022). Parliamentary question - P-005594/2021 (ASW): Answer given by Ms Kyriakides on behalf of the European Commission.

<sup>56</sup> Our World in Data. Share of population with an eating disorder, 2019.

<sup>57</sup> As regards the Covid-19 pandemic, it is estimated that a significant fraction of ED sufferers engage in excessive exercising, which indicates that if their access to exercise opportunities is restricted, such as during national lockdowns, they may resort to more extreme dangerous behaviours to keep their weight low. Bromberg et al. (2022), *supra nota* 8, p. 100.

<sup>58</sup> Latzer et al., *supra nota* 7, pp. 4-5.

<sup>59</sup> *Ibid.*, pp. 2, 4.

Similar to legislative initiatives taken at national level, the EU could take a similar approach implementing supranational legislation to ensure protection of consumers and public health, in line with its competences under the Treaty on the Functioning of the European Union. The EU maintains shared competence with MSs in governing matters concerning consumer protection and enjoys a supporting role in matters of public health; as such, the EU's engagement is well-warranted.<sup>60</sup> National efforts have largely been the result of vigorous lobbying by industry participants and the general public voicing their concerns, reflecting on their own experiences and arguing in support of policies that aim to offset the damaging effects of media on EDs.<sup>61</sup> Introducing the discussion in the EU would similarly inspire public debate, which would not only increase awareness amongst the public but could also prompt corporations to take self-regulatory actions demanded by public pressure.<sup>62</sup> The rules established by photoshop law are a rarity and not applicable in the large majority of the world's jurisdictions; the EU could therefore be a frontrunner in the implementation of such rules. Further, this could result in a snowball effect whereby third countries would follow suit and develop similar laws in order to keep abreast of EU standards and requirements.<sup>63</sup>

Considerable effort is required to effect change, as the EU must take into account research on the existing law and its efficacy before improvidently passing legislation that is unsubstantiated and ineffective. In the absence of sufficient oversight, the advertising and media industry will continue to push the thin-ideal construct contributing to the development of EDs.<sup>64</sup> Moreover, in light of the ever-expanding reach of social media, the constant barrage of individuals sharing their daily lives, and exposure to curated advertisements, there is an increasing need to address unregulated practices. Undoubtedly, the introduction of photoshop law temporarily drew attention to the advancing issues of the media's connection to disordered-eating practices; however, the problem persists and public discussion and treatment of the problems have seemingly not been placed at the top of policymakers' agendas. In light of the scarcity of comprehensive photoshop laws regulating the advertising industry within the EU and the EU's

---

<sup>60</sup> See: Article 4(2)(f), Article 6(a), and Article 169(1) of the Consolidated Version of the Treaty on the Functioning of the European Union. (OJ 326, 26.10.2012, p. 47-390), pp. 51-52, 124; *Division of competences within the European Union*. EUR-Lex.

<sup>61</sup> Bromberg et al. (2019), *supra nota* 15, p. 189.; Latzer et al., *supra nota* 7, pp. 2-3.; O'Neil, *supra nota* 30, p. 640.

<sup>62</sup> The past has shown that public pressure has led to companies' quick response to public outcry, which has resulted in certain improvements within the industry as well as increased transparency. See: Mizrachi, M.P., Tal, A. (2022). Regulation for Promoting Sustainable, Fair and Circular Fashion. *Sustainability*, 14(1), 1-28, p. 23; Cerchia, R.E., Piccolo, K. (2019). The Ethical Consumer and Codes of Ethics in the Fashion Industry. *Laws*, 8(4), 1-19, pp. 4-6.

<sup>63</sup> For instance, in terms of marketing regulation, advertisers from third countries wishing to reach EU consumers would have to adjust their advertisements to suit the expectations, shaped by local standards, of the target audience. See: O'Neil, *supra nota* 30, pp. 638- 640.

<sup>64</sup> Bildfell, *supra nota* 10, p. 76.

high-priority treatment of consumer protection, its action is evidently warranted. Existing legal initiatives and their shortcomings are addressed in the following chapters with a view to assessing the strengths and limitations and identifying areas for development.

## **2. A COMPARATIVE REVIEW OF THE EXISTING NATIONAL FRAMEWORK**

Various attempts at regulating the display of digitally-retouched models in advertising imagery have been made through various means, including legislation and less stringent measures such as the adoption of industry standards based on a self-regulatory approach. These efforts are scarce with a limited number of jurisdictions having well-defined rules requiring advertisers to disclose photo manipulations.

Alternatively, governments and industry stakeholders have seemingly relied strongly on self-regulation as a means to regulate harmful practices. Despite substantial effort undertaken by some industry participants, initiatives brought by private bodies have proved insufficient to address the problem or effect significant change in the industry at large.

This chapter reviews existing national initiatives that were introduced for the purpose of modulating the display of heavily-retouched models in advertising content in order to protect the health of consumers. The second section of this chapter reviews the strengths and weaknesses of self-regulation, discussing the use of such means for regulating issues associated with harmful advertising practices, and ultimately arguing that the development of legislation remains sufficiently warranted.

### **2.1. Photoshop Law: Direct Initiatives at the National Level**

A limited number of countries have introduced initiatives to modulate the widespread display of excessively thin models on commercial images disseminated to large audiences; however, the effectiveness of these initiatives is not yet well-established given their novelty. Further, the laws that do exist are subject to significant criticism due to various shortcomings.

Several initiatives have been introduced by EU Member States; however, as these are limited in number, laws from jurisdictions outside the EU must also be reviewed. The fundamental rationale underlying the development of these national initiatives - to curtail the negative effects of the media to reduce the proliferation of EDs by increasing consumer protection - corresponds to the high-degree of consumer protection objectives sought by the EU.<sup>65</sup> These initiatives can

---

<sup>65</sup> Latzer et al., *supra nota* 7, p. 4; Mizrachi et al., *supra nota* 62, p. 14.

serve as a guide to the EU, which can utilise these regulations as bases for its own measures and draw on the experiences of other jurisdictions' legislative processes. This allows the EU to identify any unsuccessful advances in the respective processes, thereby allowing it to evade possible legislative obstacles it may have otherwise faced in implementing its own legislation.

### 2.1.1. Single EU Member State Initiative: France

The only MS with legislation embracing photoshop law is France, which introduced a provision under the advertising section of the Public Health Code mandating that any commercial images of models retouched to make their body appear “thinner, larger, or augmented in any way”<sup>66</sup> must include a disclaimer stating so.<sup>67</sup> The law applies to photos of models distributed on a commercial basis only, whether through online public communication, print media, or private advertising correspondence.<sup>68</sup> Influencer marketing activities are not expressly addressed; however, the obligation to attach the disclaimer label applies to photographs of models used in advertising “by means of communication to the public online”.<sup>69</sup> It may therefore be surmised that the obligation applies to influencer marketing, which is carried out on digital platforms and is by its very nature a public activity.<sup>70</sup> Applicability of such laws to influencers is of increasing importance given the significant spread of influencer marketing and its discernible success. Based on the volume of commercial content made available on social media everyday, companies have evidently realised the advantages of utilising influencers for advertising their brand and their products.<sup>71</sup> As such, it is important to ensure that influencers' activities are

---

<sup>66</sup> Schirmer, N.A., Schwaiger, M., Costello, J.P., Taylor, C.R. (2018). Consumer Response to Disclosures in Digitally Retouched Advertisements. *Journal of Public Policy & Marketing*, 37(1), 131-141, p.132.

<sup>67</sup> Abbadessa, *supra nota* 7; The provision requires advertisers to include the label “photographie retouchée” (“retouched photograph”, in English). See: Article L2133-2, Chapter III, Title III, Book I, Part 2, Legislative Part of the Public Health Code (Amended by Order No 2016-462 of April 14, 2016 - art. 3 (DV)). *Légifrance*; *Ibid.*; Bromberg et al. (2019), *supra nota* 15, p. 191.

<sup>68</sup> *Ibid.*

<sup>69</sup> Article R2133-4, Section 2, Chapter III, Title III, Book II, Part 2, Regulatory Part of the Public Health Code (Created by Decree No 2017-738 of 4 May 2017- art. 1). *Légifrance*.

<sup>70</sup> “Advertising messages disseminated by means of communication to the public online” within the meaning of Article 1 of Law No. 2004-575 of June 21, 2004 on confidence in the digital economy, means ‘any making available to the public by an electronic communications process, of signs, signals, writings, images, sounds or messages of any kind, which do not have the character of private correspondence’. (Law No. 2004-575 of June 21, 2004 on confidence in the digital economy (art. 1). *Légifrance*); Law No. 2004-575 sets requirements for “any form of advertising accessible via online communication service[s]”, therefore any post made by an influencer on online media that meets these criteria may be qualified as advertising and falls subject to these regulations. See: Michaelsen, F., Collini, L. et al., 2022, *The impact of influencers on advertising and consumer protection in the Single Market*, Publication for the committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg., p. 70.

<sup>71</sup> In 2020, for instance, it was reported that a large majority (86%) of marketers utilise influencer marketing and that 92% of these marketers consider this use to be “tremendously positive” for their brand. See: Cardaci, N., Bromberg. M., Luong, K. (2022). I’m a Celebrity, Don’t Get Me Out of Here: How Law and Celebrity Advocacy

modulated equivalently to that of traditional advertising in order to effectively catch all adverse commercial practices.

Additionally to the disclaimer requirement, the French Labor Code requires that individuals produce a medical health certificate to work as a model, which must provide an assessment of the individual's health with particular regard to their BMI.<sup>72</sup> The object of this requirement is to protect models from feeling the need to lose excessive amounts of weight in order to be accepted in the modelling industry.<sup>73</sup>

Indeed, the underlying object of the French law was to protect industry workers, as well as to reduce the volume of images of ultrathin women that dominate the fashion industry and lead young people to engage in harmful eating practices.<sup>74</sup> France notoriously maintains a considerable position of power in the fashion industry, playing a pivotal role in shaping beauty standards and establishing norms, thus making its initiative in such a progressive area all the more significant.<sup>75</sup> France's key role in an industry long associated with poor eating behaviours driven by desire to be thin, allows a culture of body-image dissatisfaction and harmful eating behaviour to propagate.<sup>76</sup> The adoption of law to curtail this demonstrates France's willingness to champion such initiatives and its acceptance of the need for change in the industry.

France's legislation, applicable to the advertising industry and targeting the media specifically, has the capacity to be applied to contemporary means of advertising, such as influencer marketing, thereby keeping abreast of novel issues related to influencer activities. The state of legislation within EU MSs is notably lacking in both existence and scope; therefore, initiatives introduced in third countries may be utilised by the EU to provide additional considerations and insights into the development of such legislation.

---

Can Protect Young People from Miracle Weight Loss Products' Advertising on Social Media. *Hastings Journal of Gender and the Law*, 33(1), 29-58, p. 31.

<sup>72</sup> Article L7123-2-1, Subsection 2, Section 1 of Chapter III, Title II, Book I, Part 7, Legislative Part of the Labor Code (Created by Law No. 2016-41 of 26 January 2016 - art. 20). Légifrance; Bromberg et al. (2019), *supra nota* 15, p. 190; Bildfell, *supra nota* 10, p. 51; Taylor et al. *supra nota* 18, p. 382.

<sup>73</sup> Bildfell, *supra nota* 10, p. 50.

<sup>74</sup> This connection was cited by French lawmakers in their justification for the introduction of the photoshop law; For example, socialist politician, neurologist and legislator Dr Olivier Véran, asserts that the commercial exploitation of ultrathin models drives unhealthy eating behaviours and laws should therefore be introduced to address the issue. *Ibid.*; Sparks, I. (2015, March 19). *France rejects imposing a ban on skinny models...because it would discriminate against 'thin people in the workplace'*. Daily Mail.

<sup>75</sup> France maintains a significant role in the fashion industry as home to many distinguished luxury fashion houses and modelling agencies. Bildfell, *supra nota* 10, pp. 54-55.

<sup>76</sup> "Body image dissatisfaction and eating disorders thrive in societies that deeply value and admire thinness. France is one." See: Bromberg et al. (2019), *supra nota* 15, p. 187.

## 2.1.2. Non-EU Initiatives

### 2.1.2.1. Israel

Israel's contribution is noteworthy due its relatively substantial coverage and the fact it is understood to be the first law of its kind in the world.<sup>77</sup> Similarly to the EU initiatives, the Israeli law was introduced as a means to address the risk factors of EDs due to their increasing proliferation in the country.<sup>78</sup> The bill was championed by an Israeli parliament member and backed by the head of an ED institution in Israel, who participated in the parliament meetings to provide scientific input supporting the adoption of a law to address risk factors associated with the onset of EDs.<sup>79</sup>

Similar to the French law, Israel's law requires a disclaimer to accompany digitally retouched photos in advertisements.<sup>80</sup> Israeli law also requires that models photographed for use of their image in advertisements must have a BMI over a minimum threshold, which must be certified by a medical professional.<sup>81</sup> The Israeli law also expressly excludes the application of the aforementioned restrictions to non-commercial advertisements insofar as there is a "significant public interest in its publication".<sup>82</sup> Although the exclusion provision is vague, it may be inferred that the margin of flexibility for advertisers is sufficiently restricted, as they must bear the burden of establishing whether their advertisement meets the exclusion criteria.

The Israeli law entered into force in 2012 and, at the time of writing, has not yet been updated or augmented in any way; it is therefore unsurprising that it fails to directly address influencer marketing. However, similarly to French law, the wording of the Israeli provisions and the definitions provided therein imply that any individual who poses for a photograph wherein a commercial promotion is contained, shared via print or technological means, would be subject to

---

<sup>77</sup> Bromberg et al. (2016), *supra nota* 1, p. 7.

<sup>78</sup> A WHO study found that Israel had a significantly high rate of disturbed eating-related behaviour, with one of the highest reported rates amongst the 34 countries participating in the study. See: Latzer et al., *supra nota* 7, p. 1.

<sup>79</sup> Experts had been invited to participate in the Israeli parliament meetings in order to discuss the issue in relation to EDs and determine the possible approaches to mitigate risks. See: *Ibid.*, p. 2.

<sup>80</sup> See: Article 3 of The Law for Restricting Weight in the Modeling Industry, 5772-2012 translated in Hildesheimer, *supra nota* 7, p. 137; Bromberg et al. (2016), *supra nota* 1, p. 7; Schirmer et al., *supra nota* 66, pp. 131-132; Latzer et al., *supra nota* 7, p. 2; Bromberg et al. (2019), *supra nota* 15, p. 191.

<sup>81</sup> See: Article 2 of The Law for Restricting Weight in the Modeling Industry, 5772-2012 translated in Hildesheimer, *supra nota* 7, p. 136; Bromberg et al. (2016), *supra nota* 1, p. 6; Latzer et al., *supra nota* 7, p. 2; Bromberg et al. (2019), *supra nota* 15, p. 190.

<sup>82</sup> See: Article 4(a) of The Law for Restricting Weight in the Modeling Industry, 5772-2012 translated in Hildesheimer, *supra nota* 7, p. 137.

the law.<sup>83</sup> Influencers' commercial activities, typically carried out on online digital platforms, therefore by definition fall within the scope of the law.

#### 2.1.2.2. Norway

Norway's approach may serve as a preferable base for comparison for the EU, given its closer regulatory relationship through the European Economic Area (EEA). Moreover, Norway's legislation, an amendment to the Marketing Act introduced as part of a large effort on behalf of the Norwegian Government to help protect the public from psychological health issues associated with body image-related concerns, was passed as recently as 2021 and is therefore considerably more attuned to contemporary issues than the aforementioned initiatives.<sup>84</sup> Not dissimilarly to the French and Israeli photoshop laws, the Norwegian law requires that digitally-retouched images used in advertising are accompanied with a label disclosing the fact.<sup>85</sup> Notably, the obligations provided therein expressly apply uniformly to all parties involved in the production of an advertisement and can therefore be interpreted as applying to images shared on social media by influencers and other public figures receiving compensation in association with a specific post.<sup>86</sup>

Evidently, all legislative initiatives were based on the objectives of promoting health by modulating harmful practices in the advertising, influencer marketing, and modelling industry, with a view to protecting both industry participants and the general public at large. Demonstrated by the lengthy periods between the introduction of the respective initiatives, governments are distinctly sceptical about adopting such laws and exercise extreme caution in the development of the rules therein. In the absence of tailored rules, self-regulatory tools may be consulted to guide company and influencer behaviour to a certain degree.

---

<sup>83</sup> The law explicitly defines models as "individual[s] photographed for the purpose of using [their] image for advertising, promoting, or presenting a product, service or brand". Additionally, the law provides that an advertisement is qualified by the fact that it is made available to the public and may be in "print or other electronic or technological means". See: the definition of "Model" and "Advertisement" respectively under Article 1 of *ibid.*, p. 136.

<sup>84</sup> Chiu, *supra nota* 22; Stortinget. Lovvedtak 146 (2020-2021) om endringer i markedsføringsloven mv. (merking av retusjert reklame).

<sup>85</sup> Chiu, *supra nota* 22; Tiggemann, *supra nota* 36, p. 174, Bromberg et al. (2022), *supra nota* 8, p. 104.

<sup>86</sup> *Ibid*; See also: §2 Lov om kontroll med markedsføring og avtalevilkår mv. (markedsføringsloven) (Article 2 of the Norwegian Marketing Act).

## 2.2. Self-Regulation in the Fashion and Advertising Industry

Self-regulation, which may take different forms, is a system of voluntary internal regulation within a given industry. Businesses may decide whether to comply or not, making the tool significantly less reliable than legislation.<sup>87</sup> Indeed, the call for legislation is the result of the advertising and fashion industry's insufficient voluntary measures, which have consistently failed to produce any impact or notable change in industry practices.<sup>88</sup> However, due to its high degree of involvement of industry stakeholders and its flexibility, it is considered an important accessory to the business industry and law.<sup>89</sup> Further, the subject matter at issue in the context of this paper is of a sensitive nature, thus voluntary self-regulation may be the preferred approach for some jurisdictions.<sup>90</sup> The rise of influencer marketing, which is not directly provided for in existing regulation, has spurred efforts to address deficiencies and make up for the lack of legal definition, and thereby certainty, of influencer practices.<sup>91</sup> This is of particular significance due to the volume of commercial communications on social media that consumers are exposed to on a daily basis. Influencers have the ability to potentially reach millions of users worldwide and should therefore be held accountable for their actions and assertions to a similar degree as traditional advertisers. To that end, administrative guidelines and internal industry measures to complement the existing legislation may be a worthwhile pursuit.<sup>92</sup> These initiatives may include efforts to monitor commercial practices through authorities or self-regulatory organisations, such as the UK's Committee of Advertising Practice (CAP) Code regulated by the Advertising Standards Authority or Italy's Marketing Code, which is continuously updated to keep abreast of contemporary changes in the advertising industry.<sup>93</sup> Other initiatives include private companies' actions pursuant to guidelines provided by relevant authorities; for instance, luxury fashion magazine Vogue committed to no longer working with models who appear severely underweight

---

<sup>87</sup> McBride et al., *supra nota* 11.

<sup>88</sup> Bromberg et al. (2019), *supra nota* 15, p. 205.

<sup>89</sup> Reale, M. (2019). Digital Market, Bloggers, and Trendsetters: The New World of Advertising Law. *Laws*, 8(3), 1-14, p. 9.

<sup>90</sup> Hildesheimer et al., *supra nota* 7, p. 106.

<sup>91</sup> Michaellesen et al., *supra nota* 70, p. 73.

<sup>92</sup> *Ibid.*

<sup>93</sup> The UK's Advertising Standards Authority (ASA) is a non-governmental organisation that observes compliance with the CAP Code by those committed to it and works as the investigative authority. The ASA ensures the Code is complied with and may refer breaches to the ASA's Council to adjudicate on the matter, which then deliberates and subsequently hands down the decision with directions to cease the breaching conduct; such a decision may compel the advertiser responsible to withdraw the ad or to amend the identified issues. See: ASA and CAP. The CAP Code: The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, p. 7; O'Neil, *supra nota* 30, pp. 622-623; Cardaci et al. *supra nota* 71, pp. 43-45.

or have EDs.<sup>94</sup> Media company Getty Images also changed its photo submission requirements to restrict the submission of photos wherein the model's size or body shape has been manipulated.<sup>95</sup> These initiatives demonstrate that well-established self-regulatory approaches can be utilised to fill gaps and that the industry itself is willing to make changes necessary to comply with societal needs.

Evidently, there are advantages to self-regulatory action, in particular the efficiency of introducing and administering new rules to a given industry in contrast to legislative changes. On the contrary, self-regulation is criticised for being largely ineffectual in reality and insufficient to address the issue alone irrespective of its potential to aid statutory intervention.<sup>96</sup> It is argued that leaving the implementation of industry rules to the goodwill of industry participants should be avoided, as the voluntary nature of such regulation leaves it susceptible to abuse and poor legal certainty.<sup>97</sup> Relying on advertisers' good faith to regulate their practices is arguably unreliable, as they may benefit from engaging in certain practices that may be insidiously adverse to consumer welfare, such as digitally modifying commercial photographs.<sup>98</sup> As a result, advertisers are hesitant to relinquish normalised industry practices for concern that this would place them at a competitive disadvantage to their counterparts.<sup>99</sup> Private business initiatives, such as internal codes of conduct and codes of ethics, are other examples of self-regulation subject to scepticism. These codes establish ground rules that govern employees' internal behaviour and that of the company in terms of their social responsibility. The codes reflect to the general public, consumers, competitors, potential employees, inter alia, the company's core values and standards they seek to uphold in their business practices.<sup>100</sup> An article written by Cerchia et al. (2019)

---

<sup>94</sup> Bromberg et al (2016), *supra nota* 1, p. 15; *Vogue bans too-skinny models from its pages*. (2012, May 04). The Sydney Morning Herald; Latzer, *supra nota* 10, p. 4; Hildesheimer et al., *supra nota* 7, p. 106.

<sup>95</sup> Strutner, S. (2017, September 27). *Getty Images Bans Retouched Photos That Change A Model's Body Shape*. HuffPost. Referenced in McBride et al.; Getty's action allegedly followed in support of the French photoshop law's implementation. See: Agnish, J. (n.d.). *Getty bans 'Photoshopped' images of models' body weight*. USA Today: News.

<sup>96</sup> Reale, *supra nota* 89, p. 12; Bromberg et al. (2019), *supra nota* 15, p. 205; McBride et al., *supra nota* 11; Riefa, C., Clausen, L. (2019). Towards fairness in digital influencers' marketing practices. *Journal of European Consumer and Market Law*, 8(2), 1-21, p. 15; As an example, on the role of International Chamber of Commerce's guidelines for advertisement communications, see: Wang, S. (2019). *Markedsføringslovens vern av barn og unge mot barn og unge mot usunt kroppspress*. Stenger EU-retten for Norges adgang til å vedta strengere regler? [Master's thesis, the University of Bergen]. Bergen Open Research Archive., pp. 7-8.

<sup>97</sup> Reale, *ibid.*, p. 12; McBride et al., *supra nota* 11.

<sup>98</sup> For instance, where consumers view a seemingly imperfect model (post-photo-editing, though unbeknownst to the consumer) and, wanting to emulate what they see, are inadvertently convinced that they need the product advertised, thereby benefiting the economic interests of the company. See: Abbadessa, *supra nota* 7.

<sup>99</sup> *Ibid*; It has been argued that insofar as companies consider the economic benefit, resulting from their competitive advantage, to outweigh the social and health costs related to their practices, they are likely to disregard voluntary measures of self-regulation. See: McBride et al., *supra nota* 11.

<sup>100</sup> *Code of Ethics*. (n.d.). Betterteam [Human Resources: Tools and Samples]; *Code of Conduct*. (2022, April 08). Valamis [Knowledge Hub: Human Resources].

considers that companies may use business codes of ethics or conduct, conveying their dedication to important principles, as a marketing tool rather than a sincere commitment.<sup>101</sup> The essential point being that companies can choose how their image is presented to the public through their codes and as such they may be used as a means to mislead consumers into believing one company is more socially-conscious than another. Cerchia et al. use companies' commitments to promoting sustainable fashion as an example to convey the effect these publicly-declared undertakings may have on a consumer's decision to purchase from a certain company.<sup>102</sup> As an illustrative example: company A may develop a code of ethics indicating its commitment to sustainable production promoting labour standards, workers' rights and respect for the environment, which may be the difference for an ethically-conscious consumer deciding between buying from company A rather than company X, which hasn't publicly made the same commitments. Here, the concern is the opportunity for companies to dishonestly falsely present themselves whilst not taking any legitimate action to pursue these goals.<sup>103</sup> If consumers rely on these commitments to make their purchasing decisions only to later discover that they were a misrepresentation, their remedial opportunities are not immediately apparent. As such, scholars have explored the idea of whether corporate social responsibility representations could be regarded as legally binding commitments, considering in particular regulation against misleading advertising.<sup>104</sup> Essentially, insofar as business codes convey misrepresentations that ultimately cause a consumer to take a transactional decision they would not have otherwise, these practices could fall within the ambit of misleading advertising regulation.<sup>105</sup> In the EU, for instance, businesses' publicly available self-regulatory codes constitute a form of communication modulated by legislation such as the Unfair Commercial Practices Directive<sup>106</sup> (UCPD), which regulates traders' behaviour on the consumer market in relation to their commercial

---

<sup>101</sup> Cerchia et al. consider this in the context of consumer attitudes towards supporting a more sustainable fashion industry, as an example of a principle often associated with corporate social responsibility. See: Cerchia et al., *supra nota* 62, p. 2.

<sup>102</sup> *Ibid.*, pp. 11-12.

<sup>103</sup> *Ibid.*, p. 12.

<sup>104</sup> *Ibid.*; See generally: Beckers, A. (2017). The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms. *Common Market Law Review*, 54(2), 475-515.

<sup>105</sup> Cerchia et al., *supra nota* 62, pp. 13-14.; The EU Commission's Guidance on the UCPD also recognises that corporate social responsibility has become a marketing tool. See: Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. (OJ C 526, 29.12.2021, p. 1-129), p. 29; Beckers, *supra nota* 104, pp. 476-477.

<sup>106</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22-39).

communications.<sup>107</sup> For the UCPD to be applicable to misrepresentative practices related to self-regulatory obligations, however, the communicated commitment must be directly linked to the sale of products or services to consumers.<sup>108</sup> In the context of this paper, the preceding considerations are important as it may be inferred that influencers and advertisers who commit themselves to industry rules related to the manipulation of images could be held legally accountable for breaching these voluntary commitments. This pursuit, however, would be considerably ambitious, as adequately demonstrating a link between the sale and the breach of the hypothetical commitment at issue would be an onerous undertaking.

Despite positive developments associated with self-regulation, the industry continues to resist change. While it is undeniable that self-regulatory schemes play an important role in business practice and serve as a valuable accessory to legislation, alone it remains largely ineffectual and inadequate for effectively fighting harmful advertising practices.<sup>109</sup> As such, the possibility of adopting legally-enforceable measures must be explored.

---

<sup>107</sup> Beckers, *supra nota* 104, p. 478; The European Court of Justice has previously defined the scope of the UCPD as covering “acts which clearly form part of an operator’s commercial strategy”. See: Joined Cases C-261 & 299/07, *VTB-VAB*, para 50 referenced in Beckers, *supra nota* 104, p. 486.

<sup>108</sup> *Ibid.*, pp. 483-485.

<sup>109</sup> For instance the EU has acknowledged the important role of self-regulatory mechanisms in supporting legislation and other administrative mechanisms (Reale, *supra nota* 89, p. 8), whilst at the same time, has reinforced the fact that self-regulatory initiatives cannot be legally enforced and are thereby limited. See: European Commission. (2020). Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. COM (2020) 825 final. Brussels, 15.12.2020, p. 7.

### 3. THE OVERLY SIMPLISTIC APPROACH OF EXISTING LEGAL INITIATIVES

The existing legislative initiatives designed to address the risks associated with the development of EDs are criticised for being poorly substantiated, lacking in sufficient research base, and largely unenforceable.<sup>110</sup> Understanding the limitations of these initiatives would allow lawmakers to pre-empt the problems they could face in implementing such laws and avoid making similar mistakes. Neglecting relevant research and the criticism towards the novel and largely unexplored laws not only threatens the success of the legislative process but would ultimately result in a largely superficial piece of legislation. It is therefore necessary to address these shortcomings to understand how weaknesses in new legislation can be avoided.

#### 3.1. The Lack of Harmonisation of Law

Poor harmonisation of laws between countries is a fundamental challenge that may be faced in the development of any law. This is especially the case where multiple countries often work in unison to reach common goals and desired objectives, such as the case of the EU. At the time of writing, France is the only EU MS to have directly legislated practices pertaining to digital manipulation of photographs used in commercial advertising. Naturally, this means that such practices undertaken by advertisers outside France remain unregulated and the rest of the EU continues to be exposed to harmful advertising. Further, French consumers who travel around Europe will continue to be exposed to heavily retouched ads sans the disclaimer, which would arguably render the French law, on the whole, useless and inconsequential. While the EU generally allows MSs to implement stricter laws with the object of providing greater protection to consumers, the goal pursued by France's photoshop law is arguably in the interest of consumers across the whole EU.<sup>111</sup> As indicated above, obtaining accurate data on the prevalence of EDs within Europe is challenging but; however, there is sufficient reason to believe that their prevalence within Europe is enough to warrant concern and the need for change.<sup>112</sup> When MSs

---

<sup>110</sup> For example, see: Hildesheimer et al., *supra nota 7*; Bildfell, *supra nota 10*; Rodgers et al., *supra nota 16*, pp. 2-3; Bromberg et al. (2016), *supra nota 1*; Abbadessa, *supra nota 7*; Latzer et al., *supra nota 7*, p. 4.

<sup>111</sup> Recital 3 of the UCPD, for example, provides that EU laws pertaining to misleading and comparative advertising set minimum standards for harmonising legislation, but “[do] not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers...”, see: OJ L 149, 11.6.2005, p. 22.

<sup>112</sup> Latzer et al., *supra nota 7*, p. 1; Hildesheimer et al., *supra nota 7*, p. 104; For statistics on prevalence of EDs, see: Our World in Data. Share of population with an eating disorder, 2019.

fail to cooperate with one another in matters of mutual concern, the door is left open for actors in bad faith to exploit loopholes and circumvent important laws without repercussions.

Under both the French law, the BMI requirement for models can be easily circumvented by simply leaving the country with stricter laws to work in another country which leaves the harmful advertising practices unregulated.<sup>113</sup> Although the law would bar both French and foreign models from being employed in France and thereby from appearing in fashion shows in the country, the effect of the law remains largely trivial. Essentially, without harmonisation, whereby there is a threshold that is mutually applicable within different countries, the impact of such a law on the modelling and advertising industries at large is negligible. As regards the disclaimer requirement, whereby advertisers are obliged to disclose modifications made to their commercialised photographs, there are notable disparities between the national laws and their specific requirements. One such example is the size of the disclaimer, which under French law must “be easily readable and clearly differentiate from the advertising or promotional message”<sup>114</sup>, thus affording advertisers reasonable flexibility to be creative in circumventing the law. The producer of the advertisement could make the disclaimer very small in size thereby allowing it to be easily missed and avoid detection by certain viewers.<sup>115</sup> Further, in the context of posts on social media, rather than including a disclaimer in the caption of the photo, which is unlikely to escape detection by viewers, the poster might place the disclaimer on the photo itself making it small enough that it is essentially hidden. Another way to possibly bypass the law is by including the disclaimer on the photo, but editing the text in a way that makes it virtually unreadable, so that the presence of the disclaimer itself cannot be denied, irrespective of its readability. Based on the imprecise wording of the French law, these actions would not technically obstruct the obligations set forth therein. Ultimately, there are a number of hypothetical methods for advertisers and influencers to circumvent this law, which undermines the law’s successful application. Conversely, the Israeli law provides considerably more detail in its requirements for disclaimer labels, setting a minimum size the label must adhere to.<sup>116</sup> Setting specific standards not only allows for more legal certainty in that advertisers and creators can regulate themselves more accurately, but it also leaves less room for flexibility and decreases the

---

<sup>113</sup> Bromberg et al. (2016), *supra nota* 1, p. 19; Bildfell, *supra nota* 10, p. 72.

<sup>114</sup> Article R2133-5 of Section 2, Chapter III, Title III, Book II, Part 2, Regulatory Part of the Public Health Code (Created by Decree No 2017-738 of 4 May 2017- art. 1). Légifrance.; Abbadessa, *supra nota* 7; Bromberg et al. (2019), *supra nota* 15, p. 191.

<sup>115</sup> Bromberg et al. (2016), *supra nota* 1, p. 8.

<sup>116</sup> Article 3(b) stipulates that the disclaimer must “appear... in a noticeable location, in visible colour and size, on a space of no less than 7% of the overall advertising space of the advertisement”. See: The Law for Restricting Weight in the Modeling Industry, 5772-2012 translated in Hildesheimer et al., *supra nota* 7, p. 137.

opportunities for successfully bypassing the requirement. In this regard, the provision in the Israeli law is preferable for specificity.

As regards the disclaimer and to what modifications it applies, the French law provides that the requirement applies to photos that have been retouched to “refine or thicken the silhouette of the model”<sup>117</sup>, implying that changes to the model’s skin complexion, hair or eye colour do not have to be disclosed.<sup>118</sup> Though not necessarily specific, the wording is such that it may be interpreted as covering any changes made to the appearance of the body aiming to make the model appear more slender or muscular.<sup>119</sup> The vague wording of this requirement is however arguably preferable in that it allows broad interpretation, which is important in keeping abreast of societal changes and evolving idealisations. Essentially, the law is sufficiently broad that it could catch any retouches made to photos containing models digitally manipulated to look like the contemporary standard; specifically, the desired body ideal “in fashion” at the time. In contrast, the Norwegian law’s broader scope requires the disclosure of changes to body shape or size, as well as skin.<sup>120</sup> Though Norway is not an EU MS and would therefore not fall subject to any prospective EU photoshop law, it is worth highlighting its differences for the purpose of conveying the complications associated with poor harmonisation. With a view to using either example for the development of an equivalent EU provision, neither law is more or less preferable than the other, as neither is too excessive than the other. Rather, a combination of the wording of the Norwegian and French provision would provide sufficient coverage, as well as foster harmonisation not only within the EU but also possibly with third countries like Norway.

Overall, poor harmonisation to any degree, in terms of the specificity of the law or simply the fact that one country has an appropriate law and another does not, leads to weak legal certainty and opportunities for circumvention.

### **3.2. The Harmful Irony of the BMI Measurement Requirement**

An important element of photoshop law is the detrimental reliance on BMI as an indicator of health. Both the Israeli and French photoshop laws, as well as the initiatives of the Spanish and

---

<sup>117</sup> Article L2133-2, Chapter III, Title III, Book I, Part 2, Legislative Part of the Public Health Code (Amended by Order No. 2016-462 of April 14, 2016 - art. 3 (DV)). Légifrance.

<sup>118</sup> Bromberg et al. (2019), *supra nota* 15, p. 191.

<sup>119</sup> Rodgers et al., *supra nota* 16, p. 3.

<sup>120</sup> §2 Lov om kontroll med markedsføring og avtalevilkår mv. (markedsføringsloven) (Article 2 of the Norwegian Marketing Act).

Italian governments outlined above, rely heavily on the measurement of an individual's BMI to determine whether they are fit to be employed for modelling work. Scholars argue that the BMI measurement is an arbitrary, faulty measure of whether an individual can truly be considered an (un)healthy weight or not.<sup>121</sup> Additionally, the BMI requirement is criticised for discriminating against individuals who are naturally slimmer, arbitrarily barring them from working in their selected occupation, which can in turn have negative consequences for the models' mental health.<sup>122</sup> As such, the rationale of the law loses credibility, as the objective sought to protect consumers and industry participants is significantly undermined due to the possible adverse effects on models in the industry.<sup>123</sup> The main arguments against the BMI requirement under Israeli law, presented by Hildesheimer et al. (2015), are threefold: the requirement disproportionately restricts model's activities, does not adequately target advertisers nor hold them accountable for their conduct and fails to serve the intended purpose of protecting the public against advertisements containing unnaturally thin-looking models.<sup>124</sup> The latter argument is grounded on the fact that photoshop laws do not ban the use of photo-retouch tools per se. Specifically, unless an advertiser is deterred from publishing retouched advertisements due to their reluctance to publicly disclose the artificial nature of the photos, they are free to retouch their advertisements as they see fit. As a result, commercial images may display a model who in real life maintains a healthy body weight but is retouched to appear as though underweight; thus, irrespective of the presence of a disclaimer, the publishing of such an image completely undermines the essence and purpose of the BMI requirement.<sup>125</sup>

The French photoshop law may serve as a preferable alternative in that, unlike the Israeli law, it does not stipulate a BMI threshold for which to be considered "healthy" for employment

---

<sup>121</sup> It is well understood that BMI values do not accurately reflect a person's fitness or overall health due to the limited variables the measure takes into consideration. The measurement does not take into consideration relevant factors, such as age, gender, bone density, body frame, race or nationality, nor does it consider factors attributable to genetic makeup, including cartilage mass, water weight and muscle. Consequently, it often misclassifies individuals as underweight or obese when they are, as a matter of fact, a healthy weight. (Bromberg et al. (2022), *supra nota* 8, pp. 111-112; Bromberg et al. (2016), *supra nota* 1, p. 12; Bildfell, *supra nota* 10, p. 40). As a result, models who present over the minimum threshold may have dangerously unhealthy eating habits, whilst models who are genetically smaller but sufficiently healthy are turned away. For example, several researchers conducted a study finding that the large majority of participants displaying symptoms of EDs had a BMIs above the minimum threshold considered healthy by the WHO (and the photoshop laws). See: Christina Ralph-Nearman et al., *What is the Relationship Between Body Mass Index and Eating Disorder Symptomatology in Professional Female Fashion Models?*, 293 PSYCHIATRY RSCH., Nov. 2020, at 1, 19-20 referenced in Bromberg et al. (2022), *supra nota* 8, pp. 111-113.

<sup>122</sup> Bildfell, *supra nota* 10, p. 69; Hildesheimer et al. *supra nota* 7, pp. 126-127.

<sup>123</sup> Hildesheimer et al. *supra nota* 7, p. 127.

<sup>124</sup> *Ibid.*, pp. 126-128; The disclaimer requirement was intended to complement the BMI requirement so that the latter could not be circumvented by editing photos to make healthy models appear thinner. See: Bromberg et al. (2016), *supra nota* 1, pp. 8-9.

<sup>125</sup> *Ibid.*

purposes.<sup>126</sup> Moreover, the relevant provision implies that doctors are given more discretion to determine the health of the individual, not necessarily having to rely solely on the BMI value to deem the model fit for work.<sup>127</sup>

Between the two initiatives considered hereunder, the more substantiated approach taken by the French law is the preferable option. Notwithstanding, the use of BMI as a tool for evaluating models' health is not scientifically-backed, nor is its inclusion in legislation well justified by lawmakers.<sup>128</sup> For the purpose of developing a photoshop law that fits into the framework of EU consumer law, particularly under regulation of commercial practices, the inclusion of a BMI requirement in legislation is therefore particularly undesirable.

### **3.3. The Application of the Law and the Reality of its Enforceability**

Enforceability of the law is subject to intense scrutiny and scepticism on the part of legal scholars and researchers who argue that the enforcement mechanisms associated with the law are largely flawed and lacking in any real punitive effect.<sup>129</sup> Given that the object of legislation is to serve as a legally enforceable tool that goes beyond the powers of largely unenforceable self-regulatory measures, this weakness proves a considerable challenge to the law's effectiveness.

A major obstacle faced in enforcement and affording consumers redress possibilities pertains to the fundamental challenge of establishing causality. The Israeli photoshop law, for instance, provides for consumer redress through civil litigation; however, this not only requires the aggrieved individual to establish causality, but it is also inherently flawed in that consumers are often unaware of the existence or extent of their rights.<sup>130</sup> Consumers unaware of any such law

---

<sup>126</sup> The French law requires the presentation of a medical certificate, verifying the model's health, "assessed in particular with regard to his body mass index". See: Article L7123-2-1, Subsection 2, Section 1 of Chapter III, Title II, Book I, Part 7, Legislative Part of the Labor Code (Created by Law No. 2016-41 of 26 January 2016 - art. 20). Légifrance.

<sup>127</sup> *Ibid.*; The French law assumes a "more holistic approach" to evaluating models' health. Bromberg et al. (2022), *supra nota* 8, p. 113; Bildfell, *supra nota* 10, p. 51.

<sup>128</sup> It is the express view of Bromberg et al. that "the Israeli and French Body Image Laws do not sufficiently take into consideration the evidence from allied health researchers in this area that relate to Body Image Law". See: Bromberg et al. (2019), *supra nota* 15, p. 185.

<sup>129</sup> This is an assertion well-documented by researchers in the field of photoshop law. For reference, see: Szewczyk, J. (2014). Photoshop Law: Legislating Beauty in the Media and Fashion Industry; Abbadessa, *supra nota* 7; Bromberg et al. (2019), *supra nota* 15; Bildfell, *supra nota* 10; Latzer et al., *supra nota* 7; Hildesheimer et al. *supra nota* 7;

<sup>130</sup> Abbadessa, *supra nota* 7; For example, an individual suffering from an ED who wishes to seek redress based on the Israeli photoshop law would have to complain about a particular commercial image in a magazine that was not

restricting these practices can easily overlook the fact that a retouched advertisement does not contain a disclosure. Further still, relying on consumers to take legal steps to enforce the law is arguably unreasonable and unlikely to produce any real effect. Consumers, though they may disapprove of undisclosed retouched advertisements, are unlikely to engage in the initiation of a formal complaint.<sup>131</sup> Moreover, consumers might not even be aware that an advertisement has been retouched, as it is not always apparent.<sup>132</sup> On social media platforms, for instance, such practices have become the norm and consumers are therefore likely to become accustomed to seeing edited images and internalising the idea that that is what people typically look like. To that end, it may be reasonably argued that this mechanism is a poor and uninformed means to enforce the law. Ultimately, as maintained by Gina Abbadessa (2018) in her appraisal of the various photoshop laws and their suitability for serving as a basis for other countries considering such legislation, the Israeli law is therefore a “poor model for adoption”.<sup>133</sup>

Conversely, the French and Norwegian photoshop laws set fines for failure to comply with the photoshop disclaimer provisions.<sup>134</sup> In this way, there is a clear sanction that provides for advertisers so that they can rely on the law and allow them to regulate their behaviour accordingly, and also grants consumers assurance that harmful behaviours are appropriately regulated. These considerations comprise some of the most important elements that make an enforcement mechanism successful and conducive to its intended purpose.<sup>135</sup> That is not to say the French and Norwegian laws are without flaw; in spite of the existence of seemingly valid punitive sanctions, there remains little evidence of their application in practice. Indeed, both the Norwegian and French photoshop laws are considerably new and enacted only in recent years - at the time of writing, the Norwegian law only entered into effect the previous year and is

---

disclosed for having been photoshopped. Bromberg et al. use the illustrative hypothetical example of a parent seeking redress for their child suffering from an ED, emphasising the challenges associated with legitimising the relation between such claims against an advertiser and the child’s development of an ED. See: Bromberg et al. (2016), *supra nota* 1, p. 9; Michaelsen et al., *supra nota* 70, p. 94.

<sup>131</sup> Michaelsen et al., *ibid.*

<sup>132</sup> It has been asserted that “most people” are unaware that a certain image has been photoshopped. See: Kerry C Donovan, ‘Vanity Fair: the Cost, Controversy and Art of Fashion Advertisement Retouching’ (2012) *Notre Dame Journal of Law, Ethics and Public Policy* 581, 589 referenced in Bromberg et al. (2016), *supra nota* 1, p. 4.

<sup>133</sup> Additionally, according to Abbadessa, the Israeli photoshop law, despite being the oldest initiative legislating against such practices, is “largely ignored in practice” (Abbadessa, *supra nota* 7); As recent as 2019, researchers have also reported no findings of documented violations of the law or existence of any civil lawsuits. Bromberg et al. (2019), *supra nota* 15, p. 193.

<sup>134</sup> The last sentence of Article L2133-2, Chapter III, Title III, Book I, Part 2, Legislative Part of the Public Health Code (Amended by Order No 2016-462 of April 14, 2016 - art. 3 (DV)). Légifrance; §42 Stortinget. Lovvedtak 146 (2020-2021) om endringer i markedsføringsloven mv. (merking av retusjert reklame).

<sup>135</sup> For example, Abbadessa (2018) posits four criteria legislation should meet to ensure that the rules set forth therein are legally sound and sufficiently effective to fulfil their objective. The first element provides that the law must be predictable; the second requires that the law is sufficiently clear; the third requires the law to be punitive in order to be effective and enforceable; and, the fourth requires that the law is “constitutionally sound”, i.e. does not conflict with general fundamental principles. See: Abbadessa, *supra nota* 7.

therefore understandably lacking in available case law. Conversely, the French law has been in force for an arguably long enough time to expect some evidence of its application in practice; however, searches for such cases have come up short with various other researchers having reported similar results.<sup>136</sup> Accordingly, criticism as to the efficacy of the monetary sanction as a deterrent for advertisers engaging in the restricted practices can only be considered speculative and is therefore not covered further in this paper.<sup>137</sup>

### **3.4. The Contentious Debate Surrounding the Efficacy of Disclaimer Labels: Consumer Attitudes**

The final shortcoming to be addressed is that of the scepticism surrounding the true efficacy of using disclaimer labels to address the issues associated with problematic advertising practices in the media. The current outlook suggests that such disclaimer labels are ineffective at mitigating negative self-assessments associated with exposure to certain media; however, there remain several plausible arguments that may be put forward to support the use of such labels. The rationale behind the disclaimer label follows the connection between media and the development of EDs, which is based on the notion that individuals predisposed to EDs may begin to internalise cultural messages and societal idealisations upon exposure to certain media. In this way, disclaimers would catch the potential ED victim at the early stage of pre-disorder-development; specifically, when they are viewing media images that may ultimately harm their mental health.<sup>138</sup> Theoretically, the label would bring to the consumer's awareness that the appearance presented in a particular commercial image is not natural and is therefore an unrealistic target for comparison.<sup>139</sup>

Studies have produced a plethora of results, many of which diverge, but the general consensus is that disclaimers of any type are inefficient at deterring negative viewer thought processes.<sup>140</sup>

---

<sup>136</sup>As of 2021, no documented violations had been recorded according to Rodgers et al., *supra nota* 16, p. 4.

<sup>137</sup> For a theoretic overview of the possible (in)efficacy such fines may have, see: Chapter IV, Section A of Bromberg et al. (2016), *supra nota* 1, pp. 9-11.

<sup>138</sup> "Pre-eating-disorder-stage" as referred to in: Hildesheimer et al. *supra nota* 7, pp. 106-107.

<sup>139</sup> Paraskeva, N., Lewis-Smith, H., Diedrichs, P.C. (2016). Consumer opinion on social policy approaches to promoting positive body image: Airbrushed media images and disclaimer labels. *Journal of Health Psychology*, 22(2), 10, 164-175, p. 165.; Tiggemann (2022), *supra nota* 36, p. 174; Rollero (2015) suggested that resulting adverse effects could be mitigated if viewers were made aware of the artificiality behind the advertisement, as referenced in Taylor et al., *supra nota* 18, p. 391.

<sup>140</sup> McComb et al. conducted a systematic review of various literature, a total of 15 experimental studies, examining the impact of media disclaimers on women's body image, whereby they conclude that the majority of studies found that disclaimers in general were ineffective at mitigating body dissatisfaction. McComb, S.E., Mills, J.S. (2020). A

Conversely, some studies, though limited in number, have found general disclaimers to be effective amongst certain groups. The conditions of these studies present some important details that may be worth considering more closely in light of the current day's social media-driven world. Researchers McComb et al. (2020) contemplate that studies yielding positive results may be due to methodological differences, arguing that participants in one of the studies, as Fashion and Retail students, are "[more] exposed to fashion advertisements...than the general population" and may therefore "serve to benefit the most" from such disclaimers.<sup>141</sup> While it can be argued that individuals majoring in fashion-related fields will indeed be exposed to these images more than the "average population" (which includes older generations that do not use social media), today's main users of social media, adolescents and young people, are arguably exposed to similar volumes of commercial images. The implication of the preceding consideration in conjunction with the above-mentioned theory posited by McComb et al. is that laypersons using social media could similarly benefit from disclaimer labels. Additionally, McComb et al. highlighted that positive findings from another study may be explained by the study's use of fashion shoot images, instead of magazine advertisements, which may make the images "appear more natural and realistic" than those typically expected in magazines.<sup>142</sup> A similar case could be made for social media images posted by influencers who, amongst everyday casual users, create a sense of relatability by posting seemingly candid snapshots of their lives. This sense of equality and realism amongst social media users fosters an ideal platform for commercial communications to come across as natural and effortless.<sup>143</sup> However, influencers have increasingly been criticised for displaying unrealistic standards and presenting themselves only in the best light. As such, social media also fosters an environment for social-comparison triggers to thrive, due to users' poor photo-retouch-detection skills and their inability to distinguish realistic from unrealistic targets for comparison, hence the conception of the disclaimer requirement.<sup>144</sup>

At the very least, disclaimer labels may serve as a useful means to raise awareness amongst influencers, consumers, and other social media users, and could gradually incite a shift in

---

systematic review on the effects of media disclaimers on young women's body image and mood. *Body Image*, 32, 34-52, p. 50; Paraskeva et al., *supra nota* 139, p. 171; Danthinne et al., *supra nota* 20, p. 658; Tiggemann, *supra nota* 36, p. 175.

<sup>141</sup> The study at issue is that conducted by Harmon et al. (2016) referenced in McComb et al. *supra nota* 140, p. 48.

<sup>142</sup> McComb et al. in response to the effectiveness of generic disclaimers found in Slater et al. (2012). For reference, see: *ibid.*

<sup>143</sup> Social media allows influencers and peers alike to appear together on the same platform, thereby creating an impression of equality and realism. Tiggemann, *supra nota* 36, p. 173; On the definition and success of influencer marketing, see: Riefa et al, *supra nota* 96, pp. 1-2.

<sup>144</sup> Tiggemann, *supra nota* 36, p. 176; According to Schirmer et al., "most consumers" are uncertain as to whether they can recognise a retouched image or not. Schirmer et al., *supra nota* 66, p. 138.

attitudes and understanding of media practices thereby fostering a healthier, more transparent online environment.<sup>145</sup> Ultimately, there are a multitude of possible arguments and theories for and against developing and enforcing the use of disclaimers. Though it may be reasonably argued that adding a disclaimer does not address the underlying causes of EDs, it should be considered that the absolute prevention of body dissatisfaction, through means such as legislation, is a very ambitious goal and our expectations as to the effect a disclaimer can realistically achieve should therefore be adjusted.<sup>146</sup> Disclaimers may provide support in bettering viewers' feelings towards themselves and their bodies, but should not be expected to achieve "the impossible" by eradicating inherent internalisations ingrained in individuals through society and other personal factors.

---

<sup>145</sup> Tiggemann (2022), *supra nota* 36, p. 177; Paraskeva et al., *supra nota* 139., p. 166.

<sup>146</sup> See expert comments on the disclaimers' failure to sufficiently address the root of the body image problem in Chiu, *supra nota* 22; Vandenbosch et al., *supra nota* 35, p. 3.

## **4. COMPETING LEGAL INTERESTS AND THE BALANCE OF RIGHTS UNDER PHOTOSHOP LAW**

With all initiatives and proposals for new law, there must be a well-substantiated rationale underlying their development. In the EU, for instance, the principle of proportionality is of particular importance when considering the adoption of new legislation that could potentially interfere with other rights provided by law. In this context, the balance of individual rights against public interest must also be carefully observed. Photoshop law seeks to remedy harmful advertising practices deemed contributory to the development of EDs, which puts multiple legal interests at stake. For instance, consumers being the hypothetical recipient of a retouched advertisement, as the weaker parties of a commercial transaction, have certain rights owed to them by traders under EU law. Likewise, the advertisers or the advertisement creators have rights pertaining to the commercial communication itself, which may protect them against certain claims. At the same time, the subject of the photograph also retains a number of rights and protections that may challenge the legal bases of photoshop law. The advent of the internet and digital technologies has further offset the harmony by disturbing established arrangements pertaining to the balance of fundamental rights and assignment of liability, respectively.<sup>147</sup> A balance must therefore be struck in order to ensure that each fundamental right receives the respect it is due.<sup>148</sup>

The interrelated rights at issue are presented separately in the following sections to convey the associated challenges with a view to proposing a solution that does not disproportionately interfere with one right over another.

### **4.1. Right to Privacy and Freedom of Occupation**

The issues associated hereunder are concerned with the personal liberties of models in the fashion and advertising industries who inherently retain the fundamental right to privacy and the

---

<sup>147</sup> Georgiades, E. (2021). A Right That Should've Been: Protection of Personal Images on the Internet. *IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property*, 61(2), 275-327, pp. 313-314.

<sup>148</sup> For example, in the context of transposing an EU Directive into national law, where certain implementing measures may interfere with fundamental rights, the MSs are obliged to ensure that they “rely on interpretation of the directive which allows a fair balance to be struck between the applicable fundamental rights protected [by the EU]”. See: Judgement of the Court (Fourth Chamber) of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192, paragraph 46.

freedom of occupation, both of which are threatened by the underlying rationale of photoshop law. Photoshop law was introduced to promote health amongst both the general population, by regulating their exposure to thin-ideal media, as well as the models working in the industry, by alleviating their pressure to stay thin. Instead, these laws have attracted criticism for infringing models' rights to engage in work and their personal rights to privacy.

The right to privacy in the EU is guaranteed by the Charter of Fundamental Rights of the European Union (CFREU) under Article 7.<sup>149</sup> Given the provision's reference to private life, it may be inferred that personal eating habits and weight control practices fall within the purview of this protection; as such, the imposition of any obligations related thereto may constitute an infringement of privacy.<sup>150</sup> Photoshop laws, by demanding the fulfilment of a minimum weight requirement to be employable, indirectly regulate individuals' private activities, thereby blurring the line between public and private matters.<sup>151</sup> Throughout history, women have been instructed on what to wear and eat to achieve the ideal physical appearance pushed by contemporary sociocultural standards. As a result, women's desire to pursue this ideal is often considered a private free choice;<sup>152</sup> on the contrary, it may be argued that this "free-choice" is clouded by inherent socially-enshrined beliefs.<sup>153</sup> In turn, women's perception of beauty may be distorted and, feeling the pressure to look a certain way, may resort to harmful practices such as those characterising EDs. The challenge lies in the fact that photoshop laws should target the pre-disorder-development stage, which is characterised by private activities such as the consumption of media and diet-related practices.<sup>154</sup> The rationale of photoshop law essentially marries the private with the public sphere, by connecting private activities to public influences.<sup>155</sup> To that end, there must be a distinct limit so as to ensure the law does not go beyond what is absolutely necessary to achieve the desired end.

---

<sup>149</sup> The CFREU, which has legally binding force, corroborates the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as applicable within the EU. See: Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, A.1. in the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, 26.10.2012.

<sup>150</sup> "Everyone has the right to respect for his or her private and family life, home and communications". See: Article 7, Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 397.

<sup>151</sup> Hildesheimer et al., *supra nota* 7, pp. 114-116.

<sup>152</sup> *Ibid.*, pp. 118-119.

<sup>153</sup> The non-intervention attitude toward the pre-eating-disorder stage can be linked back to historical practices and beliefs pertaining to the private nature of, particularly women's, eating habits. *Ibid.*, pp. 115, 119.

<sup>154</sup> Critics of the Israeli photoshop law contend that in order for the law to be effective it should address "various aspects of the pre-eating-disorder stage". See: *Ibid.*, p. 114

<sup>155</sup> Hildesheimer et al. contemplate the considerations behind the rationale of the development of the Israeli photoshop law. See: *ibid.*, pp. 118-119.

Concerns relating to the consequences for the freedom of occupation, providing for the right to engage in a freely chosen occupation<sup>156</sup>, may be similarly cited as an obstacle for the adoption of photoshop law.<sup>157</sup> The object of this right is to allow individuals to pursue their chosen careers; thus, the imposition of standards, which if unmet results in rejection from the industry, bars the models from exercising this right. Photoshop law, which imposes weight requirements on models in order for them to be considered employable, undermines this right with its very essence. Though the right to privacy is not related to employment as such, the European Court of Human Rights (ECtHR) in its application of the European Convention on Human Rights (ECHR) has held that some aspects of private life may be affected by employment-related disputes such as non-admission to a profession, thereby triggering the engagement of Article 8, the privacy right.<sup>158</sup> To illustrate, it may be argued that the imposition of a weight requirement led to a model losing her job as a result of not meeting the minimum weight threshold, thereby calling into question private practices that ultimately led to her dismissal. Notably, the adoption of the Israeli photoshop law faced severe criticism throughout the legislative process, mainly in relation to the restrictions on the aforementioned rights. Similar to France, the Israeli law had initially imposed a general prohibition on the employment of underweight individuals for any modelling activity; however, this was later changed to apply only to models used in commercial photographs.<sup>159</sup> This demonstrates the paradoxical route taken by legislators in developing the law, whereby instead of protecting the health of models and the general public, the law deviated towards interference with the former's activities. Other restrictions, such as the proposal to ban the use of photo-editing tools in advertising altogether, were abandoned for concerns as to the undue restriction on freedom of expression within the advertising industry.<sup>160</sup> After the initial rewording of the bill, the Parliament's legal committee remained reluctant to pass the law, persistently citing the interference and violation of freedom of occupation, to which lobbyists responded with scientific evidence reinforcing the initial rationale: targeting the media to fight EDs in the

---

<sup>156</sup> Guaranteed in the EU by Article 15(1), Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 398.

<sup>157</sup> Latzer et al., *supra nota 7*, p. 3.

<sup>158</sup> The requirements for limitations of rights under the ECHR must also be observed by the EU in its limitation of CFREU rights, insofar as the respective CFREU right corresponds to a right in the ECHR. (*Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance*. (2020). European Union Agency for Fundamental Rights., p. 46); Pursuant to ECtHR practice, employment-related disputes typically engage Article 8 either where a person loses a job because of something they did in their private life or when their private life is impacted as a result of the job loss. See: Council of Europe. (2022, August 31). *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. European Court of Human Rights, p. 30.

<sup>159</sup> Latzer et al., *supra nota 7*, p. 2. Hildesheimer et al., *supra nota 7*, p. 120.

<sup>160</sup> Latzer et al., *ibid.*; Hildesheimer et al., *ibid.*, pp. 119, 121.

interest of public health.<sup>161</sup> Moreover, it was argued that the restriction to freedom of occupation would prospectively be limited to a trivial number of individuals, whilst the abandonment of the proposal would lead to the detriment of a large population of young girls exposed to harmful media impacting their health and body image.<sup>162</sup> The scientific evidence was reconsidered, the foregoing argument prevailed, and the law was passed. Notwithstanding, it may still be argued that the Israeli photoshop law infringes privacy, as it demands models to control private activities typically not subject to external control or supervision so as to ensure their ability to exercise their freedom of occupation.<sup>163</sup> Not only does this unsuccessfully achieve the objective of protecting the public against harmful industry practices, but it constitutes a disproportionate interference with models' rights to privacy.<sup>164</sup> In light of the foregoing, a poorly-backed weight requirement is hardly justifiable nor recommendable to the EU for their prospective development of a photoshop law.

The introduction of a disclaimer requirement for retouched photos was the result of the abandoned blanket ban on photo-editing proposal, which was considered a disproportionate restriction on the advertising industry's freedoms. The revised disclaimer requirement, however, serves to protect the general public and is significantly less intrusive on models' personal rights. As regards the implications for the EU's prospective regulation, pursuant to the argument successfully raised by Israeli activists which resulted in the reconsideration and adoption of the law, a similar argument could be made on the basis of the CFREU. The Charter provides that limitations on fundamental rights are subject to the principle of proportionality and may be made insofar as they are strictly necessary "and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".<sup>165</sup> Essentially, to effectively argue for the implementation of photoshop law on a similar basis to that of the Israeli lobbyists, the argument would have to hold up against the principle of proportionality.<sup>166</sup>

---

<sup>161</sup> Latzer et al., *ibid.*, p. 3.

<sup>162</sup> *Ibid.*

<sup>163</sup> Hildesheimer et al., *supra nota* 7, p. 126.

<sup>164</sup> *Ibid.*, pp. 126-127.

<sup>165</sup> The principle of proportionality is provided by Article 5(4) of the Treaty on the European Union and is applied in the implementation of any action taken at EU level. The principle ensures that the action taken does not exceed that which is necessary to achieve the objectives of the Treaties. See: Article 5(4), Consolidated Version of the Treaty on European Union [2012] OJ C 326, 26.10.2012, p. 18; *Principle of proportionality*. EUR-Lex; Article 52(1), Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 406.

<sup>166</sup> For EU measures to qualify as proportional they must meet the following criteria: i) the measures must be suitable to achieve the desired end; ii) the measures must be necessary to achieve the desired end; and iii) the measures must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (proportionality in the narrow sense). See: *Principle of proportionality*. EUR-Lex.

To illustrate, one may contemplate the compliance of the BMI requirement against the criteria of the principle of proportionality. It may be argued that the principle of proportionality precludes the adoption of a weight requirement under photoshop law, based on the following assessment: First, it may be argued that the law restricting models' weight is not suitable to achieve the desired end, given the redundancy of the measurement value on which it is based, as described in Chapter III. Second, it is not necessary to restrict models' weight in order to achieve the desired end when other less invasive approaches exist, such as the use of disclaimer labels. To corroborate this inference, it must be noted that the Israeli law has not provided any indication that the interferences with the respective fundamental rights can achieve the objective sought.<sup>167</sup> Finally, whether it imposes an excessive burden on the individual in relation to the objective sought may be considered in light of the fundamental freedoms at stake. It can reasonably be asserted that the weight requirement is indeed excessive, since there exists the alternative less invasive requirement of using disclaimer labels to indicate photoshopping in an image. In light of the foregoing, the weight requirement hardly complies with the conditions of the principle of proportionality under EU law and, as previously stated, is not an advisable measure for adoption at EU level.

Though it may be argued that the disclaimer requirement neglects the modelling industry in favour of protecting public interests, it may be counter-argued that the requirement will have indirect effects on the industry at large. Tentatively, mandating the use of disclaimer labels could effect significant change by reforming modelling and advertising culture, with industry participants becoming less inclined to retouch their images. This may result from advertisers' reluctance to include a disclaimer label next to their retouched photo, as such an admission openly acknowledges the artificiality of the image, and thereby indirectly the product.<sup>168</sup> The advertising industry would be forced to either maintain long-standing practices and publicly disclose them or discontinue these practices altogether. Both avenues require a shift in industry norms, which would reflect in communications received by the public. This is not to say that legislation should be expected to effect a cultural-shift whereby deep-rooted societal beauty standards are changed; however, there is sufficient reason to believe that the law can effectively aid in raising awareness about the media's negative effects on body image and thereby reopen the

---

<sup>167</sup> Hildesheimer et al., *supra nota* 7, p. 127; Szewczyk, *supra nota* 129, p. 23.

<sup>168</sup> Bildfell, *supra nota* 10, p. 57.

conversation.<sup>169</sup> However, determining the proportionality of the disclaimer requirement in terms of whether it is “necessary” to achieve the desired end is challenged by the fact that the requirement targets media as a cause for EDs and fails to address other factors contributing to their development.<sup>170</sup> While this is an extremely important point, the fact that the media is not the sole, or necessarily the main, contributor to the development of EDs is arguably a poor excuse not to legislate against harmful media practices. No legislation of any kind can be expected to solve the problem of EDs entirely, nor can it be expected to guarantee absolute prevention of the manifestation of such disorders. This does not mean that implementing legislation targeting only one aspect of the issue is not a worthwhile pursuit; at the very least, such a law could contribute to a better societal understanding of media influence and raise awareness about EDs.<sup>171</sup>

Ultimately, the disclaimer requirement pursues a legitimate aim to the benefit of both the industry and the general public and is for that reason a preferable measure. As regards its suitability, the only way to accurately determine the true efficacy of the labels will be to observe consumers’ perceptions over a substantial period of time once it has become common practice to use them, as this will allow researchers to gauge their efficacy in an uncontrolled environment.

The disclaimer requirement attracts further conflict with other fundamental rights, such as the freedom of expression, as explored in the following sections.

## **4.2. Copyright Law and Personal Image Rights**

The series of rights concerned under photoshop law include those assigned to consumers as regards their right to information, personal image rights of the person photographed, and the photographer’s rights to their intellectual property.<sup>172</sup> These rights are linked in a complex entanglement whereby all individuals concerned have their own interests that may conflict with one another, the ultimate balance of which may lead to the detriment of others.

---

<sup>169</sup> Bildfell (2018) provides a comprehensive analysis of the plausibility of laws to effect a profound cultural-shift. See: Bildfell, *ibid.*, pp. 55-66; McBride et al., *supra nota* 11; Szewczyk, *supra nota* 129, pp. 13-14; Tiggemann, *supra nota* 36, p. 179; On the influence both the law and celebrities (or influencers) can have on regulating advertisement of “miracle weight loss products”. See: Cardaci et al., *supra nota* 71.

<sup>170</sup> Bildfell, *supra nota* 10, p. 64.

<sup>171</sup> *Ibid.*, pp. 74-77; Vermeir et al. (2014) discuss the importance of educating individuals, particularly children, about the effects of media and call on policymakers to assume a more active role in regulating media practices that adversely affect individuals. See: Vermeir et al., *supra nota* 19, pp. 225-227.

<sup>172</sup> On the conflicting rights of the author of the photograph and the rights of the person photographed, see: Knoll, *supra nota* 3, p. 2; Georgiades, *supra nota* 147, pp. 291-296.

In advertising, images are used to send attractive messages in order to entice consumers to purchase goods or services offered by the advertiser; however, these images are often digitally retouched to further enhance their appeal.<sup>173</sup> Problems may arise where these photos contain an image of a model who does not exercise direct control over the dissemination of the photograph to the public and later objects to the use of her image in the respective campaign. Here, problems pertaining to the use of one's personal image, typically invoked under privacy-rights provisions, may become an issue for both the influencer and the trader.<sup>174</sup> Such problems are foreseeable when an agreement between the respective parties has failed to sufficiently delegate rights and limitations to the use of the image - a problem which is likely common within an industry where it is assumed that one's image will be publicly disseminated as part of advertising.<sup>175</sup> The nature of influencer marketing entails the widespread sharing and availability of images on media platforms with significant reach, which makes the consideration of the image rights a vital necessity in influencer-trader agreements.<sup>176</sup> As mentioned, personal image rights constitute an element of the right to privacy, owing to its significance as a distinguishing feature of a person from their peers, the protection of which must be ensured.<sup>177</sup> The protection afforded to personal image, however, is argued to be poorly developed and unevenly applied by different countries, which further complicates its reliability as a basis for legal recourse.<sup>178</sup> This is exacerbated by influencer marketing on social media, which has created an environment where photos of individuals can be shared and taken without the owner's permission and thereby digitally modified and used for personal or commercial purposes.<sup>179</sup> The ability to freely share images fosters confusion amongst private users, influencers and traders as to their respective rights and obligations, thereby creating an environment where copyright infringements become frequent

---

<sup>173</sup> Knoll, *supra nota* 3, pp. 1, 10.

<sup>174</sup> The concept of "private life" under Article 8 ECHR is markedly broad in definition and is said to encompass multiple facets of a person's identity, including elements relating to their personal image. See: Council of Europe. (2022, August 31). *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. European Court of Human Rights., p. 48.

<sup>175</sup> Knoll, *supra nota* 3, p. 10.

<sup>176</sup> Tao (2017) highlights the importance of personal image permission in user-generated content on social media sites, given that they can easily be taken and shared without authorisation. See: Tao, E.J. (2017). A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media. *Indiana Journal of Global Legal Studies*, 24(2), 617-636, pp. 630, 633.

<sup>177</sup> Council of Europe. (2022, August 31). *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence*. European Court of Human Rights., p. 49; Knoll, *supra nota* 3, p. 3.

<sup>178</sup> Knoll, *ibid.*, p. 1; Georgiades, *supra nota* 147.

<sup>179</sup> Georgiades, *ibid.*, p. 277; Komkova, G., Amelin, R., Kulikova, S. (2020). Legal Protection of Personal Image in Digital Relations: Leading Trends. *Advances in Social Science, Education and Humanities Research*, 441: *Proceedings of the 6th International Conference on Social economic, and academic leadership (ICSEAL -6 - 2019)*, 382-390, p. 384.

due to legal uncertainty and poor awareness.<sup>180</sup> Copyright allows authors to exclusively create, reproduce, publicly share, and economically benefit from their original works and at the same time protect that work from infringement.<sup>181</sup> The scope of protection differs nationally but copyright is recognised under various international treaties, harmonised at EU level under various Directives and, most importantly, is afforded equivalent protection in online media.<sup>182</sup> However, the assignment of these rights are complicated by the number of actors involved in the sharing of images, particularly in a commercial context. Commercial messages on social media may be authored by the subject of the photo themselves which, under traditional intellectual property rights (IPR), implies that the copyright inherent in the photo belongs to this subject.<sup>183</sup> Conversely, in traditional advertising the brand is typically responsible for sourcing photographers to shoot commercial campaigns and it may therefore be assumed that the brand retains the copyright on those photographs and is free to use and disseminate them as they please.

Irrespective of the ownership assignment issues, where an influencer objects to use of their image, the question arises as to whether they may invoke personal image rights to establish an infringement. In principle, the autonomous right to one's image affords the person whose appearance is represented in a photograph the ability to independently determine what happens to that photo.<sup>184</sup> However, when the conflict involves copyrighted material, the authorship and ownership of which is contested, it complicates the ability to rely on personal image violations as a basis for legal recourse. In the case of influencer marketing whereby the influencer, the trader, and consumers are the affected parties, balance must be struck between their respective rights.

As a theoretical example in the context of a prospective photoshop law, a situation may arise whereby an influencer shares a retouch-free image representing a brand, which is then retouched by the brand without the influencer's knowledge and posted without attaching the mandatory disclaimer. Consequently, the brand would be sanctioned; however, the brand's actions may

---

<sup>180</sup> Kyryliuk, A., Lysenko, V., & Podolieva, A. (2020). Bloggers, copyrights and some other legal issues. *Ius Humani: Revista de Derecho*, 9(2), 421-446, p. 424.

<sup>181</sup> *Ibid.*, p. 426; Tao, *supra nota* 176, p. 620; Knoll, *supra nota* 3, p. 3.

<sup>182</sup> The Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights are both international treaties governing copyright protection. See: Tao, *supra nota* 176, p. 622; As regards copyright applicability to digital media, Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society compels MSs to "provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them". See: OJ L 167, 22.6.2001, p. 16.

<sup>183</sup> Knoll, *supra nota* 3, p. 2.

<sup>184</sup> Komkova et al., *supra nota* 179, p. 382; de Diego, M.S. (2018). Right to One's Own Image in Spain: What it Is and What it Is Not. *Journal of Information Policy*, 8, 401-416, p. 405.

make the influencer look bad in the eyes of the public thus undermining the influencer's reputation and trustworthiness. As it is understood in theory that a photographer's copyright liberties are limited to the extent that their photograph contains an image of another person, the influencer may try to invoke personal image rights as a method to object to these practices.<sup>185</sup> However, in practice, this is much more difficult to execute, as a number of considerations are at play in the influencer-trader relationship, which will ultimately impact the enforceability of such claims. The first obstacle is the fact that protection of personal images differs on the national level and is not provided for separately in international legal provisions but is invoked under privacy rights.<sup>186</sup> This fragmentation makes its applicability and enforceability uncertain and unreliable for prospective victims. Some countries have provided for the right under their respective Constitutions or under specific legislation, whilst others rely on rights to privacy and IPR to protect image.<sup>187</sup> In Spain, for instance, the right to one's image is specifically provided as an autonomous fundamental right under the Constitution and is also afforded civil protection.<sup>188</sup> Irrespective of its constitutional and civil status, as with all rights, this protection can be limited insofar as other fundamental rights are at stake. Typically, a prerequisite for the lawful publication of a third party's image is their express consent; however, public figures, for instance, who are photographed in public places cannot rely on the right to image to prevent its capture or publication.<sup>189</sup> A similar finding was made in the UK in favour of upholding the right to freedom of expression in the context of free press, whereby the court ruled that images must be of private nature to warrant protection.<sup>190</sup> The importance placed on public interest in freedom of press outweighed the complainant's interest in protecting her personal image, as the photographed activities were of a public nature.<sup>191</sup> Similarly, under the ECHR, image rights can be protected under Article 8 but are limited where the right must be balanced against freedom of expression. The publication of photos relating to intimate aspects of an individual's life is indeed typically considered a legitimate aim for the purpose of applying Article 8; however, in the context of the hypothetical influencer-trader dispute presented above, photos taken for

---

<sup>185</sup> Knoll, *supra nota* 3, p. 3.

<sup>186</sup> *Ibid.*, pp. 3-4.

<sup>187</sup> *Ibid.*, p. 4.

<sup>188</sup> *Ibid.*; Under Spanish organic law LO 1/1982, acknowledging its relevance in the Constitution, right to image is granted civil protection against arbitrary interference. See: Knoll, *supra nota* 3, p. 4; de Diego, *supra nota* 184, p. 403, 405.

<sup>189</sup> Knoll, *ibid.*

<sup>190</sup> *Campbell v. MGN Ltd* [2004] UKHL 22, [122] referenced in Georgiades, *supra nota* 147, p. 301.

<sup>191</sup> Georgiades, *ibid.*, p. 313.

commercial purposes cannot be regarded as intimate or private in nature.<sup>192</sup> Irrespective of whether the influencer posted and took the commercial photo themselves, or it was taken by the brand and the influencer merely posed for it, the photo was clearly intended for commercial purposes - a fact that likely cannot be successfully contested by the influencer. Where an agreement exists between a trader and an influencer for the latter to endorse the former's products on social media, the influencer is likely to have relinquished their rights to be photographed or to have photographs of their image shared. In light of the foregoing, based on ECtHR case law, the trader may rely on its right to freedom of expression to retaliate influencers' claims to personal image as part of the former's right to impart information, even for commercial purposes.<sup>193</sup> Further, a trader may invoke copyright protections vested in the images insofar as they were not authored, or their ownership retained, by the influencer. The trader's ownership of the image would effectively prevent the image subject from controlling or opposing its reproduction and publication.<sup>194</sup> The trader's copyrights, the protection afforded to freedom of expression, and the fact that the images of the influencer are unlikely to be private in nature, suggest that the influencer would be unsuccessful in their endeavour to object to a brand's resharing of their image.

On the contrary, if the influencer did take the photo and did not transfer ownership rights, it is possible they may rely on copyright claims as, evidently, freedom of expression is afforded considerable protection but may be limited by invoking IPR.<sup>195</sup> It has been established that online communications, such as blogs featuring original photographs, are subject to copyright protection; however, where these pages are commercial in nature the distinction becomes ambiguous.<sup>196</sup> Essentially, the influencer's ability to rely on copyright infringement claims rests on the terms of the agreement between the influencer and the trader.<sup>197</sup> It is therefore crucial that

---

<sup>192</sup> On the balance of rights and the protection of the reputation of others, see: Council of Europe. (2022, August 31). *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression*. European Court of Human Rights, p. 28.

<sup>193</sup> For instance, the ECtHR found that the unlawful for-profit activities of the applicants were part of their right to "impart and receive information" under Article 10 of the ECHR. See: *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013 referenced in *ibid.*, p. 28.

<sup>194</sup> Georgiades, *supra nota* 147, pp. 292-296.

<sup>195</sup> In *Neij and Sunde Kolmisoppi v. Sweden* (dec.) although the Court found that the applicants' activities were within their rights under Article 10, these rights were subsequently balanced against IPR and the Court ruled that the Swedish authorities had acted within their rights and obligations pursuant to the respective Copyright Act. See: Council of Europe. (2022, August 31). *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression*. European Court of Human Rights, p. 28.

<sup>196</sup> Kyryliuk et al., *supra nota* 180, pp. 430, 432.

<sup>197</sup> *Influencer Content Rights and Usage in 2021*. (2021, January 4). One Roof Social.

copyright terms are appropriately agreed and assigned under an enforceable contract, as otherwise an influencer has very little redress against the use of their image.<sup>198</sup>

The preceding considerations demonstrate the weak enforceability of personal image rights when balanced against freedom of expression, public interest, and IPR, which are all at stake in the hypothetical influencer-trader relationship presented above. Personal image rights are largely ignored in practice, which is a concern exacerbated by the rapid development of the internet and digital capabilities allowing the unprecedented widespread dissemination of protected material.<sup>199</sup> As a result, influencers' images are increasingly vulnerable to dubious reproduction and scholars therefore argue that more attention must be given to developing personal image rights to provide subjects with a greater degree of control.<sup>200</sup> In the context of photoshop law, this may become a challenge for influencers in good faith where their original photos are taken, digitally modified, and subsequently shared by third parties.

Influencers and traders do not only have duties towards one another but also towards consumers, which must be similarly balanced against one another's rights, the complications of which are discussed in the following sub-chapter.

### **4.3. Consumer Protection under Unfair Commercial Practices Rules**

Covert advertising practices may deceive consumers and preclude them from making an informed purchase decision thereby negatively impacting their freedom of choice.<sup>201</sup> This is an example of the information asymmetry inherent in business-to-consumer relationships, whereby the consumer is in a weaker position in terms of knowledge and access to trustworthy information.<sup>202</sup> As such, both influencers and traders (collectively: advertisers) have an obligation to consumers to ensure their commercial activities do not undermine general public interests. In consideration of the emphasis placed on proportionality under EU principles and the

---

<sup>198</sup> Georgiades, *supra nota* 147, pp. 316-318; Alternatively, Knoll (2020) suggests that individuals who rely on their image in their professional activities, such as models, should be provided with certain terms in modelling contracts in order to establish comprehensive protection of their personal image. See: Knoll, *supra nota* 3, p. 12.

<sup>199</sup> Georgiades, *supra nota* 147, p. 313; Knoll, *supra nota* 3, p. 11.

<sup>200</sup> For example, see: Georgiades, *supra nota* 147; Knoll, *supra nota* 3; de Diego, *supra nota* 184.

<sup>201</sup> Reale, *supra nota* 89, p. 5; See also: Recitals 14 and 16 of the UCPD, OJ L 149, 11.6.2005, pp. 24, 25.

<sup>202</sup> In practice, the existence of knowledge asymmetry between traders and consumers is widely acknowledged in regards to consumer protection. For instance, in appraisal of the protection afforded by the EU's Unfair Contract Terms Directive, the ECJ has frequently reiterated the Directive's purpose of ensuring consumers' protection against traders who may abuse their power "...based on the idea that the consumer is in a weak position vis-à-vis the seller..., as regards both his bargaining power and his level of knowledge", see: Beckers, *supra nota* 104, p. 484.

ECtHR, it can be argued that a disclaimer requirement would hardly infringe advertisers' rights to free commercial speech.<sup>203</sup> Advertisers would remain free to digitally modify their images, the only difference made to their commercial communications would be the arguably minor obligation of including a disclaimer. Moreover, the purpose of the disclaimer requirement is not to restrict advertisers' rights to free commercial speech by arbitrarily compelling them to disclose their typically private photo-perfecting practices but is rather to pursue the legitimate aims of protecting public health interests and the rights and freedoms of others. In the assessment of public health-related interferences, the ECtHR has previously taken into account the existence of any Europe-wide consensus as to the need for certain regulation.<sup>204</sup> This is an important consideration in the context of the EU's prospective adoption of a photoshop law as, if the ECtHR was to establish that EU countries were generally in agreement that the implementation was necessary for public health reasons, the restriction may pass the proportionality test. For instance, the ECtHR, ruled against the right to freedom of expression in favour of the implementation of stricter regulation on tobacco advertising for public health reasons, the regulation of which was endorsed by the European Union.<sup>205</sup> Another element deemed significant in the balance of these rights is the vulnerability of the audience exposed to the contested speech, particularly where the communications are not targeted but are available to any and all members of the public.<sup>206</sup> The ECtHR has found that the interference with the right to free expression was justified on the grounds that young people were the primary audience of the magazine at issue and the communication therein may therefore attract and encourage young people to consume tobacco products.<sup>207</sup> Moreover, due to the existence of a general consensus as to the public health risks associated with smoking, the mere fact that the communications were considered "capable of" inciting such interest amongst young people was sufficient to warrant a restriction.<sup>208</sup> This is particularly relevant to the applicability of photoshop law to influencer marketing, given that a large fraction of social media users may be considered "young people"; to illustrate, recent statistics reveal that almost 40% of Instagram users are between the ages of 13 to 24 and almost

---

<sup>203</sup> Identical to the EU's principle of proportionality, the ECtHR asserts that in order to satisfy the proportionality requirement, "there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned." See: *Glor v. Switzerland*, no. 13444/04, §94, ECHR 2009 referenced in Council of Europe. (2022, August 31). *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression*. European Court of Human Rights, p. 24.

<sup>204</sup> *Ibid.*, pp. 101-102.

<sup>205</sup> See: *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, §56, 5 March 2009 referenced in *ibid.*, pp. 101, 102.

<sup>206</sup> *Kaos GL v. Turkey*, no. 4982/07, §§61 and 63, 22 November 2016 referenced in Council of Europe. (2022, August 31). *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression*. European Court of Human Rights, pp. 104-105.

<sup>207</sup> *Société de conception de presse et d'édition and Ponson v. France*, §§58-60 referenced in *ibid.*, p. 105.

<sup>208</sup> *Société de conception de presse et d'édition et Ponson v. France*, no. 26935/05, 5 March 2009.

half of TikTok users are under 30 years old.<sup>209</sup> Given the abundance of influencer marketing communications on these platforms, the high numbers of young users should have significant implications for the way commercial messages are communicated on these platforms. In light of the foregoing and the ECtHR's earlier findings, the enforcement of a photoshop disclaimer requirement under advertising regulation is unlikely to amount to a disproportionate restriction on freedom of expression relative to the need for protection of consumer health.

The issue of liability as regards influencer marketing and on to whom the responsibility falls poses additional contemporary challenges unforeseen by legislation targeting traditional advertising. Current EU legislation does not make explicit reference to influencer marketing as such; however, it has been established that existing horizontal rules for consumer protection apply correspondingly to influencers' commercial activities.<sup>210</sup> The UCPD, for instance, is heavily relied on to regulate influencers' activities due to its coverage of unfair advertising, which applies in a general manner to commercial communications, seemingly on any medium.<sup>211</sup> The recent Digital Services Act<sup>212</sup> (DSA) introduces obligations for platforms, on which traders and influencers operate, to ensure more transparency in their activities.<sup>213</sup> A relevant feature of the DSA is its applicability to "illegal content", which is broadly defined in the legislation and may be understood as applying to any content in breach of specific EU or national laws.<sup>214</sup> This implies that if the EU were to introduce a photoshop provision mandating the use of disclaimer labels, failure of the advertisers to comply with this requirement could render the content illegal for the purpose of the DSA. Establishing liability for this illegal content, however, remains challenging under the DSA, which has further complicated the matter by introducing stringent duties for platforms, some of which may overlap with traders' and influencers' obligations.<sup>215</sup>

Given the novelty of the DSA, it remains to be seen how these obligations will be appropriately assigned - in the current context, the UCPD may be more appropriate to assess traders' and

---

<sup>209</sup> McLachlan, S. (2022, March 24). *Instagram Demographics in 2023: Most Important User Stats for Marketers*. Hootsuite; *Instagram Age Demographics*. (2023). Oberlo; Shepherd, J. (2023, April 13). *20 Essential TikTok Statistics You Need to Know in 2023*. The Social Shepherd; Howarth, J. (2023, January 13). *TikTok User Age, Gender, & Demographics (2023)*. Exploding Topics.

<sup>210</sup> Michaelsen et al., *supra nota* 70, pp. 62, 92.

<sup>211</sup> *Ibid.*, pp. 63, 92; Riefa et al., *supra nota* 96, p. 7; Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. (OJ C 526, 29.12.2021, p. 1-129), pp. 27, 98.

<sup>212</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1-102).

<sup>213</sup> Michaelsen et al., *supra nota* 70, p. 68.

<sup>214</sup> *Ibid.*, p. 69; Article 3(h) of OJ L 277, 27.10.2022, p. 42.

<sup>215</sup> As the intermediary on which traders and influencers operate, platforms may have obligations to consumers and duties to oversee the lawfulness of these users' activities. *Ibid.*, p. 68.

influencers' respective obligations. The UCPD was initially developed to regulate traditional advertising where the commercial communication is delivered by the seller directly to the consumer. Influencer marketing, however, utilises a third party to make the communication to the public, thereby unsettling the traditional trader-consumer relationship regulated under the UCPD.<sup>216</sup> Since influencers operate as individuals on their own platforms and post sponsored content alongside their personal content, they may qualify as consumers in instances where they are not reimbursed by brands for the endorsement of their products.<sup>217</sup> To fall subject to the UCPD's requirements, the influencer must be regarded as a trader or "acting in the name of or on behalf of a trader", which is the case where an agreement exists under which the influencer has undertaken to promote the trader's products on their media.<sup>218</sup> The EC has confirmed that a brand could be faulted for not taking the necessary steps to ensure its affiliates' compliance with consumer law, such as ensuring transparency in communications and educating influencers on their obligations.<sup>219</sup> Establishing whether liability is assigned to the brand or to the influencer is established on a case-by-case basis and depends on the circumstances of the violation. The brand's editorial control over the influencer's post is a factor that may be taken into consideration upon such deliberation, thus implying that if the brand is involved in the creation of the content, it cannot then claim that it was uninvolved in the production process to avoid liability.<sup>220</sup> In light of the foregoing, in the context of a photoshop law, it would be advisable for brands to require their approval of influencers' commercial content as well as the latter's disclosure to the brand as to whether the image has been retouched. That way, brands can play an active role in reminding influencers of their transparency obligations as well as avoid liability for failing to sufficiently modulate their affiliates' commercial practices.

Finally, critics may reasonably argue that regulating modelling and influencer practices under advertising regulation is a fundamentally basic approach that only addresses one concern and ignores the complex reality of elements comprising problematic sociocultural constructions.<sup>221</sup>

---

<sup>216</sup> Riefa et al., *supra nota* 96, p. 4; Trzaskowski, J. (2018). Identifying the Commercial Nature of 'Influencer Marketing' on the Internet. *Scandinavian Studies in Law*, 65, 81-100, p. 83.

<sup>217</sup> Riefa et al., *ibid.*, p. 5; Trzaskowski (2018), *ibid.*, p. 84.

<sup>218</sup> Article 2(b) of OJ L 149, 11.6.2005, p. 26; OJ C 526, 29.12.2021, p. 98; Trzaskowski (2018), *ibid.*, p. 86; For a non-exhaustive list of the criteria that may be considered in qualifying an influencer as a trader, see: Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. (OJ C 526, 29.12.2021), p. 27.

<sup>219</sup> See: Norwegian Market Council, MR-2021-349: Sport Nutrition AS referenced in OJ C 526, 29.12.2021, p. 99.

<sup>220</sup> OJ C 526, 29.12.2021, p. 98.

<sup>221</sup> Multiple elements of sociocultural constructions concerning thinness are at play in the development of body image issues and EDs; thus, it must be considered that purely targeting harmful advertising practices through photoshop laws may fail to fulfil their intended objective. Essentially, the fact that the modelling and influencer industry is not the only industry whereby significant importance is placed around women's physical appearance

McBride et al. (2019) assert that regulating the advertising industry to curtail negative health effects of commercial communications must be appropriately substantiated and weak evidence of negative health consequences is unlikely to “pass [legal] scrutiny”, given that the health risk may be considered too far-reaching.<sup>222</sup> On the contrary, it may be argued that a legislative approach will naturally have to tackle the issue from one angle at a time. An analogy introduced by Bildfell (2018) considers the evolution of social changes observed in the 1980/90s when stricter smoking regulations, including restrictions on advertising, were introduced and initially scrutinised but eventually gained social acceptance.<sup>223</sup> As such, Bildfell suggests that a similar legal approach to combat EDs may be warranted.<sup>224</sup> Indeed, the reason behind the adoption of restrictions on tobacco advertising was scientifically-backed by the causal link established between smoking and cancer, whereas the media cannot be elected as a primary cause for EDs.<sup>225</sup> Thus, regulating media, which can only be considered a contributing factor, to combat EDs may be deemed a futile pursuit; however, following that line of reasoning, it could also be argued that legislating just one causal factor of cancer is not worthwhile, since there are a plethora of other factors also contributing to its development. Such a proposal should not be abandoned simply because it will fail to entirely eradicate EDs on account of its narrow approach. Ultimately, implementing anti-ED legislation through advertising regulation is just one possible avenue to consider and, most importantly, it does not entail the preclusion of future supplementary initiatives.

---

should not be overlooked; for instance, flight attendants, saleswomen, ballerinas, inter alia, are all held to a high standard of beauty in order to be employable in their respective sector. Hildesheimer et al., *supra nota* 7, pp. 109-110, 128-129; See also: Bildfell, *supra nota* 10, p. 64; Rodgers et al. argue that disclaimer label requirements still allow for photos to be modified to an unrealistic degree and thus fails to adequately target the underlying issue nor encourage systemic change of body idealisations. See: Rodgers et al., *supra nota* 16, p. 7.

<sup>222</sup> McBride et al., *supra nota* 11.

<sup>223</sup> Bildfell, *supra nota* 10, p. 63.

<sup>224</sup> *Ibid.*, p. 64.

<sup>225</sup> *Ibid.*

## 5. RECOMMENDATIONS FOR FURTHER DEVELOPMENT AT EU LEVEL

In light of the preceding considerations, the current work returns to the original research question: how might advertising regulation aimed at promoting consumer protection be developed to consolidate the enforceability of “photoshop law” at EU level? The following chapter posits EU legislation regulating advertising practices as an avenue worth exploring for the possible adoption of an anti-photoshop provision. The Unfair Commercial Practices Directive is of particular interest due to its distinguished position in promoting consumer protection against harmful advertising practices and its capacity to be applied to communications in a variety of situations.<sup>226</sup>

### 5.1. Suitability of the Unfair Commercial Practices Directive

The content and scope of the UCPD must be assessed to determine its suitability for incorporating an anti-photoshop provision into its framework. To that end, it is necessary also to elucidate the increasing importance of regulating influencers, given that they are one of the major sources of marketing today. In traditional advertising, the company is responsible for production and execution of an advertisement and is therefore by default the party held responsible for any infringements thereof.<sup>227</sup> When marketing activities are outsourced, this control is somewhat relinquished, as the influencer is responsible for creating and disseminating the content. Naturally, this may also be limited to an extent where influencers may be contractually obliged to seek approval from the brand prior to publication of the content; however, where this is not the case brands may have limited control over what their affiliates distribute. Unregulated influencer communications have the potential to cause significant damage both to consumers and to brands’ reputation, as the former’s actions may reflect poorly on the brand which may then struggle to counteract the negative impact of the influencers’ actions.<sup>228</sup> Influencer marketing’s success is based on the trust built between the influencer and

---

<sup>226</sup> Beckers, *supra nota* 104, p. 782.

<sup>227</sup> Bentz, T.V., Veltri, C. (2020). The Indirect Regulation of Influencer Advertising. *Food and Drug Law Journal*, 75(2), 185-194, p. 185.

<sup>228</sup> As Reale (2019) posits, there exists also a need to protect brands from risks associated with a “controversial testimonial” or inappropriate content shared by public figures which, in the current context, includes influencers as well. See: Reale, *supra nota* 89, p. 6.

their large following, who faithfully take notice of recommendations and endorsements made by the influencer. Given the casual environment in which influencers' communications are made, followers are likely to pay less attention to hints indicating the commercial nature underlying the communication and may fail to distinguish between paid-for endorsements and genuine personal reviews.<sup>229</sup> Further, influencers' platforms often have considerable reach, which further necessitates regulatory intervention, as deception could be fostered on a large scale.<sup>230</sup> This puts influencers and the brands utilising them at a significant advantage, as they may exploit their channels by appealing to loyal followers who believe each communication to be an authentic reflection of the influencers' personal views.<sup>231</sup> As a result, the reliance on these channels' success leaves the practice susceptible to abuse, as advertisers may be less incentivised to be transparent in case it should have negative consequences for its business.<sup>232</sup>

Notably, given that brands often engage multiple influencers in their marketing strategies, some scholars have posited that regulatory intervention should target brands, rather than influencers, as enforcing advertising standards and requirements on brands could correct multiple influencers' activities.<sup>233</sup> Conveniently, as presented in the preceding chapter, the UCPD ensures the lawfulness of all commercial communications and can be applied to both the brand as well as the influencer. The UCPD's driving purpose, which is to ensure strong consumer protection by approximating MS' laws against commercial practices negatively impacting consumers' economic interests, allows considerable leeway for including various practices in the scope of the Directive.<sup>234</sup> The Directive maintains extensive application to an array of commercial practices not exhaustively set forth in the legislation but classified as unfair if they meet the prescribed criteria.<sup>235</sup> Moreover, practices that do not meet this criteria may still be caught by Annex I to the Directive, which lists practices deemed unfair in all circumstances, without the requirement of a circumstantial analysis.<sup>236</sup> Although the UCPD's wording allows flexible interpretation and can thus be applied to a variety of advertising practices, it is not without complications. It must be determined to what extent the photoshopping of commercial images can be considered unfair and how it can be reasonably provided for under the framework of the UCPD in line with its objectives and scope.

---

<sup>229</sup> *Ibid.*, p. 4;

<sup>230</sup> Bentz et al., *supra nota* 227, p. 186.

<sup>231</sup> Riefa et al., *supra nota* 96, p. 19.

<sup>232</sup> *Ibid.*

<sup>233</sup> Although Bentz et al. (2020) consider the regulation of influencer marketing in the context of the U.S., several of their notions can be applied in a general context to any legal system. See: Bentz et al, *supra nota* 227, p. 189.

<sup>234</sup> Article 1 of OJ L 149, 11.6.2005, p. 26.

<sup>235</sup> See: Article 5 of *ibid.*

<sup>236</sup> As provided by Recital 17 of *ibid.*, p. 25.

## 5.2. Proposal for an Amendment to the Unfair Commercial Practices Directive

### 5.2.1. Qualifying Hidden Photoshopping Under the Unfair Commercial Practices Directive

In terms of introducing an anti-photoshop provision into the UCPD's text, it must sufficiently cohere with the existing framework and fit within the limitations of its application. First, it must be acknowledged that the UCPD only applies where a consumers' economic interests are at stake<sup>237</sup>, thus in order for an anti-photoshop disclaimer to fit within the framework of the Directive, it must be linked to an economic objective. One could attempt to argue that use of photoshop in commercial images could be considered misleading insofar as it harms the financial interests of consumers.<sup>238</sup> Under Article 6 UCPD, misleading commercial practices are those that deceive, or are likely to deceive, consumers in relation to a number of elements listed in the Directive and lead the consumer to take a transactional decision they would otherwise not have.<sup>239</sup> The digital manipulation of a person's body in a commercial photograph does not deceive the consumer as such in terms of the existence or nature of the advertised product or its characteristics, thus the application of the 'misleading actions' constituents do not have much relevance in this context. Another avenue could be qualifying covert photo-editing as a misleading omission under Article 7, as this requires the disclosure of all "material information" necessary for a consumer to make a transactional decision.<sup>240</sup> In order to fall within the ambit of this provision, the fact that an image was retouched would have to constitute "material information" necessary for the consumer to make a fully-informed transactional decision. The concept of "material information" is not expressly defined; however, Article 7(5) UCPD provides that information requirements for commercial communications demanded under specific EU law shall be regarded as material.<sup>241</sup> Specifically, if the EU were to introduce a disclaimer requirement, it may constitute 'material information' for the purposes of the UCPD. Additionally, to establish an infringement, the economic connection must be established, i.e. it must be sufficiently demonstrated that the unfair commercial practice enticed the consumer to take a transactional decision they would not have in the absence of such an advertisement.<sup>242</sup> Notably, however, the EC has clarified that there need not be actual evidence of a distortion of

---

<sup>237</sup> OJ C 526, 29.12.2021, p. 6; Article 1 of OJ L 149, 11.6.2005, p. 26.

<sup>238</sup> In the context of influencers not disclosing the commercial nature of certain communications, Riefa et al. explore the possibility of capturing this practice under the provisions of the UCPD. See: Riefa et al., *supra nota* 96, p. 5

<sup>239</sup> Riefa et al., *supra nota* 96, p. 5; Article 6 of OJ L 149, 11.6.2005, p. 28.

<sup>240</sup> Riefa et al., *ibid.*, p. 6; Article 7 of OJ L 149, 11.6.2005, p. 28.

<sup>241</sup> OJ C 526, 29.12.2021, p. 50.

<sup>242</sup> Riefa et al., *supra nota* 96, p. 6; de Meese, T. (2014, December 19). *Unfair EU Commercial Practices over the Past Year - Overview of EU Court of Justice Case Law* [Client alert]. Crowell.

consumers' economic behaviour, but an assessment as to the theoretical impact on an average consumer, or "whether [the] practice was 'likely' (i.e. capable) to have such an impact", will suffice.<sup>243</sup> Based on the EC's interpretation, in the photoshop law context, the relevant authorities would need to investigate the specific circumstances and thereby determine the likelihood that the photoshopped image would lead to an ill-informed transactional decision. This test of 'likelihood' affords considerable leeway to assess the case without imposing an excessive burden on authorities to establish actual distortion. In the same vein, the concept of 'transactional decision' is understood broadly and refers not only to the act of buying the advertised product but also to any decision directly associated therewith. Specifically, even if the consumer does not purchase the product but is enticed by the advertisement to enter a shop, visit a website, or click on an advertisement link, etc, this may qualify as a 'transactional decision' and trigger the application of the UCPD.<sup>244</sup> This is very relevant in the context of photoshop law online, as influencers posting commercial messages may share links with their followers which, if clicked on, may represent a consumer's transactional decision; however, this is likely difficult to demonstrate in practice. The retouching of photos in commercial practices could be linked to consumers' health and their economic interests by, for instance, establishing that the health of consumers' is used as a selling point. However, it would be considerably challenging to establish whether it was the appearance of the photoshopped model that enticed the consumer to take a transactional decision or whether it was another element of the advertisement. Ultimately, this scenario is merely speculative and is based on the existence of a hypothetical anti-photoshop provision at EU-level and therefore cannot be relied on as a solution to the current work's question.

Similarly, the UCPD's general prohibition clause, which serves as a 'safety net'<sup>245</sup> to capture unfair practices that are not misleading, aggressive, nor caught under the blacklist, is unlikely to yield results. Firstly, the practice must be deemed 'contrary to the requirement of professional diligence'<sup>246</sup>, which may be ambiguous enough to argue that covert photoshopping of models' bodies is contrary to the principle of 'honest market practice' in advertising.<sup>247</sup> Given that sociocultural and industry standards have shaped the common practices seen in advertising, with

---

<sup>243</sup> OJ C 526, 29.12.2021, p. 32.

<sup>244</sup> Judgement of the Court (Sixth Chamber) of 19 December 2013, *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v. Autorità Garante della Concorrenza e del Mercato*, C-281/12, ECLI:EU:C:2013:859, para 36 referenced in de Meese, *supra nota* 242; OJ C 526, 29.12.2021, p. 32.

<sup>245</sup> OJ C 526, 29.12.2021, p. 37.

<sup>246</sup> Article 5(2) of OJ L 149, 11.6.2005, p. 27.

<sup>247</sup> 'Honest market practice' is a principle encompassed in the notion of 'professional diligence' under the UCPD and is considered key in the field of business. See: OJ C 526, 29.12.2021, p. 37.

digital retouching becoming the norm, it is unlikely to be deemed a violation of honest market practice as we currently know it.<sup>248</sup> Secondly, the provision requires that a connection between the practice and the consumer's economic behaviour with regard to the advertised product must once again be established which, as discussed above, would be considerably challenging. The general clause requires both criteria to be fulfilled and as neither serve as plausible bases for action against photoshopped commercial images, the general prohibition cannot be relied on for this purpose.

For these reasons, it is preferable to consider supplementing Annex I to the UCPD as a means to counter harmful photoshopping practices. Although the UCPD only applies where consumers' economic interests are at stake<sup>249</sup> and it expressly excludes from its scope EU and national laws on health-related matters, it should not be discounted that advertisements fostering negative body image may constitute misleading practices where they are related to economic interests.<sup>250</sup> The EC has clarified that national rules can protect both the health and economic interests of consumers and such rules would fall within the scope of the UCPD.<sup>251</sup> This suggests that the UCPD generally accommodates rules that outlaw practices contrary to other interests, such as health, insofar as that interest is directly related to the economic interest pursued. Further, nothing in the UCPD suggests that it precludes the possibility of adding health-related provisions under the Directive itself. Indeed, the UCPD blacklist contains several provisions which may be related to health concerns as well; for instance, the prohibition of displaying certification marks without authorisation<sup>252</sup>, creating the impression that a product can be legally sold when it cannot, or falsely claiming that a product is able to cure illnesses or other ailments.<sup>253</sup> This blacklist, provided under Annex I, comprises a list of commercial practices deemed unfair under all circumstances irrespective of any impact on consumers' transactional decisions.<sup>254</sup> Specifically, the facts of the case are irrelevant for finding a breach of the Directive when it is

---

<sup>248</sup> On use of photoshop in advertising: Karges, C., Ekern, J. (2016). *Prevalence of Photoshop in Marketing Materials*. Eating Disorder Hope.

<sup>249</sup> OJ C 526, 29.12.2021, p. 6; Article 1 of OJ L 149, 11.6.2005, p. 26.

<sup>250</sup> Wang, *supra nota* 96, p. 39.

<sup>251</sup> *Ibid.*, p. 38; "...national rules that aim to protect the economic interest of consumers, even if it is in conjunction with other interests, do fall within [the UCPD's] scope", see: OJ C 526, 29.12.2021, p. 7.

<sup>252</sup> Certification marks, or trust and quality marks, may indicate the safety or quality of various products and are therefore relied on by consumers to indicate that the products they are consuming are up to standard (*Certification Mark*. (2023). SendPulse.). As such, health-conscious consumers may rely on such certification marks to make their purchasing decisions, hence the relation to health-interests.

<sup>253</sup> See: Point 2, Point 9 and Point 17, respectively, of Annex I to the Unfair Commercial Practices Directive, OJ L 149, 11.6.2005, pp. 35-36.

<sup>254</sup> Michaelsen et al, *supra nota* 70, p. 64; Trzaskowski, J. (2011). User-generated marketing - legal implications when word-of-mouth goes viral. *International Journal of Law and Information Technology*, 19(4), 348-380, p. 353; Trzaskowski, J. (2018), *supra nota* 216, p. 85; de Meese, *supra nota* 242.

clear that an advertisement comprises one of the listed practices. As such, the blacklist under the UCPD offers an ideal framework in which to incorporate a limitation on an undesirable commercial practice.

### **5.2.2. Amendment to the Unfair Commercial Practices Directive**

Updating the blacklist of the UCPD has been acknowledged as a valuable method to address unregulated issues pertaining to emerging problematic commercial practices. Such a content-based adjustment would allow the UCPD to keep abreast of imminent issues and provide greater legal clarity to industry participants.<sup>255</sup> Accordingly, in the current context, the blacklist could be amended to include a prohibition against photoshopped advertisements that do not disclose that the image has been digitally retouched. This prohibition would fit within the framework of the UCPD and, in keeping with the conclusions under Chapter IV, disclaimer labels infringe the least on fundamental rights of all parties involved. To that end, this work proposes an amendment to the list under Annex I to the UCPD in the form of an added point under the ‘misleading commercial practices’ section. The new point may be inserted under Point 11 of Annex I and would follow the addition to the list of Point 11a made by Directive (EU) 2019/2161.<sup>256</sup>

Tentatively, the amendment to the list of Commercial Practices which are in All Circumstances Unfair under Annex I to the UCPD could be inserted and worded as follows:

‘11b. Displaying in an advertisement an image of a model whose physical appearance has been digitally altered by photo-editing software in order to narrow, thicken, or otherwise change the shape or size of the model’s body without disclosing this by means of a disclaimer label clearly legible to consumers through written text.’

Point 11b provides a transparency requirement distinct from but parallel to those in Points 11 and 11a.<sup>257</sup> The wording of the provision takes inspiration from the French, Norwegian and Israeli laws and seeks to be as specific as possible in terms of the modifications that must be disclosed in order to ensure that negligible enhancements to commercial photographs are not caught by the

---

<sup>255</sup> Riefa et al., *supra nota* 96, p. 19; European Commission. Behavioural Study on Advertising and Marketing Practices in Online Social Media: Final Report 2018, p. 93.

<sup>256</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7-28).

<sup>257</sup> See: Point 11 and Point 11a of Annex I under the Consolidated Version of OJ L 149, 11.6.2005.

prohibition. The provision, however, does not specify the exact wording the disclaimer label should assume, which allows the advertiser flexibility to adjust the wording as they see fit.

The addition of this item under the blacklist not only allows potentially harmful advertisements to be modulated as unfair commercial practices irrespective of the impact on consumers' transactional decisions, but it also harmonises the requirement at EU level.<sup>258</sup> This is significant as it ensures the requirement is equally applicable across the EU, and bridges the gap left open by national efforts that have little consequence for commercial practices in other EU countries. Ultimately, the provision would provide legal certainty for all parties involved without imposing undue burdens on advertisers subject to the requirement. These benefits thus complement the goal sought by the current research to develop a proposal for advancing EU regulation applying directly to businesses in their dealings with consumers to include coverage of harmful advertising that may have negative consequences on consumers' body image, without significantly infringing on the fundamental rights of any party concerned.

---

<sup>258</sup> On advantages of UCPD blacklist items: European Commission. Behavioural Study on Advertising and Marketing Practices in Online Social Media: Final Report 2018, pp, 47-48.

## CONCLUSION

The adoption of a photoshop law entails a number of considerations that must be carefully deliberated to ensure the development of a legally sound restriction that does not disproportionately infringe the rights of the advertising and modelling industry nor the general public. Accordingly, this thesis aimed to identify an optimal solution for adopting a photoshop law that fits into the framework of existing consumer protection legislation without disproportionately infringing the fundamental rights of all parties concerned.

The absence of a definitive causal link between media and EDs should not be relied on as a justification for neglecting EDs and failing to address the risk factors associated with their development, given the proven existence of a correlational link between media triggers and the development of EDs. Without sufficient oversight, the advertising industry will continue to push harmful ideations without consequence. The industry has consistently demonstrated its poor ability to sufficiently self-regulate or make any considerable impact on the beauty standards expected of models in the industry, despite certain initiatives taken by private companies. As such, the adoption of a legally enforceable mechanism is warranted to effect significant change. To avoid passing unsubstantiated legislation, it is of fundamental importance that the EU considers available research regarding existing measures and their efficacy. The contribution offered herein is a comprehensive overview of existing initiatives, which focuses on identifying their strengths and weaknesses with a view to using these as bases for a proposal to further develop EU law. To that end, it is recognised that research has frequently refuted the efficacy of disclaimer labels in improving individuals' body image; however, implications of various findings from niche studies suggest that disclaimer may prove useful in the digital age. In light of these inconclusive results, this thesis posits that the only way to accurately determine the success of using disclaimer labels will be to observe their use in practice over a substantial period of time, in order to allow research to effectively gauge their efficacy in an uncontrolled (i.e. non-experimental) environment. Irrespective of their ambiguous efficacy, disclaimer labels are likely to at least serve as an advantageous means to raise awareness amongst industry participants and consumers at large. Furthermore, in light of the principle of proportionality under EU law and the rationale behind the development of photoshop laws, the disclaimer label requirement is the preferable measure for adoption. The BMI value threshold required by various jurisdictions is invasive and alarmingly inaccurate, as well as potentially detrimental to models' health and their freedom of occupation. This thesis has also argued that the disclaimer label

requirement complies with the principle of proportionality and pursues a legitimate aim to the benefit of both the industry and the general public.

The findings of the main analysis herein indicate that, in accordance with the balance of fundamental rights, the State may lawfully compel advertisers on social media to make certain disclosures with the aim of protecting public interests, irrespective of the restriction on the advertisers' free commercial speech. The conclusions of the analysis also have implications for the way traders and influencers conduct business with one another, concerning the importance of addressing certain fundamental rights in trader-influencer agreements in order to ensure conflicts do not arise later. Influencers and models must be aware that their ability to rely on their personal image rights is restricted if specific limits are not provided for under a mutual agreement. Similarly, relying on claims to copyright must be sufficiently backed by an enforceable agreement wherein the retention, or transfer, of copyright is clearly assigned.

This thesis maintains that the implementation of a photoshop law at EU level is conceivable insofar as fundamental rights are taken into account and the law does not go beyond what is necessary to achieve the essential objectives. To that end, the original research question is revisited: how might advertising regulation aimed at promoting consumer protection be developed to consolidate the enforceability of "photoshop law" at EU level? As provided under Chapter 5, the EU's UCPD, governing commercial communications, is used as the legal basis in which to incorporate a photoshop law provision. The proposal posited under Chapter 5 follows the main analysis by building on the strengths of the French, Norwegian and Israeli photoshop laws as the bases for the essence of the proposed provision. The proposal comprises an additional point added to the blacklist under Annex I to the UCPD, which establishes a disclaimer requirement applicable to all commercial communications. An amendment under the UCPD's blacklist constitutes a minimum standard for EU MSs and therefore promotes harmonisation and legal certainty within the EU. Supplementing existing law with such an amendment is an ideal solution for lawmakers, as the proposed provision fits into an already well-established legal framework.

Ultimately, one cannot expect photoshop law to completely prevent the proliferation of EDs, just as stricter tobacco advertising regulations have not eradicated smoking entirely; however, the EU could lead as a forerunner in the successful development and implementation of such laws. Disclaimers may provide support in improving consumers' self-perceptions but are unlikely to

abolish all negative self-feelings. This should not be mistaken as failure to address the problem, but should be understood as the reasonable effect law can realistically be expected to have.

This work has contributed to the limited literature addressing the legal considerations associated with the development of photoshop law by providing a comprehensive analysis of the legal rights at issue. The current research has considered the plausibility of implementing photoshop law into EU legislation but there is a considerable need for further research. The focus hereunder was on finding a solution for implementing a photoshop law that applies to edited photographs, with consumer protection law being the sole focus. However, employment law would cover issues pertaining to the modelling industry's practices and be more geared towards finding a solution for the protection of models in the industry. Accordingly, future research could consider this matter from an occupational safety standpoint. Further, in light of platforms' stricter obligations under the DSA, the question of liability is further challenged, as some of the platforms' duties thereunder may overlap with those of the trader and the influencer. If undisclosed photoshopped images qualify as illegal content under the DSA, the platform may be obliged to ensure the swift removal of such content. In the absence of such an obligation on online platforms, it must be established how advertisers' obligations can be enforced to ensure the removal or rectification of their infringing content. As of current day, the EU's prospective adoption of a photoshop law is purely hypothetical; however, research could provide theories and proposals for prospective enforcement mechanisms for the purpose of developing this topic further.

# LIST OF REFERENCES

## Scientific articles

1. Abbadessa, G. (2018). Airbrushed: Photoshop's Harmful Effect on Girls and the Need for Legislative Controls on Advertising. *New England Law Review*, 53(1). <https://www.newenglrev.com/v53/airbrushed-photoshops-harmful-effecton-girls-and-the-need-for-legislativecontrols-on-advertising>
2. Beckers, A. (2017). The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms. *Common Market Law Review*, 54(2), 475-515. <https://heinonline.org/HOL/P?h=hein.kluwer/cmlr0054&i=479>
3. Bentz, T.V., Veltri, C. (2020). The Indirect Regulation of Influencer Advertising. *Food and Drug Law Journal*, 75(2), 185-194. <https://www.jstor.org/stable/27007729>
4. Bildfell, C. (2018). Legislating Away Illness: Examining Efforts to Curb the Development of Eating Disorders through Law. *Dalhousie Journal of Legal Studies*, 26, 37-78. [https://heinonline.org/HOL/Page?handle=hein.journals/dalhou26&div=6&g\\_sent=1&casa\\_token=MLCP8O0Dv48AAAAA:VuxcLzXiaQzfZcDqhTCIOAgHuSNap4og1dZvytQjkaIb4GjL\\_7ZvvHinxqo6Rq5EtOc99HYPiw&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/dalhou26&div=6&g_sent=1&casa_token=MLCP8O0Dv48AAAAA:VuxcLzXiaQzfZcDqhTCIOAgHuSNap4og1dZvytQjkaIb4GjL_7ZvvHinxqo6Rq5EtOc99HYPiw&collection=journals)
5. Bromberg, M., Cardaci, N. (2022). 'Feel[ing] Unpretty Too': Do Body Image Laws Measure up in the Post-COVID-19 World? *Journal of Law in Society*, 22(1), 94-116. <https://heinonline.org/HOL/P?h=hein.journals/jls22&i=102>
6. Bromberg, M., Halliwell, C. (2016). All About That Bass and Photoshopping a Model's Waist: Introducing Body Image Law. *The University of Notre Dame Australia Law Review*, 18(1), 1-19. <https://doi.org/https://doi.org/10.32613/undalr/2016.18.1.1>
7. Bromberg, M., Hay, M., Fitzgerald, T., de Freitas, C. (2019). "You Are Beautiful, No Matter What They Say": Applying An Evidence-Based Approach To Body Image Law. *Issues in Law & Medicine*, 34(2), 183-205. [https://heinonline.org/HOL/Page?handle=hein.journals/ilmed34&div=18&g\\_sent=1&casa\\_token=JnZC8t0YVf8AAAAA:ul8bivp0nfEdoi0Xf1Gq3MS6xw-ilF9n6rfKzKaQz0t](https://heinonline.org/HOL/Page?handle=hein.journals/ilmed34&div=18&g_sent=1&casa_token=JnZC8t0YVf8AAAAA:ul8bivp0nfEdoi0Xf1Gq3MS6xw-ilF9n6rfKzKaQz0t)
8. Cardaci, N., Bromberg, M., Luong, K. (2022). I'm a Celebrity, Don't Get Me Out of Here: How Law and Celebrity Advocacy Can Protect Young People from Miracle Weight Loss Products' Advertising on Social Media. *Hastings Journal of Gender and the Law*, 33(1), 29-58. [https://heinonline.org/HOL/Page?handle=hein.journals/haswo33&div=6&g\\_sent=1&casa\\_token=&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/haswo33&div=6&g_sent=1&casa_token=&collection=journals)
9. Cerchia, R.E., Piccolo, K. (2019). The Ethical Consumer and Codes of Ethics in the Fashion Industry. *Laws*, 8(4), 1-19. <https://doi.org/10.3390/laws8040023>
10. Culbert, K.M., Racine, S.E., Klump, K.L. (2015). Research Review: What we have learned about the causes of eating disorders - a synthesis of sociocultural, psychological,

- and biological research. *Journal of Child Psychology and Psychiatry*, 56(11), 1141-1164. <https://doi.org/10.1111/jcpp.12441>
11. Danthinne, E.S., Giorgianni, F.E., Rodgers, R.F. (2020). Labels to prevent the detrimental effects of media on body image: A systematic review and meta-analysis. *International Journal of Eating Disorders*, 53 (5), 647-661. <https://doi.org/10.1002/eat.23242>
  12. de Diego, M.S. (2018). Right to One's Own Image in Spain: What it Is and What it Is Not. *Journal of Information Policy*, 8, 401-416. <https://scholarlypublishingcollective.org/psup/information-policy/article/doi/10.5325/jinfopoli.8.2018.0401/314486/Right-to-One-s-Own-Image-in-Spain-What-It-Is-and>
  13. Georgiades, E. (2021). A Right That Should've Been: Protection of Personal Images on the Internet. *IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property*, 61(2), 275-327. <https://heinonline.org/HOL/Page?handle=hein.journals/idea61&collection=journals&id=289&startid=&end=341>
  14. Hildesheimer, G., Gur-Arie H. (2015). Just Modeling? The Modeling Industry, Eating Disorders, and the Law. *International Journal of Feminist Approaches to Bioethics*, 8(2), 103-138. <https://doi.org/10.3138/ijfab.8.2.103>
  15. Knoll, S.B. (2020). Photoshop & The (Virtual) Body of Models. *Laws*, 9(1), 1-14. <https://doi.org/10.3390/laws9010003>
  16. Krawitz, M. (2014). Beauty is only photoshop deep: legislating models' BMIs and photoshopping images. *Journal of Law and Medicine*, 21(4). [https://www.researchgate.net/publication/264463496\\_Beauty\\_is\\_only\\_photoshop\\_deep\\_1\\_egislating\\_models%27\\_BMIs\\_and\\_photoshopping\\_images](https://www.researchgate.net/publication/264463496_Beauty_is_only_photoshop_deep_1_egislating_models%27_BMIs_and_photoshopping_images)
  17. Kyrlyiuk, A., Lysenko, V., & Podolieva, A. (2020). Bloggers, copyrights and some other legal issues. *Ius Humani: Revista de Derecho*, 9(2), 421-446. [https://heinonline.org/HOL/Page?handle=hein.journals/iushum9&div=31&g\\_sent=1&cas\\_token=-SX0Wj-iMKwAAAAA:iAYgS-gUphvHEWvJ\\_Nm\\_iYyvpMEfpu-cVXtUewC9mOWU95vY2-bO19OAuz\\_B7eJ7J8X0aqB1pA&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/iushum9&div=31&g_sent=1&cas_token=-SX0Wj-iMKwAAAAA:iAYgS-gUphvHEWvJ_Nm_iYyvpMEfpu-cVXtUewC9mOWU95vY2-bO19OAuz_B7eJ7J8X0aqB1pA&collection=journals)
  18. Latzer, Y., Adatto, R., Neumark-Sztainer, D. (2022). Addressing eating disorders through legislation: The Israeli 'Models' Law' - process, enactment, and dilemma. *Dialogues in Health*, 1, 1-6. <https://doi.org/10.1016/j.dialog.2022.100001>
  19. McBride, C., Costello N., Ambwani, S., Wilhite, B., Austin, S.B. (2019). Digital Manipulation of Images of Models' Appearance in Advertising: Strategies for Action Through Law and Corporate Social Responsibility Incentives to Protect Public Health. *American Journal of Law & Medicine*, 45(1), 7-31. <https://doi.org/10.1177/0098858819849990>
  20. McComb, S.E., Mills, J.S. (2020). A systematic review on the effects of media disclaimers on young women's body image and mood. *Body Image*, 32, 34-52. <https://doi.org/10.1016/j.bodyim.2019.10.010>
  21. Mizrachi, M.P., Tal, A. (2022). Regulation for Promoting Sustainable, Fair and Circular Fashion. *Sustainability*, 14(1), 1-28. <https://www.mdpi.com/2071-1050/14/1/502>

22. O'Neil, A. (2014). A Call for Truth in Fashion Pages: What the Global Trend in Advertising Regulation Means for U.S. Beauty and Fashion Standards. *Indiana Journal of Global Legal Studies*, 21(2), 619-641. <https://doi.org/10.2979/indjglolegstu.21.2.619>
23. Paraskeva, N., Lewis-Smith, H., Diedrichs, P.C. (2016). Consumer opinion on social policy approaches to promoting positive body image: Airbrushed media images and disclaimer labels. *Journal of Health Psychology*, 22(2), 10, 164-175. Retrieved February 02, 2023, from [doi.org/10.1177/1359105315597052](https://doi.org/10.1177/1359105315597052)
24. Reale, M. (2019). Digital Market, Bloggers, and Trendsetters: The New World of Advertising Law. *Laws*, 8(3), 1-14. <https://doi.org/10.3390/laws8030021>
25. Riefa, C., Clausen, L. (2019). Towards fairness in digital influencers' marketing practices. *Journal of European Consumer and Market Law*, 8(2), 1-21. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3364251](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364251)
26. Rodgers, R.F., Laveway, K. (2021). Retouchée au Féminin: The Gendered Nature of the French Law Mandating Labeling of Digitally Modified Images. *Laws*, 10(3), 1-9. <https://doi.org/10.3390/laws10030062>
27. Schirmer, N.A., Schwaiger, M., Costello, J.P., Taylor, C.R. (2018). Consumer Response to Disclosures in Digitally Retouched Advertisements. *Journal of Public Policy & Marketing*, 37(1), 131-141. <https://doi.org/10.1509/jppm.16.188>
28. Semaan, R.W., Kocher, B., Gould S. (2018). How Well Will this Brand Work? The Ironic Impact of Advertising Disclosure of Body-Image Retouching on Brand Attitudes. *Psychology & Marketing*, 35 (10), 766-777. <https://doi.org/10.1002/mar.21133>
29. Szewczyk, J. (2014). Photoshop Law: Legislating Beauty in the Media and Fashion Industry. <http://dx.doi.org/10.2139/ssrn.3267772>
30. Taylor, C.R. Cho, Y.N., Anthony, C.M. Smith, D.B. (2018). Photoshopping of models in advertising: A review of the literature and future research agenda. *Journal of Global Fashion Marketing*, 9(4), 379-398. <https://doi.org/10.1080/20932685.2018.1511380>
31. Tao, E.J. (2017). A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media. *Indiana Journal of Global Legal Studies*, 24(2), 617-636. <https://www.repository.law.indiana.edu/ijgls/vol24/iss2/12/>
32. Tiggemann, M. (2022). Digital modification and body image on social media: Disclaimer labels, captions, hashtags, and comments. *Body Image*, 41, 172-180. <https://doi.org/10.1016/j.bodyim.2022.02.012>
33. Trzaskowski, J. (2011). User-generated marketing - legal implications when word-of-mouth goes viral. *International Journal of Law and Information Technology*, 19(4), 348-380. Retrieved March 09, 2023, from <https://doi.org/10.1093/ijlit/ear012>
34. Trzaskowski, J. (2018). Identifying the Commercial Nature of 'Influencer Marketing' on the Internet. *Scandinavian Studies in Law*, 65, 81-100. <https://scandinavianlaw.se/pdf/65-4.pdf>
35. Vandenbosch, L., Fardouly, J., Tiggemann, M. (2022). Social media and body image: Recent trends and future directions. *Current Opinion in Psychology*, 45, 1-6. <https://doi.org/10.1016/j.copsyc.2021.12.002>

36. Vermeir, I., Van de Sompel, D. (2014). Assessing the What is Beautiful is Good Stereotype and the Influence of Moderately Attractive and Less Attractive Models on Self-Perception, Ad Attitudes, and Purchase Intention of 8-13-Year-Old-Children. *Journal of Consumer Policy*, 37, 205-233. <https://doi.org/10.1007/s10603-013-9245-x>

### **EU and international legislation**

1. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-407. Retrieved from, [http://data.europa.eu/eli/treaty/char\\_2012/oj](http://data.europa.eu/eli/treaty/char_2012/oj)
2. Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, 26.10.2012, p. 47-390. Retrieved from, [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj)
3. Consolidated Version of the Treaty on European Union [2012] OJ C 326, 26.10.2012, p. 13-390. Retrieved from, [http://data.europa.eu/eli/treaty/teu\\_2012/oj](http://data.europa.eu/eli/treaty/teu_2012/oj)
4. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. (OJ L 167, 22.6.2001, p. 10-19). Retrieved from, <http://data.europa.eu/eli/dir/2001/29/oj>
5. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22-39). Retrieved from, <http://data.europa.eu/eli/dir/2005/29/oj>
6. Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7-28). Retrieved from, <http://data.europa.eu/eli/dir/2019/2161/oj>
7. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1-102) Retrieved from, <http://data.europa.eu/eli/reg/2022/2065/oj>

### **Other countries' legislation**

1. Article L2133-2, Chapter III, Title III, Book I, Part 2, Legislative Part of the Public Health Code (Amended by Order No 2016-462 of April 14, 2016 - art. 3 (DV)). Légifrance. Retrieved from, [https://www.legifrance.gouv.fr/codes/article\\_lc/LEGIARTI000032411563](https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032411563)
2. Article L7123-2-1, Subsection 2, Section 1 of Chapter III, Title II, Book I, Part 7, Legislative Part of the Labor Code (Created by Law No. 2016-41 of 26 January 2016 - art. 20). Légifrance. Retrieved from, [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006072050/LEGISCTA0](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA0)

[00006195973?init=true&page=1&query=L7123-2-1%2C&searchField=ALL&tab\\_selection=all&anchor=LEGIARTI000031918223#LEGIARTI000031918223](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072665/LEGISCTA000034586988?page=1&pageSize=10&query=R2133-4&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT&anchor=LEGIARTI000034587062#LEGIARTI000034587062)

3. Section 2, Chapter III, Title III, Book I, Part 2, Regulatory Part of the Public Health Code (Created by Decree No 2017-738 of 4 May 2017- art. 1). Légifrance. Retrieved from [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006072665/LEGISCTA000034586988?page=1&pageSize=10&query=R2133-4&searchField=ALL&searchType=ALL&tab\\_selection=all&typePagination=DEFAULT&anchor=LEGIARTI000034587062#LEGIARTI000034587062](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072665/LEGISCTA000034586988?page=1&pageSize=10&query=R2133-4&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT&anchor=LEGIARTI000034587062#LEGIARTI000034587062)
4. Decree No. 2017-738 of May 4, 2017 relating to photographs for commercial use of models whose bodily appearance has been modified. Légifrance. Retrieved from, <https://www.legifrance.gouv.fr/eli/decret/2017/5/4/AFSP1703011D/jo/texte>
5. Law No. 2004-575 of June 21, 2004 on confidence in the digital economy. Légifrance. Retrieved from, [https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164?init=true&page=1&query=2004-575&searchField=ALL&tab\\_selection=all](https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164?init=true&page=1&query=2004-575&searchField=ALL&tab_selection=all)
6. Lov om kontroll med markedsføring og avtalevilkår mv. (markedsføringloven). Retrieved from, [https://lovdata.no/dokument/NL/lov/2009-01-09-2#KAPITTEL\\_2](https://lovdata.no/dokument/NL/lov/2009-01-09-2#KAPITTEL_2)
7. Stortinget. Lovvedtak 146 (2020-2021) om endringer i markedsføringloven mv. (merking av retusjert reklame). Retrieved from, <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=84478>

#### Other court decisions

1. *Glor v. Switzerland*, no. 13444/04, §94, ECHR 2009. <https://hudoc.echr.coe.int/eng?i=001-92525>
2. Judgement of the Court (Sixth Chamber) of 19 December 2013, *Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v. Autorità Garante della Concorrenza e del Mercato*, C-281/12, ECLI:EU:C:2013:859. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ028>
3. Judgement of the Court (Fourth Chamber) of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0314>
4. *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013. <https://hudoc.echr.coe.int/eng?i=001-117513>
5. *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, 5 March 2009. <https://hudoc.echr.coe.int/eng?i=002-1615>

#### Other sources

1. Agnish, J. (n.d.). *Getty bans 'Photoshopped' images of models' body weight*. USA Today: News. Retrieved March 01, 2023, from

- <https://eu.usatoday.com/story/news/nation-now/2017/09/25/getty-bans-photoshopped-images-models-body-weight/702685001/>
2. *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance.* (2020). European Union Agency for Fundamental Rights. <https://fra.europa.eu/en/publication/2018/applying-charter-fundamental-rights-european-union-law-and-policymaking-national>
  3. ASA and CAP. The CAP Code: The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing. Retrieved January 31, 2023, from <https://www.asa.org.uk/codes-and-rulings/advertising-codes/non-broadcast-code.html>
  4. Cambridge Dictionary. (n.d.). Influencer. In Dictionary.Cambridge.org. Retrieved February 15, 2023, from <https://dictionary.cambridge.org/dictionary/english/influencer>
  5. *Certification Mark.* (2023). SendPulse. Retrieved April 25, 2023, from <https://sendpulse.com/support/glossary/certification-mark>
  6. Chiu, A. (2021, July 08). Why experts say Norway’s retouched photo law won’t help fight body image issues. *The Washington Post*. Retrieved September 15, 2022, from [https://www.washingtonpost.com/lifestyle/wellness/photo-edit-social-media-norway/2021/07/08/f30d59ca-df2c-11eb-ae31-6b7c5c34f0d6\\_story.html](https://www.washingtonpost.com/lifestyle/wellness/photo-edit-social-media-norway/2021/07/08/f30d59ca-df2c-11eb-ae31-6b7c5c34f0d6_story.html)
  7. *Code of Conduct.* (2022, April 08). Valamis [Knowledge Hub: Human Resources]. Retrieved March 23, 2023, from <https://www.valamis.com/hub/code-of-conduct>
  8. *Code of Ethics.* (n.d.). Betterteam [Human Resources: Tools and Samples]. Retrieved March 23, 2023, from <https://www.betterteam.com/code-of-ethics>
  9. Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. (OJ C 526, 29.12.2021, p. 1-129). Retrieved March 06, 2023, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC1229%2805%29>
  10. Council of Europe. (2022, August 31). *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence.* European Court of Human Rights. Retrieved February 03, 2023, from [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf)
  11. Council of Europe. (2022, August 31). *Guide on Article 10 of the European Convention on Human Rights: Freedom of expression.* European Court of Human Rights. Retrieved April 04, 2023, from [https://www.echr.coe.int/documents/guide\\_art\\_10\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_10_eng.pdf)
  12. de Meese, T. (2014, December 19). *Unfair EU Commercial Practices over the Past Year - Overview of EU Court of Justice Case Law* [Client alert]. Crowell. Retrieved November 2, 2022, from <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Unfair-EU-Commercial-Practices-over-the-Past-Year-Overview-of-EU-Court-of-Justice-Case-Law>
  13. *Division of competences within the European Union.* EUR-Lex. Retrieved September 28, 2022, from

- <https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html>
14. European Commission. Behavioural Study on Advertising and Marketing Practices in Online Social Media: Final Report 2018. Retrieved March 18, 2023, from [https://commission.europa.eu/publications/behavioural-study-advertising-and-marketing-practices-social-media\\_en](https://commission.europa.eu/publications/behavioural-study-advertising-and-marketing-practices-social-media_en)
  15. European Commission. (2020). Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. COM (2020) 825 final. Brussels, 15.12.2020. Retrieved March 24, 2023, from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>
  16. European Parliament. (2022). Parliamentary question - P-005594/2021 (ASW): Answer given by Ms Kyriakides on behalf of the European Commission. Retrieved February 23, 2023, from [https://www.europarl.europa.eu/doceo/document/P-9-2021-005594-ASW\\_EN.html#def5](https://www.europarl.europa.eu/doceo/document/P-9-2021-005594-ASW_EN.html#def5)
  17. McLachlan, S. (2022, March 24). *Instagram Demographics in 2023: Most Important User Stats for Marketers*. Hootsuite. Retrieved April 21, 2023, from <https://blog.hootsuite.com/instagram-demographics/>
  18. *Principle of proportionality*. EUR-Lex. Retrieved March 29, 2023, from <https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-proportionality.html>
  19. Ghimire, S. (2021, August 04). *What Is Norway's New Photo Retouching Law?* [Newsletter]. MakeUseOf. Retrieved February 01, 2023, from <https://www.makeuseof.com/what-is-norway-photo-retouching-law/>
  20. Grant, K. (2021, July 06). *Influencers react to Norway photo edit law: 'Welcome honesty' or a 'shortcut'?* BBC. Retrieved September 15, 2022, from <https://www.bbc.com/news/newsbeat-57721080>
  21. *Hiding Photoshop retouching will be illegal for brands and influencers, in Norway but not only*. (2021, July 16). Dress Ecode. Retrieved February 10, 2023, from <https://dress-ecode.com/en/2021/07/16/hiding-photoshop-retouching-will-be-illegal-for-brands-and-influencers-in-norway-but-not-only/>
  22. Howarth, J. (2023, January 13). *TikTok User Age, Gender, & Demographics (2023)*. Exploding Topics. Retrieved April 21, 2023, from <https://explodingtopics.com/blog/tiktok-demographics#tiktok-users-age>
  23. *Influencer Content Rights and Usage in 2021*. (2021, January 4). One Roof Social. Retrieved April 18, 2023, from <https://www.oneroofsocial.com/articles/influencer-content-rights-and-usage-in-2021>
  24. Karges, C., Ekern, J. (2016). *Prevalence of Photoshop in Marketing Materials*. Eating Disorder Hope. Retrieved April 25, 2023, from <https://www.eatingdisorderhope.com/blog/prevalence-photoshop-marketing-materials>
  25. Komkova, G., Amelin, R., Kulikova, S. (2020). Legal Protection of Personal Image in Digital Relations: Leading Trends. *Advances in Social Science, Education and Humanities Research, 441: Proceedings of the 6th International Conference on Social*

- economic, and academic leadership (ICSEAL -6 - 2019)*, 382-390. Retrieved February 10, 2023, from [10.2991/assehr.k.200526.056](https://www.asehr.k.200526.056)
26. Michaelsen, F., Collini, L. et al., 2022, *The impact of influencers on advertising and consumer protection in the Single Market*, Publication for the committee on Internal Market and Consumer Protection (IMCO), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. Retrieved March 09, 2023, from [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL\\_STU\(2022\)703350\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)
  27. *Instagram Age Demographics*. (2023). Oberlo. Retrieved April 21, 2023, from <https://www.oberlo.com/statistics/instagram-age-demographics>
  28. Our World in Data. Share of population with an eating disorder, 2019. Retrieved February 23, 2023, from <https://ourworldindata.org/grapher/share-with-an-eating-disorder?region=Europe>
  29. Shepherd, J. (2023, April 13). *20 Essential TikTok Statistics You Need to Know in 2023*. The Social Shepherd. Retrieved April 21, 2023, from <https://thesocialshepherd.com/blog/tiktok-statistics>
  30. Sieczkowski, C. (2012, April 11). *Supermodels Without Photoshop: Israel's 'Photoshop Law' Puts Focus On Digitally Altered Images [PHOTOS]*. International Business Times. Retrieved February 01, 2023, from <https://www.ibtimes.com/supermodels-without-photoshop-israels-photoshop-law-puts-focus-digitally-altered-images-photos>
  31. Strutner, S. (2017, September 27). *Getty Images Bans Retouched Photos That Change A Model's Body Shape*. HuffPost. Retrieved March 01, 2023, from [https://www.huffpost.com/entry/getty-images-retouch\\_n\\_59cbdecbe4b05063fe0e84c6](https://www.huffpost.com/entry/getty-images-retouch_n_59cbdecbe4b05063fe0e84c6)
  32. Sparks, I. (2015, March 19). *France rejects imposing a ban on skinny models...because it would discriminate against 'thin people in the workplace'*. Daily Mail. Retrieved March 20, 2023, from <https://www.dailymail.co.uk/news/article-3002734/France-rejects-imposing-ban-skinny-models-discriminate-against-people-workplace.html>
  33. U.K. National Health Service. (n.d.). *What is the body mass index (BMI)?*. Retrieved February 22, 2023, from <https://www.nhs.uk/common-health-questions/lifestyle/what-is-the-body-mass-index-bmi/>
  34. *Vogue bans too-skinny models from its pages*. (2012, May 04). The Sydney Morning Herald. Retrieved February 01, 2023, from <https://www.smh.com.au/lifestyle/fashion/vogue-bans-tooskinny-models-from-its-pages-20120504-1y2jx.html>
  35. Wang, S. (2019). *Markedsføringslovens vern av barn og unge mot barn og unge mot usunt kroppspress. Stenger EU-retten for Norges adgang til å vedta strengere regler? [Master's thesis, the University of Bergen]*. Bergen Open Research Archive. Retrieved September 15, 2023, from <https://bora.uib.no/bora-xmlui/handle/1956/20094>

36. World Health Organisation. (2010, May 06). *A healthy lifestyle - WHO recommendations*. Retrieved February 22, 2023, from <https://www.who.int/europe/news-room/fact-sheets/item/a-healthy-lifestyle---who-recommendations>

# APPENDICES

## Appendix 1. Non-exclusive licence

### A non-exclusive licence for reproduction and publication of a graduation thesis<sup>259</sup>

I, Philippa Anna Attrill,

1. Grant Tallinn University of Technology free licence (non-exclusive licence) for my thesis “Towards the Development of Photoshop Law and Its Enforceability within the European Union”,

supervised by Thomas Hoffmann,

1.1 to be reproduced for the purposes of preservation and electronic publication of the graduation thesis, incl. to be entered in the digital collection of the library of Tallinn University of Technology until expiry of the term of copyright;

1.2 to be published via the web of Tallinn University of Technology, incl. to be entered in the digital collection of the library of Tallinn University of Technology until expiry of the term of copyright.

2. I am aware that the author also retains the rights specified in clause 1 of the non-exclusive licence.

3. I confirm that granting the non-exclusive licence does not infringe other persons' intellectual property rights, the rights arising from the Personal Data Protection Act or rights arising from other legislation.

---

09.05.2023 \_\_\_\_\_ (date)

---

<sup>259</sup> *The non-exclusive licence is not valid during the validity of access restriction indicated in the student's application for restriction on access to the graduation thesis that has been signed by the school's dean, except in case of the university's right to reproduce the thesis for preservation purposes only. If a graduation thesis is based on the joint creative activity of two or more persons and the co-author(s) has/have not granted, by the set deadline, the student defending his/her graduation thesis consent to reproduce and publish the graduation thesis in compliance with clauses 1.1 and 1.2 of the non-exclusive licence, the non-exclusive license shall not be valid for the period.*