



Fake reviews on online platforms: perspectives from the US, UK and EU legislations

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Abstract

User-generated online reviews have become essential sources of information for potential consumers. Given the increasing importance of online reviews on consumer purchases, some traders try to publish or promote fake reviews on online platforms to improve the reputation of their goods or services, or to damage the reputation of their competitors. This paper aims (1) to analyse whether and how fake reviews violate the main legal and ethical principles of advertising, according to the legislations of the US, UK and EU as well as the International Advertising and Marketing Communications Code; (2) to assess how the EU, the UK and the US are dealing with them, and find out which approaches and actions are working best; and (3) to offer normative recommendations for effective prosecution of fake reviews. The paper uses a combination of theoretical and sociological approaches (section 1), black letter analysis of law (sections 2 and 3) and a comparative approach (sections 2 and 3). Among others, the article observes (1) that fake reviews are a form of illegal advertising and (2) that the European regulatory instruments provide more protection against fake reviews than the US and argues (3) that an effective fight against fake reviews requires strong administrative bodies, endowed with sufficient resources.

Keywords Fake reviews · Illegal advertising · Covert advertising · Astroturfing · Online platforms

Introduction

In 2018, the European Commission launched its attempt at reform in consumer protection, known as the New Deal, whose goal is to strengthen online consumer rights, adapting the legal framework to the technological and sociological changes that have

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occurred in recent years.¹ One of the main objectives of the New Deal is to reinforce the transparency of online marketplaces and digital platforms, which face challenges in different areas, such as ranking search results, the identity of contractual parties, and online rating and review systems.²

Over the last few years, online consumer reviews have increased both in prevalence and importance, becoming a decisive factor in shaping the reputation of goods and services. Online reputation has a considerable impact on the chances of success of products or services, as most consumers consult online reviews before entering into a contractual relationship. Therefore, there is no doubt that online reviews influence the decisions of potential purchasers.

Given the growing impact of online product reviews on consumer purchases, it is not surprising that some traders try to publish or promote fake reviews on digital platforms to improve the reputation of their own goods or services, or to denigrate the reputation of those of their competitors. Certainly, the more important reviews get, the bigger the temptation to manipulate them. Fake reviews have severe consequences in the marketplace because of the consumers' high reliance on the reviews. Indeed, this deception presents a particular social problem as an increasing number of consumer decisions are made in online environments, based on online reviews.

The proper functioning of online marketplaces requires the information to be truthful and offered to the consumers transparently. Fake reviews on digital platforms are one of the main challenges to Consumer Protection Law on the Internet, as they jeopardise this. Despite a growing attention to consumer rating systems and online fake reviews in the academic literature, legal research on the topic is still rare. Most scholars focus on contributing to the identification of counterfeit reviews, which often entails considering linguistic aspects of the reviews (Fiedler and Kissling 2020, p. 79). Hence, this paper aims to fill the gap in research by presenting a detailed analysis of the legal framework applicable to fake reviews, comparing law and enforcement practices in the US, EU and the UK. In particular, this study seeks to answer how do the laws in the US, EU and the UK respond to the problem of fake reviews. This study approaches it in four steps. First, the problems of fake reviews in online platforms and their seriousness are discussed. Second, illegality of fake reviews is assessed. Third, we compare enforcements by the US and European public bodies. Finally, this paper proposes some measures that can be adopted to increase efficiency of enforcement.

As the question of fake review demands interdisciplinary analysis, this paper uses multiple methodologies, combining theoretical and sociological approaches to identify and describe the problem of fake reviews in Sect. 1, based on selection of secondary sources from legal, technological and marketing literature on fake reviews.

¹ European Commission, 'A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement' (Press Release), 11.4.2018. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3041.

² These areas have been flagged as problematic in Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive (2017). European Commission, 23.5.2017. Available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

Black letter and comparative doctrinal analysis predominate in Sects. 2 and 3, as the sections require a systematic description of the legal treatment of fake reviews in different jurisdictions. In these sections, the article analyses the current regulations and their application by national authorities. Finally, Sect. 4 concludes with normative proposals *de lege ferenda* and for public policies, including some political discussions.

When presenting specific proceedings against fake reviews, the paper focuses on three European countries: the UK, Spain and Italy. The UK, which was a EU member state until February 2020, was chosen because it has one of the strongest regulatory boards with powers to combat fake reviews in Europe: the Competition and Markets Authority (CMA).³ On the other hand, Spain was chosen because it does not have a national regulatory body with powers to enforce advertising regulations and fake reviews are tackled by a plurality of regional bodies. Finally, the Italian case is compelling because Italy has made some of the first decisions against publishing fake reviews.

The paper proceeds as follows. In Sect. 1, an introduction to the phenomenon of fake reviews in online platforms is presented. In Sect. 2, the legality of fake reviews under the US and European law is discussed. Considering that fake reviews constitute a form of commercial communication, the legal analysis is structured following four widely accepted principles of advertising: authenticity, truthfulness, fair competition, and legality. The legal analysis is complemented by a reference to advertising self-regulation codes, which also contain relevant provisions for the purposes of this study. After reflecting on issues related to liability, cause of action, and competence, Sect. 3 presents different proceedings related to fake reviews followed in the US and three European countries, the UK, Italy, and Spain, offering an overview of the administrative and judicial avenues explored so far to punish fake reviews. Section 4 concludes by discussing the analysed proceedings and recommending some measures that public authorities and stakeholders can implement to deal with fake reviews more efficiently and to ensure transparency and fair competition in online market places.

Problems of online fake reviews and their seriousness

Most Internet platforms offer users the possibility of rating merchants, goods, and services. Consumer ratings can be expressed simply by means of a numerical value or through a narrative review describing the purchase and the user experience. Information, experiences, and opinions shared by users on the Internet generates a reputation that is highly valued by potential consumers since it may offer impartial feedback about the goods or services they are interested in (Hunt 2015, p. 6). New customers are more likely to trust other customers' reviews than information provided by the seller (Short 2013, p. 443). Reviews posted by previous customers are

³ Although the UK left the EU on 31 January 2020, its consumer protection regulations are derived from the main European directives on the subject.

considered an honest reflection of product quality, as opposed to a statement made directly by the trader who produces a particular product or service (Zhuang et al. 2018, p. 25). Moreover, this greater trust in user reviews also stems from the fact that they tend to convey a subjective or personal approach, explaining whether and how a product matches a specific individual's preference and usage condition, while the information offered by the seller typically focuses on product attribute information (Chen and Xie 2008, p. 480).

It is estimated that around 80% of users go to the agora of digital platforms to read online reviews and learn the general opinion of the product or service they intend to purchase (Kaitlin 2013, p. 364). Customer reviews contribute to reducing the information asymmetry that occurs many times in digital marketplaces, where the consumer often has no information about the seller, nor can personally examine the product or service before buying it (Malbon 2013, p. 149).⁴ As Narciso stresses (2019, p. 560), the increase in available online information on products and services is one of the most significant advantages of the platform economy.

Different platforms and digital marketplaces have diverse rating systems. In one system, the platform or webpage restricts the possibility of giving an opinion only to those people who have the experience that can be verified by the platform. This is the case, for example, of Airbnb or Uber. This rating system is the most reliable, since all the opinions that are collected come from the users who have personal experiences of the goods or services on which they comment (Short 2013, p. 468). Although this type of system does not entirely prevent fake reviews from being published, it does increase the cost of fake reviews since it is necessary to buy the product or hire the service before posting the review. In a second model, the system may allow any registered user to share their experience with a product or service. For instance, the travel webpage, TripAdvisor, which collects location reviews and a movie webpage of IMDb, which collects evaluations of audio-visual productions. This is more typical of platforms where the consumer cannot buy or rent the rated goods or services directly on the platform. The openness of these systems fosters participation and is optimal to gather many opinions, but it comes at the price of subtracting credibility from the digital reputation, given the fact that anyone can publish a review (Ranchordás 2018, p. 135).⁵ Finally, some platforms combine both models, admitting and distinguishing the evaluations of the verified users from those that are not. An example of a mixed system is Amazon, which distinguishes the standard evaluations from those with verified purchases.

Despite these differences, most rating systems have common features. The users can simply provide an evaluation (usually a score out of five) or write a comment. The traders can answer or report comments that affect their goods or services.

⁴ In any case, as Blasco warns (2018, p. 150), online rating systems are not as transparent as they seem and may not meet all the information needs of consumers.

⁵ In 2017, a journalist Oobah Butler proved the unreliability of these open rating systems by making his garden shed the top-rated restaurant in London in TripAdvisor, after he and his friends submitted fake reviews to the site. See Horton, H., 'Garden shed becomes top-rated London restaurant on TripAdvisor after site tricked by fake reviews,' *The Telegraph*, 6.12.2017. Available at: <https://www.telegraph.co.uk/news/2017/12/06/garden-becomes-top-rated-london-restaurant-TripAdvisor-site>.

Certain information about the person providing the opinion is disclosed and the users are offered the option of marking an evaluation as useful or valuable.

Research found that ratings and reviews correlate with sales ranks.⁶ Online reviews can make or break businesses (Barnes 2019, p. 553). This is no surprise, when we consider the trust that users place in the opinions and personal experiences of other consumers, which contrasts with a generalised scepticism regarding the information offered by the seller herself in her advertising or institutional communication.⁷ Noting the impact of digital reputation on sales, many traders have attempted to artificially influence the reviews about their products or those of their competitors (Uslay 2017, p. 345). A manipulation of reputation is done primarily through fake reviews, so-called ‘astroturfing’ or ‘opinion spam,’ which conceal a biased message from the seller himself or a competitor,⁸ instead of conveying the honest opinions of real consumers. Fake reviews could be either positive reviews favouring the sellers’ own goods or services, or negative reviews against competitors’ goods or services.

Fake reviews is defined here as “deceptive reviews provided with an intention to mislead consumers in their purchase decision making, often by reviewers with little or no actual experience with the products or services being reviewed” (Zhang 2016, p. 457). The definition, does not focus specifically on the content of the review, that is typically misleading or inaccurate, but in the deceptive intention of the reviewer, who, through an untruthful opinion, aims to promote or damage the targeted product’s reputation.

The definition allows us to differentiate fake reviews from other questionable commercial practices, such as influencer marketing, sponsored content, or so-called cherry-picking. In influencer marketing, the persons endorsing the product are someone who have built a solid following and are well-known for their online or offline

⁶ For instance, according to a recent study published by the European Commission, “compared to having no user reviews or ratings, a review in a prominent position on the website leads to a 200% increase in the probability of choosing the product. The same is found when the product receives the highest user rating. Information that the reviewers have been used the product increases the probability of choosing it by 40%”. Behavioural Study on the Transparency of Online Platforms, Executive Summary, European Commission, 2018, p. 6. Similarly, a report from the Spiegel Research Center offers revealing data about the correlation between reviews and sales. According to the report, for example, in certain platforms the purchase likelihood for a product with five reviews is 270% greater than the purchase likelihood of a product with no reviews, a figure that reaches 380% in products considered high-end. How Online Reviews Influence Sales?, Spiegel Research Center, Northwestern University, Chicago, 2017. Available at: <https://spiegel.medill.northwestern.edu>. In the same vein, it has been argued (Luka 2016) that an increase of one star on Yelp.com represents a correlative increase of between 5 and 9% in the establishment’s revenues. Similarly, it has been maintained (Anderson 2012) that an increase of one star on TripAdvisor can mean an increase of 11% in hotel reservation requests.

⁷ Fake reviews, like other forms of covert advertising, “are anchored on the premise that people are generally sceptical of any business-provided sources of information, so even random endorsements by strangers on the street might provide consumers with more persuasive sales messages.” Göbel (2017, p. 578).

⁸ An approach to the different ways of artificially modifying the digital reputation can be found in Malbon (2013, p. 146). In the US, one tactic used by some traders was to include non-disparagement clauses to prohibit negative reviews contractually. Such clauses prohibited only negative reviews or critiques about the merchant or the goods or services it provides. These clauses have been prohibited recently by the Consumer Review Fairness Act 2016. For a thorough analysis of this Act, see Myers (2020, 4 et seq).

activities (Riefa and Clausen 2019, p. 65). These influencers would rarely purchase the products they review but instead receive them for free from the advertisers or may even be paid to carry out the review. Fake reviewers, in contrast pretend to be anonymous users who have bought the products and neutrally transmit their personal opinions about them.

Sponsored content, which is sometimes referred as native advertising, can be defined as the purposeful integration of brands or branded persuasive messages into editorial media content, in exchange for compensation from a sponsor (Boerman and van Reijmersdal 2016, p. 117). Unlike fake reviews, in sponsored content, the promotional message is integrated into a traditional non-commercial content, such as a report, an opinion piece, or a post in a social network or a blog. To be legal, influencer marketing and sponsored content should disclose their commercial nature. When they fail to do so, they become illegal commercial practices with common characteristics with fake reviews.

So-called cherry-picking, which is sometimes referred as ‘review-gating,’ consists of selecting, collecting or publishing reviews, in order to present only the positive opinions about the products or services (Greenfield 2018). This can be done in many ways, like selecting those customers who are most likely to write glowing reviews and asking them, or offering them incentives, like cash, discounts or vouchers, to write reviews. Even if these reviews are published by real customers and, to some extent, are truthful, the picture they offer is misleading, as the trader is preventing or hiding neutral or negative reviews.

Except for the coarsest fake reviews, it is not easy to distinguish between genuine and fake reviews. After all, as Mayzlin et al. observe (2012, p. 4), promotional reviews are designed to mimic unbiased reviews. It goes without saying that covert manipulation of online reviews can be quite professional and sophisticated, almost impossible to detect for an average consumer (Zhuang et al. 2018, p. 25; Cardoso et al. 2018, p. 107).⁹ Moreover, fake reviews can be directly published by the sellers, but also by various other persons. Reviews can be published by the closely associated persons such as employees, friends or relatives, by a group of people in exchange for reward and payment,¹⁰ by other traders who exchange fake reviews for their own their goods or services, or by a communication agency, as part of a broader online positioning strategy (Maartens and Maalej 2019, pp. 8–14).¹¹ Fake reviews can also be produced and published by bots.

Although it is extremely difficult to quantify the real incidence of fake reviews, it is estimated that they range between 20 and 30% of the total reviews published excluding reviews directly filtered and rejected by platforms (Hunt 2015, p. 7,

⁹ Among the factors to distinguish honest and fraudulent reviews, there are those related to its content (language, grammatical coherence, use of superlatives) and those related to its context (identity and habits of the reviewer, date and time of publication, or popularity of the opinion). On the analysis of reviews’ content, one of the first studies is Ott et al. (2011). Concerning the context of the reviews, see Munzel (2016) or Martens and Maalej (2019).

¹⁰ He et al. (2021, 7 et seq) document the existence and nature of online markets for fake reviews.

¹¹ According to these authors, the usual price for a false evaluation can range between 0.20 and 10 dollars.

Kaitlin 2013, p. 365; Barish 2018, p. 833).¹² We are therefore faced with a widespread practice, with high potential for misinforming the users and distorting the competition in the market.¹³ Fake reviews are detrimental to consumers, because they influence surreptitiously the consumers' decision making by falsifying the digital reputation of products and services (Short 2013, pp. 448–450). Likewise, they are prejudicial to fair competition in the market. Positive fake reviews give the praised product unfair competitive advantages. In contrast, negative fake reviews hurl an inaccurate or false accusation at the competitor's goods or services (Cardoso et al. 2018, p. 106).¹⁴ Moreover, negative fake reviews potentially mislead competitors, who can make business decisions based on fraudulent opinions of fictitious customers, without knowing that such feedback is being manipulated by a competitor (Martens and Maalej 2019, p. 30).¹⁵ Fake reviews also harm the online platforms that host them, since they reduce the credibility of their rating systems and consequently, their business model (Narciso 2017, p. 4; Ranchordás 2018, p. 135; He 2021, p. 31). Thus, fake reviews can be detrimental to the development of e-commerce, leading to vicious cycles of consumer dissatisfaction and defamation among competitors (Barish 2018, p. 833). Finally, some authors highlight that even the positive fake reviews can be harmful, because eventually consumers' suspicions would-be aroused, to a detrimental effect on the trader's sales thereafter (Zhuang et al. 2018, p. 26).

The essentially fallacious nature of fake reviews and the harmful effects they generate lead to the conclusion that posting fake reviews on digital platforms should constitute illegal and unethical conduct. Next section discusses if and how fake reviews violate the main legal and ethical principles applicable to advertising.

¹² Despite the opacity of fake review detection systems, there is some doctrinal consensus (Martens and Maalej 2019, 21 et seq, Munzel, 2016, p. 97) that detection algorithms allow to identify around 90% of fraudulent evaluations. In September 2019, TripAdvisor published its first Review Transparency Report. According to it, only 2.1% of all review submissions were determined to be fraudulent, and the vast majority of those (73%) were blocked before they were ever posted. See *Review Transparency Report*, TripAdvisor, 2019, p6. Available at: <https://www.TripAdvisor.com/TripAdvisorInsights/w5144>.

¹³ An example of this distorting power of fake reviews was denounced by the British platform *Which?*. In April 2019, *Which?* published an investigation that demonstrated the existence of thousands of fake reviews on Amazon aimed at improving the positioning of technological products of little known and reliable brands. Some of the products had more than 500 comments, all of them positive and published on the same day. See Walsh, Hannah: 'Thousands of fake customer reviews found on popular tech categories on Amazon' *Which?* 04.04.2019. Available at: <https://www.which.co.uk/news/2019/04/thousands-of-fake-customer-reviews-found-on-popular-tech-categories-on-amazon>.

¹⁴ It is not uncommon that companies resort to fake reviews to defend themselves against other fake reviews of their competitors, thus creating a bubble of false evaluations that distorts the digital reputation of companies in a whole sector.

¹⁵ Dellarocas (2003, 1409) underlines the fact that online feedback can assist an organization to better understand consumer reactions to its current product line.

Are fake reviews illegal and unethical?

As noted above, the ultimate goal of fake reviews is to improve or worsen the market positioning of a product, in order to increase or decrease its sales by using the rating systems offered in digital Internet platforms. As fake reviews have commercial goals, they can be characterised as commercial communications,¹⁶ which are subject to advertising regulations (Barish 2018, p. 829).

In the last decades, various advertising regulations and self-regulation codes have evolved to manage and control commercial communications. These provisions promote four main principles that every advertisement must respect: authenticity, truthfulness, fair competition, and legality.¹⁷ The principles of authenticity and truthfulness primarily aim to protect consumers and fair competition refers to the respect due to competitors. Finally, the principle of legality aspires to protect public interests and certain fundamental rights in the field of advertising. Here, we analyse fake reviews in light of these four principles. Each principle as applied to fake review is discussed using European and American advertising legal frameworks and self-regulatory provisions contained in one of the most accepted codes of good practices worldwide, the Advertising and Marketing Communications Code of the International Chamber of Commerce (ICC).¹⁸

Fake reviews and the principle of authenticity

The principle of authenticity, also referred to as honesty, requires that advertisements are recognised as such by their audience. This principle guarantees that consumers, being aware of the persuasive and biased nature of the message, can interpret it correctly. The principle of authenticity thus discourages any form of advertising that seeks to hide its commercial nature, such as subliminal advertising, covert advertising, or indirect advertising.

¹⁶ Because of their commercial goal, Mayzlin et al. (2012) refer to fake reviews as “promotional reviews”.

¹⁷ On its website, the European Advertising Standards Alliance (EASA) states that the foundations of all Ad Standards Codes are based on the principles that: advertising is legal, decent, honest and truthful; ads are prepared with a due sense of social responsibility; ads conform to the principles of fair competition; and ads do not impair public confidence in advertising. Cf. <https://www.easa-alliance.org/ad-standards/what-are-ad-standards/codes>. The recent Proposal for a Directive of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM (2018) 185 final, focuses its attention in two of these principles: authenticity and truthfulness, which the proposal refers to as transparency.

¹⁸ In every country analysed in this paper there is a self-regulatory body of the advertising industry, which approve and apply widely accepted codes of conduct. In the UK, there is the Advertising Standards Authority, which applies CAP Code; in Spain, Autocontrol, with its Código de la Conducta Publicitaria; in Italy, the Istituto dell’Autodisciplina Pubblicitaria, which implements the Codice di Autodisciplina della Comunicazione Commerciale; and in the US, the Better Business Bureau, which applies the BBB Code of Advertising. To avoid excessive reiterations, we will not refer to them in the following sections, although all these codes contain specific provisions regarding the principles of legality, truthfulness, fair competition and authenticity.

Covert advertising is the most typical way of violating the principle of authenticity. The practice is sometimes referred to as surreptitious or native advertising and confuses the recipient either by the form or the presentation so that he does not know that he is receiving a message of a commercial nature. In this sense, it is an advertising in disguise, under the mask of different appearances such as a piece of news, a blog post, or a consumer review. In this type of advertising, the communicator's persuasive intention remains hidden to draw consumers' attention and circumvent public scepticism about commercial communications (Tayllard 2000, p. 157).

The principle of advertising authenticity is set forth in Article 7 of the ICC Advertising and Marketing Communications Code, which states, "the true commercial purpose of marketing communications should be transparent and not misrepresent their true commercial purpose. Hence, a communication promoting the sale of a product should not be disguised as, for example, (...) user-generated content, private blogs, private postings on social media or independent reviews." It is evident that fake reviews by their very nature constitute a form of covert advertising and a blatant violation of the principle of authenticity. This is because fake reviews precisely entail an act of hiding an advertising message under the disguise of a consumer review (Mayzlin et al. 2012, p. 3).

Covert advertising is prohibited both in Europe and in the US. In EU, advertising is fundamentally regulated through two directives, the Unfair Commercial Practices Directive (UCPD)¹⁹ and the Misleading and Comparative Advertising (MCAD).²⁰ Both directives, whose objective scopes overlap, include some provisions prohibiting commercial and competition practices, contrary to the principle of authenticity. Among others, three provisions can be underlined, in the order of the most generic to the most particular. First, Article 2.b MCAD defines misleading advertising as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed (...)." ²¹ Second, Article 7.2 UCPD states that a trader incurs in misleading advertising by omission when he fails to identify the commercial intent of a commercial practice if not already apparent from the context. Finally, Annex I UCPD contains a catalogue of commercial practices which are in all circumstances considered unfair. Among them, number 22 forbids "falsely representing oneself as a consumer."

Fake reviews fit the illicit practices proscribed in these provisions, as they deceive consumers by their presentation, they hide their commercial intent, and they entail precisely posing fraudulently as a consumer.

In the US, virtually every State has passed laws against misleading and covert advertising, which provide remedies to consumers and competitors. At the federal level, Section 5 of the Federal Trade Commission Act (FTCA) declares that unfair

¹⁹ 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.

²⁰ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

²¹ It goes without saying that misleading advertising is forbidden by the Directive. In fact, Article 1 MCAD states that the purpose of the Directive is "to protect traders against misleading advertising and the unfair consequences thereof".

methods or unfair and deceptive acts or practices affecting commerce are unlawful. Under this standard, a representation, an omission, or a practice is deceptive when consumers are likely to be misled when acting reasonably under the circumstances and when the practice or the omission is material. Consequently, the act of covert advertising can be prosecuted and punished, since its presentation can deceive the audience about its commercial nature.

The laconic expression contained in Section 5 FTCA has been interpreted and developed by the Federal Trade Commission (FTC), through its resolutions and the publication of guidelines. The guidelines are not necessarily binding as law, but they are rather administrative interpretations of the FTCA. Among them, the Guides Concerning the Use of Endorsements and Testimonials in Advertising (2009) and the 'Dot Com disclosures. How to make effective disclosures in Digital Advertising (2013) concern the principle of advertising authenticity. The guidelines highlight that advertising should be transparent and truthful and the disclosures in online advertisements and endorsements be clear and conspicuous. The application of these criteria to online reviews is not controversial, even though the guides do not specifically mention online reviews.²²

Fake reviews and the principle of truthfulness

The principle of truthfulness requires advertisements to be honest towards consumers and a general ban on deceptive or misleading advertising. The ICC Advertising and Marketing Communications Code contains the principle of truthfulness in its Article 5, which prohibits misleading advertising in the following terms: "marketing communications should not contain any statement, claim or audio or visual treatment which, directly or by implication, omission, ambiguity or exaggeration, is likely to mislead the consumer."

Whilst the deception in covert advertising lies in the way the message is presented, misleading advertising is deceptive in the substance of the message, which is confusing, imprecise, or false. In most cases, fake reviews violate the principle of truthfulness, since they usually overrate the virtues of the product they are trying to promote or disproportionately and falsely criticise the characteristics of the product they are trying to demote. In any case, some fake reviews may not constitute a form of misleading advertising, e.g. a fake review that limits itself to reflect unbiased and accurate characteristics of a product, or another that conveys a reasonable and well-balanced opinion.

²² Consumer reviews fit in the concept of endorsement offered in the Guides Concerning the Use of Endorsements and Testimonials in Advertising: "For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser". In this regard, Barish (2018, pp. 857–858) proposes an update of the guides to include specific references to consumer review practices and astroturfing.

In the EU, the principle of truthfulness is recognised both in UCPD and MCAD, previously indicated. As mentioned above, Article 2.b MCAD defines deceptive advertising as “any publicity that (...) misleads or may mislead the people to whom it is addressed or affects and that, due to its deceptive nature, it can affect its economic behaviour or that, for these reasons, it harms or is capable of harming a competitor”. Articles 6 and 7 UCPD also deal with deceptive competition practices and contain definitions and two lists of actions and omissions that breach the principle of truthfulness. Article 6 UCPD defines a misleading commercial action as that which “contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (...) and (...) causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.”²³

In sum, fake reviews may constitute a form of misleading advertising that is prohibited in the EU Directives and a deceptive advertising which is declared unlawful under the Section 5 FTCA in the US.

Fake reviews and the principle of fair competition

According to the principle of fair competition, traders and marketers must respect the other competitors in the market. Thus, their advertising practices must observe good faith uses, avoiding commercial communications that threaten free competition or suppose a form of unfair competition. Fair competition principle fundamentally targets communication in relation to competitors, and also regulates the use of the name or trademarks of another company in advertising, which may compare, or denigrate reputation of other competitors. In principle, fair competition would discourage using the name or trademark of a competitor in advertising, because a trademark right is precisely the right to exclude others from using their trade mark in the course of trade. This exclusive right, however, in some cases needs to be balanced with the consumers’ right to information, as in the case of comparative advertising. However, apart from the cases expressly authorised by law, a trader may not use the name or trademark of her competitors in her advertising.

Such understanding of fair competition is visible in self-regulation instruments. The ICC’s Advertising and Marketing Communications Code contains several provisions linked to the principle of fair competition. Articles 12 and 15 are particularly relevant. Under the title “Denigration”, Article 12 states that commercial communications “should not denigrate any person or group of persons, firm, organization, industrial or commercial activity, profession or product, or seek to bring it or them into public contempt or ridicule”. Article 15, entitled “Exploitation of Goodwill,” states that “marketing communications should not make unjustifiable use of the name, initials, logo and/or trademarks of another firm, company or institution.”

Negative fake reviews would likely to be against the fair competition principle, since they mention a competitor’s trade mark to erode his reputation in the market.

²³ Article 7 UCDP contains similar provisions but in relation with misleading omissions, which, in the field of fake reviews, connects it more with the principle of authenticity.

Therefore, negative fake reviews could be viewed unfair competition as they denigrate a competitor's goods or services. In exceptional cases, some of these fake reviews might meet the legal requirements of comparative advertising, for instance when they compare analogous and objective characteristics of similar products. However, in order to be fair, the comparison should be made in an honest manner, which is not the case of fake review. Thus, negative fake reviews should always constitute unfair competition and illegal advertising.

In EU, fairness in advertising is required by UCPD and MCAD, already mentioned. In addition to this, there is EU Trade Mark Directive (2015/2436).²⁴ Article 10.1 and 2 of the EU Trade Mark Directive lists the rights conferred by a trademark, among which it is the right to exclusive use the trademark in the course of trade. Article 4 MCAD regulates comparative advertising, which allows the use of other person's trade mark under some circumstances. According to Article 4, comparisons must not be misleading or dishonest. Moreover, they cannot discredit or denigrate "trademarks, trade names, other distinctive signs, goods, services, activities or circumstances of a competitor."²⁵

In the US, at the federal level, the fair competition principle is protected primarily through the Lanham Act 1940.²⁶ Additionally, the FTCA grants the FTC the authority to prevent the use of unfair methods of competition in or affecting commerce, declaring them illegal. The Lanham Act in particular provides for a cause of action against unfair competition from false or misleading product descriptions in its Section 43(a) and the competitors who make false or misleading descriptions or representations of facts about their own or others' products or services would-be held liable. (Barish 2018, pp. 848–849). Therefore, as long as the fake reviews refer to facts or objective data, a business may bring a suit against those engaged in the publication of fake reviews under this Act. In contrast, when fake reviews convey opinions, the avenue of recourse provided by the Lanham Act cannot be explored.

Fake reviews and the principle of legality

The fourth principle applicable to advertising is the principle of legality, which requires that advertising should respect rights and public interest enshrined in the Constitution and in different statutes, such as the right to honour, self-image, or public health. Among the rights that advertising must respect is the right to honour.²⁷

²⁴ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.

²⁵ For an overview of how these two Directives play together in the realm of online platforms, see: Judgment of the CJEU of 18 June 2009, *L'Oréal v Bellure*, C-487/07, ECLI:EU:C:2009:378. An interesting doctrinal approach to the issue can be found in Ohly (2014).

²⁶ The Lanham (Trademark) Act, Pub.L. 79–489, enacted July 5, 1946, codified at 15 U.S.C. § 1051 et seq.

²⁷ In the self-regulation standards, ICC Advertising and Marketing Communications Code includes several provisions regarding the principle of legality. The provisions regarding the honour of competitors are those already mentioned when dealing with the principle of fair competition, particularly Art. 12, on Denigration.

In this regard, one can ask whether negative fake reviews undermines not only the competitor's exclusive right to a trade mark but also the right to honour. If so, alongside the legal actions for unfair competition, the affected trader may resort to civil or criminal regulations aimed at protecting their honour and reputation. A priori, this option is entirely plausible. Since negative fake reviews contain negative judgments and opinions about the competitor or her products that can erode her reputation or prestige, the competitor can resort to the appropriate legal remedies to defend her right to honour.²⁸

Negative fake reviews, thus, not only violate commercial or advertising regulation, but they may contravene civil or criminal legislation that protects the right to honour as well.

In the EU there are no specific rules for the protection of 'the right to honour' as such, neither of natural nor legal persons. In commercial communication, it is possible to derive protection of commercial reputation from Article 16 of the Charter of Fundamental Rights of the EU, the right to freedom to conduct a business, which may be invoked to defend one's honour against negative fake reviews on an online platform. At the national level, the regulatory framework tending to protect the right to honour is more complex and complete.²⁹ Here we examine the British, the Spanish and the Italian provisions as legislative examples.

In the UK, the most severe negative fake reviews may provide basis for libel suits, regulated in the Defamation Act 2013. According to its Article 1, to deserve legal punishment, the fake review must cause "serious harm", which must be suitable to produce a "serious financial loss." In Spain, different legal provisions protect the right to honour. First, Articles 205 and 208 of the Criminal Code sanction defamation. Second, there is a specific civil Act that protects the right to honour, the Regulation 1/1982, 15.05.1982, on the civil protection of the right to honour, privacy and self-image.³⁰ According to these two regulations, a trader affected by negative fake reviews may require the withdrawal of messages, as well as compensation for damages.³¹ The picture in Italy is similar. The criminal protection of honour is found in Article 595 of the Criminal Code, which punishes defamation. Besides, Article

²⁸ A different and thornier question is whether this protection should be granted to the reputation of the competitor as a natural or as a legal person. Even though corporate personality rights are a topic of contention, most countries accept corporate claims to defend their reputation. For a thorough analysis of this issue, see Westkamp (2015).

²⁹ Needless to say, the protection of the right to honour of traders is a very complex issue and exceeds by far the purpose of this paper. Therefore, in this matter we will restrict our analysis to a brief reference to the applicable rules in British, Spanish, Italian, American legal frameworks.

³⁰ Ley Orgánica 1/1982, de 15 de mayo, de protección civil del derecho al honour, la intimidad y la propia imagen.

³¹ In Spain, Martínez Nadal (2015, p. 462) has suggested that negative fake reviews can also be fought through the right of rectification, according to the Spanish Regulation 2/1984, 26.03.1984, on the right to rectification (Ley Orgánica 1/1984, de 26 de marzo, sobre el derecho de rectificación). The application of this right, however, is problematic, since it refers to erroneous objective information published in the Media. On the one hand, it is far from clear that online platforms can be considered social Media; on the other hand, most of the times negative fake reviews consist in mere opinions and do not convey objective information.

2043 of the Italian Civil Code regulates extra-contractual liability for wrongful acts, which may lead to compensation for violation of the right to honour that includes compensation for moral damages (Art. 2059).

In comparison, in the US, the honour of the traders can be defended through defamation actions, in accordance with the regulations of each state. As a rule, a trade libel action requires a plaintiff to show a written defamatory factual statement concerning the plaintiff, publication to a third-party, fault, falsity of the defamatory statement; and special damages or per se actionability. Usually, per se defamation includes statements that tend to injure another in his trade, business, or profession.³²

How are the US and European countries fighting fake reviews?

As seen in the above, fake reviews is clearly illegal and unethical practice. Here we analyse how the US and European public authorities, both administrative and judicial, are dealing with this form of unlawful practices.

First, it should be noted that the amount of litigated cases concerning fake reviews published in online platforms is minimal, considering the magnitude and prevalence of the problem. The scarcity of cases is caused by different facts. First, the absence of litigation may result from the generally low value of consumer purchases (Narciso 2017, p. 17). Second individual lawsuits against the authors of negative reviews may only amplify the negativity and impact of a review (Myers 2020, p. 9) and thus the traders may shun litigation. The difficulty of distinguishing genuine reviews from fake ones (Zhuang et al. 2018, p. 25; Cardoso et al. 2018, p. 107) and the fast development of digital technologies, whose vertiginous advance makes it difficult for legal operators to provide timely answers.³³ Moreover, the anonymity in platforms makes identifying authors time-consuming and difficult (Gerhards 2015, p. 509). The transnational nature of the Internet raises complex questions of determining the competent jurisdiction for disputes³⁴ and the shortage of material and personnel at administration services exacerbate such a complex problem (Barish 2018, p. 855). Finally in some cases there are already effective systems by the platforms themselves to solve the most unfair and flagrant cases (Munzel 2016, p. 97). Notwithstanding these obstacles, there still are some handful of litigated proceedings against the publication of fake reviews in digital environments, primarily in the US.

Question of liability, *locus standi* and competition

Liability for the publication of fake reviews

The responsibility for the publication of fake reviews is imposed firstly on the trader who promotes and benefits from them. Whether positive or negative, behind the

³² E.g. California Civil Code §§ 45 to 47.

³³ For an insightful analysis of this unavoidable *spacing problem*, see Marchant (2011).

³⁴ An approach to this issue can be found in Henn (2003).

publication of fake reviews, there is usually a seller who intends to alter fraudulently the digital reputation of certain products and services. This seller is primarily responsible for the publication of the fake reviews. However, more often, it is not easy to identify the trader who promotes fake evaluations, particularly in the case of the negative ones.

When fake reviews are not promoted by a trader but are published by an upset customer or a related private person with no business interests, consumer protection and advertising regulations would not apply. In this case, these reviewers would-be responsible only for a possible violation of the trader's right to honour, according to the civil or criminal regulations.³⁵

Regarding the potential responsibility of the platforms for the fake reviews they host, both the US and the EU regulations are very restrictive. In the EU, Internet service providers' liability is defined in Articles 12–14 of Directive 2000/31/EC on Electronic Commerce, which establish some immunities or safe harbours for providers, and the principle of “notice and take down.”³⁶ According to Article 14, online hosts are not responsible for illegal activity or information placed on their systems by a user, provided that the online host has no real knowledge of the illegal activity or information. When obtaining such knowledge, the online host must act quickly to eliminate or disable access to information. This means that the E-Commerce Directive establishes a general rule of exclusion of liability for the online platform that hosts illegal online reviews. Under this Article, online platforms only respond for fake reviews they host (1) if they have the knowledge of illegal information or (2) for not acting fast enough to eliminate or block access to illegal information after obtaining knowledge of it.³⁷ It is interesting to note that the leading online platforms offering rating systems (e.g. Amazon, TripAdvisor, Airbnb, Uber) have well-managed mechanisms to detect, report and remove fake reviews, which may indicate that they are complying with the requirement of diligent withdrawal.

³⁵ According to the UCPD, as regards consumer reviews, the Directive will not apply to consumers who provide information or misinformation about their experience with products or services, unless they are acting on behalf of a trader. This is because the UCPD applies to any natural or legal person that qualifies as a “trader”, according to Article 2(b) UCPD.

³⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). This standard has been transposed into the British, Spanish and Italian legal systems through the following legislation: UK: Electronic Commerce (EC Directive) Regulations 2002 (Art. 19); Spain: Regulation 34/2002, 11.07.2002, on E-Commerce (Ley 34/2002 de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico) (Art. 16); Italy: Legislative Decree num. 70, 09/04/2003 (Art. 16). The ambit of the hosting safe harbour has been considered by the CJEU in many cases. Some key cases are Judgment of the CJEU of 23 March 2010, Google France, C-236–238/08, ECLI:EU:C:2010:159; and of 12 July 2011, L'Oréal v eBay, C-324/09, ECLI:EU:C:2011:474. However, at the time of writing, there is currently a pending proposal for a new Regulation to amend this. 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) Final. Moreover, when it comes to liability related to copyrighted materials, there is Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

³⁷ A more detailed explanation of the scope of Art. 14 of the Directive concerning fake reviews can be found in Narciso (2019, 568–573), and in Riefa and Clausen (2019, 67 et seq.).

In the US, Section 230 of the Federal Communications Decency Act 1996 (FCDA) provides immunity from liability for providers and users of an interactive computer service who publish information provided by others. Section 230 of the FCDA precludes courts from entertaining claims that would place a service provider in a publisher's role. Therefore, Internet platforms are immune from liability for publishing fake reviews provided by third parties.³⁸ The law's umbrella immunity extends to protect platforms from claims for trade libel, slander, invasion of privacy, unfair competition, and misappropriation (Gerhards 2015, p. 504). Some sectors of the American doctrine (Short 2013, p. 469) have proposed a reform of the FCDA in order to incorporate the "notice and take down" system of responsibility, in the understanding that it would allow better protection for traders who suffered the publication of negative fake reviews against their businesses. This liability system is not alien to the US Internet regulation, which contains "notice and take down" provisions regarding copyright infringements in the Digital Millennium Copyright Act 1998.

Notwithstanding this lack of liability for third parties' content, platforms can breach advertising regulations for deceptive advertising that may arise from their business practices regarding consumer reviews.³⁹ In fact, some platforms have been accused of misleading advertising for spreading slogans or advertising claims underlining the reliable nature of their rating systems, even when they host a high number of fake reviews. Furthermore, the manners of organising customer reviews on platforms could also be considered misleading, if they display a general picture of goods or service that do not correspond to the opinions of customers.⁴⁰ This could occur, for example, when the platform operator suppresses or hides the negative evaluations, or gives unjustified priorities to positive reviews, so as to favour specific products or to encourage trading on own platforms. In these cases, platforms could be held liable for misleading advertising connected with how they deal with customers' reviews.

³⁸ Internet platforms have successfully invoked immunity under FCDA in a few cases in recent years to avoid responsibility for third-party product reviews posted in their sites. In this sense, see *Schneider v. Amazon. Com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001), or *Reit v. Yelp, Inc.*, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010).

³⁹ Narciso (2019, 573 et seq.) addresses this issue in detail. On how the design of the rating system influences the outcome that is presented to users in online platforms, see Dellarocas (2003, 1410 and 1419).

⁴⁰ In this sense, Short (2013, 467) warns of the possibility that platforms "manipulate reviews for their own profit by requiring business owners to purchase advertising space if they want the websites to remove negative reviews". An example of this kind of practices can be found in *Levitt v. Yelp, Inc.*, 765 F.3d 1123 (9th Cir. 2014), in which "a group of small businesses alleged that the site [Yelp.com] attempted to extort advertising payments from them by manipulating user reviews and writing negative reviews about the plaintiffs. (...) According to the plaintiffs, after they refused to purchase advertising on the website, Yelp deleted their positive reviews and highlighted their negative ones". Cf. Gerhards (2015, 505–506).

Locus standi

As for the right to bring legal actions against fake reviews, both the EU and UK advertising regulations admit the initiation both *ex officio* and at the request of a party, including the possibility of collective action by organizations that have a legitimate interest in the matter.⁴¹ The actions against negative fake reviews would usually be brought by the affected trader. The actions against positive fake reviews could be brought by the competitors, under MACD, or by the customers, under UCPD. However, to be actionable, the unfair commercial practice must cause or likely to cause average consumers to take transactional decisions that they would not have otherwise taken and such link will often be hard to prove.

Even though the right to private redress can be exercised, individual consumers usually have little incentive to engage in litigation against powerful tech giants, given the investment of time and financial resources that the proceedings require, with little chance of getting a favourable resolution (Riefa and Clausen 2019, p. 72). In this sense, the New Deal for Consumers should be positively viewed as one of its goals is to strengthen the position of consumer and user associations so that they can seek redress, such as compensation, replacement or repair, on behalf of a group of consumers that have been harmed by illegal commercial practices.⁴²

In the US, the rules of *locus standi* are more complex and restrictive. At the federal level, the cause of action against misleading and covert advertising is given exclusively to the FTC, excluding the affected private parties to bring an action under FTCA. Following an investigation, the Commission may initiate an enforcement action using either a judicial or administrative process if it has reason to believe that the law is being or has been violated, and it appears to the Commission that a proceeding is in the public interest.⁴³ Private parties have the right to bring legal action under the Lanham Act against the inaccurate or misleading claims of their competitors, as has been pointed out above.⁴⁴ Moreover, the internal regulations of some states include broader rules on standing against illegal advertising, extending it to the State Attorney General, as well as to private individuals who have been harmed by the illegal commercial communication.⁴⁵

In sum, both in Europe and the US, the cause of action to defend the right to honour remains in the hands of those affected by the negative fake reviews.

⁴¹ Art. 11 UCPD and Art. 5 MCAD.

⁴² Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. COM/2018/0184 final. In some Member States, it is already possible for consumers to launch collective actions in courts, but if this Directive is passed, this possibility would-be available in all EU countries.

⁴³ Section 5 FTCA.

⁴⁴ Section 43 Lanham Act.

⁴⁵ This is the case, for example, of the General Business Law of the State of New York (see Section 349.b and h), or of the Unfair Competition Law of the State of California (Section 17,204), which gives cause of action to the Attorney General of the State and any person harmed by deceptive advertising.

Competent bodies to punish fake reviews

Legal actions against illegal advertising can be brought before judicial or administrative bodies. As will be seen below, in most of the countries analysed, there is an independent agency or authority with broad powers to fight against illegal advertising, particularly in cases where it affects the consumers or the proper functioning of the market. Considering the magnitude and complexity of the problem of fake reviews, these agencies are called to play a leading role in the fight against fake reviews.

EU legislation allows Member States to choose what type of control they want to exercise over illegal advertising, whether it is judicial or administrative.⁴⁶ The three countries that we are considering by way of illustration have different approaches to this issue. In the UK, consumer law enforcement is entrusted to the Trading Standards Services, which is funded by, and accountable to the local authorities as well as to the Competition and Markets Authority (CMA).⁴⁷ The focus of the CMA is the market, while the Trading Standards Services tackles detriment to the consumers more generally. In Spain, the actions against illegal advertising are resolved by ordinary courts.⁴⁸ When illegal advertising affects consumers, regional authorities may impose administrative sanctions.⁴⁹ In Italy, ordinary courts resolve conflicts due to unfair competition and illegal advertising. In addition, advertising regulations attribute the power to prosecute and punish illegal advertising to the administrative body *Autorità Garante della Concorrenza e del Mercato* (AGCM).⁵⁰

In the US, the competent authority at the federal level to pursue deceptive, covert, and unfair advertising is the FTC.⁵¹ In some States, as we have already noted, the Attorney General also has disciplinary powers. Actions against fake reviews grounded in the Lanham Act are decided by ordinary courts.

In conclusion, both in the US and in Europe, the actions against fake reviews on the grounds of violation of the right to honour are ultimately decided by the courts, and not by administrative bodies.

Enforcement in the United States

As the cradle of the Internet and most of the leading online platforms, it is not surprising that the US is playing a pioneering role in curbing fake reviews. As soon as 2009, the State of New York imposed a penalty to a cosmetic surgery company,

⁴⁶ Art. 11.2 UCPD and Art. 5.4 MCAD.

⁴⁷ Art. 19 of Consumer Protection from Unfair Trading Regulations 2008; and Art. 13 of Business Protection from Misleading Marketing Regulations 2008.

⁴⁸ Arts. 32 et seq. of Regulation num. 3/1991, 10.01.1991, on Unfair Competition.

⁴⁹ Arts. 49 et seq. of Decree 1/2007, 16.11.2007, on Consumer Protection (Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias).

⁵⁰ Art. 8.1 of Legislative Decree num. 145, 2.08.2007; and Art. 27.1 of Consumer Code, according to the regulation approved by Legislative Decree num. 146, 2.08.2007.

⁵¹ Section 5 of the Federal Trade Commission Act (FTCA).

Lifestyle Lift, for posting positive fake comments on the Internet.⁵² Lifestyle Lift had combated negative postings on the Internet by having employees create fake accounts on online sites to post positive reviews about their employer and its services. Internal emails discovered by the Attorney General's Office showed that Lifestyle Lift employees were given specific instructions. One email to employees said, "Friday is going to be a slow day—I need you to devote the day to doing more postings on the web as a satisfied client." Another internal email directed a Lifestyle Lift employee to "Put your wig and skirt on and tell them about the great experience you had."⁵³ According to the Attorney General, the tactics used by Lifestyle Lift constituted deceptive commercial practices, false advertising, and fraudulent and illegal conduct under the state law of New York and federal consumer protection law. The case was concluded with a settlement in which Lifestyle Lift agreed to stop publishing anonymous positive reviews about the company on the Internet and to pay \$ 300,000 in penalties and costs to the state of New York.

In 2013, and within the framework of the "Clean Turf" operation, the same state imposed fines for a total amount of \$ 350,000 to nineteen companies for publishing false assessments about products on the Internet.⁵⁴ This year-long undercover investigation into the manipulation of consumer review websites found that some companies had flooded the Internet with fake consumer reviews on such websites as Yelp, Google Local, and CitySearch. The offending companies were third-party providers of fake reviews, which offered their services as search engine optimization companies (SEOs). The "Clean Turf" operation found that to hide their identities, many of these companies used such techniques as creating fake online profiles on consumer review websites and paying freelance writers from different countries (e.g. Philippines or Bangladesh) for \$1 to \$10 per review. While the Lifestyle Lift case was the first attempt to sanction astroturfing practices online, the "Clean Turf" operation was the first large-scale operation against fake reviews fraud in digital contexts.

At the federal level, the FTC has also prosecuted fake reviews on the Internet on the grounds of consumer protection law. Among the sanctions imposed, the fine of \$ 250,000 to the company Legacy Learning Systems in 2011 can be highlighted.⁵⁵

⁵² 'Attorney General Cuomo Secures Settlement With Plastic Surgery Franchise That Flooded Internet With False Positive Reviews', NY Attorney General, Press Release 14/07/2009. Available at: <https://ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet>.

⁵³ 'Attorney General Cuomo Secures Settlement With Plastic Surgery Franchise That Flooded Internet With False Positive Reviews', NY Attorney General, Press Release 14/07/2009. Available at: <https://ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet>.

⁵⁴ 'AG Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \$ 350,000 In Fines', NY Attorney General, Press Release 23.09.2013. Available at: <https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and>.

⁵⁵ 'Firm to Pay FTC \$ 250,000 to Settle Charges That It Used Misleading Online Consumer and Independent Reviews', FTC, Press Release 15.03.2011. Available at: <https://www.ftc.gov/news-events/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online>. Since 2014, the FTC has decided different cases concerning undisclosed endorsements in social media profiles, usually published by celebrities and influencers. The line that divides this kind of covert advertising and fake reviews is often blurry. For instance, in Sony's PS Vita Promotion case, the FTC declared a breach of the FTCA

The FTC charged that Legacy Learning disseminated deceptive advertisements by representing that online endorsements published by affiliates reflected the views of ordinary consumers or independent reviewers, without clearly disclosing that the endorsers were paid for every sale they generated.

In February 2019, the FTC imposed its first fine for contracting false reviews on Amazon. According to the American regulator, the slimming products company Cure Encapsulations contracted with another company the publication of positive fake reviews on Amazon, intending to place the rating of its products above 4.3 stars.⁵⁶ The FTC's complaint charges the defendants with representing that the purchased Amazon reviews were truthful reviews written by actual purchasers when in reality they were fabricated. Along with a series of supplementary obligations, the FTC imposed a fine of \$ 50,000 on Cure Encapsulations.

In a similar case, in October 2019, the FTC alleged that skincare company Sunday Riley Modern Skincare LLC had repeatedly posted reviews of its products on a beauty store Sephora's website using fake accounts.⁵⁷ As detailed in the Commission's complaint, the company's chief executive, Sunday Riley, encouraged the employees to create fake accounts to promote their products and to dislike negative reviews to get them removed. In July 2016, for instance, Ms. Riley personally complained that the 4.2 rating on two of her products was too low, and instructed her employees that she would "like to see them at 4.8+."⁵⁸ In the same message, she wrote, "if you see a negative review—DISLIKE it. After enough dislikes, it is removed. This directly translates to sales!"⁵⁹ The final FTC's consent order awarded an injunctive relief, but no monetary damages. It is noteworthy that two commissioners dissented, on the understanding that it would have been appropriate to impose an economic sanction, given the blatant deception and the egregious facts of the case. In their statement, these commissioners regretted that "the proposed settlement is unlikely to deter other would-be wrongdoers," and emphasized that "going forward, the FTC should seek monetary consequences for fake review fraud, even if the exact level of ill-gotten gains is difficult to measure."⁶⁰

Footnote 55 (continued)

for the publication of some laudatory tweets about Sony's PS console. As it turned out, the allegedly independent tweets came from some employees at the request of Sony. 'Sony Computer Entertainment America To Provide Consumer Refunds To Settle FTC Charges Over Misleading Ads For PlayStation Vita Gaming Console', FTC, Press Release 25.11.2014. Available at: <https://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer-refunds>.

⁵⁶ 'FTC Brings First Case Challenging Paid Fake Reviews on an Independent Retail Website', FTC, Press Release 26.02.2019. Available at: <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-brings-first-case-challenging-fake-paid-reviews-independent>.

⁵⁷ 'Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction', FTC, Press Release 21.10.2019. Available at: <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

⁵⁸ Sunday Riley Modern Skincare, LLC, FTC Complaint, 10. Available at: https://www.ftc.gov/system/files/documents/cases/192_3008_sunday_riley_complaint_0.pdf.

⁵⁹ Ibidem.

⁶⁰ Statement of Commissioner Rohit Chopra joined by commissioner Rebecca Kelly Slaughter, In the Matter of Sunday Riley, 21.10.2019. In their statement, the commissioners point out: "Today's proposed settlement includes no redress, no disgorgement of ill-gotten gains, no notice to consumers, and no

More recently, in May 2020, the FTC finalized a settlement with Delaware comparison shopping website LendEDU over allegations that it promoted deceptive rankings of financial products for a fee and posted fake positive reviews of its website.⁶¹ LendEDU ranked loans for customers, mainly student loans. Although LendEDU advertised that its ratings are “completely objective and not influenced by compensation,” the FTC’s investigation disclosed that it offered higher rankings and ratings to companies that paid for placement. Besides, the FTC alleged that LendEDU and its operators misrepresented that consumer reviews on its website and third-party websites reflected actual experiences of impartial consumers. In most instances, those reviews were written or made up by LendEDU employees, their family or friends, or other associates. The FTC determined, for example, that 111 of the 126 reviews about LendEDU that appeared on the review platform Trustpilot were fake reviews written by the LendEDU’s employees or their friends or family members. The FTC’s final order prohibited the company and its operators from making the same types of misrepresentations cited above and required the company to pay \$350,000.

From the above, it follows that in the US, the prosecution of fake reviews as a form of covert or deceptive advertising has intensified in recent years. Undoubtedly, the wide reach of e-commerce has fostered deceptive online marketing tactics to proliferate, which demanded a response from public authorities. The most recent actions of the FTC suggest that it is willing to take on the challenge of curbing these practices, and it seems that the decisions described in the above are just the beginning of a more systematic plan to fight illegal commercial practices on digital platforms.⁶²

All the resolutions mentioned above punish covert or deceptive advertising statements under the provisions of the FTCA or similar regulations at the state level. There are different avenues to prosecute fake reviews as discussed below.

Lanham Act has been limitedly applied to negative fake reviews, in relation to the fair competition principle and unfair advertising. In this regard, the case *Romeo*

Footnote 60 (continued)

admission of wrongdoing. Sunday Riley and its CEO have clearly broken the law, and the Commission has ordered that they not break the law again. Unfortunately, the proposed settlement is unlikely to deter other would-be wrongdoers. (...) The proposed resolution of this matter suggests that even the narrow subset of wrongdoers who are caught and attract law enforcement scrutiny will face minimal sanctions. (...) This settlement sends the wrong message to the marketplace. Dishonest firms may come to conclude that posting fake reviews is a viable strategy, given the proposed outcome here”.

⁶¹ ‘FTC Finalizes Settlement in LendEDU Case Related to Deceptive Rankings and Fake Reviews’, FTC, Press Release 26.05.2020. Available at: <https://www.ftc.gov/news-events/press-releases/2020/05/ftc-finalizes-settlement-lendedu-case-related-deceptive-rankings>.

⁶² As the Director of the FTC’s Bureau of Consumer Protection Andrew Smith recently said, “posting fake reviews on shopping websites or buying and selling fake followers is illegal. It undermines the marketplace, and the FTC will not tolerate it”. ‘Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO’s Direction’, FTC, Press Release 21.10.2019. Available at: <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

and Juliette Laser Hair Removal, Inc. v. Assara I LLC is noteworthy.⁶³ The court imposed a permanent injunction on the defendants and punished them to pay \$30,000 for the plaintiff's attorneys' fees and costs, for posting a series of negative fake reviews about their competitor's business on different Internet fora. These fake reviews consisted of a series of invented stories, in which fictional clients told very negative experiences regarding the treatments that they have received in the plaintiff's establishment. The decision is illustrative, at least, for two reasons. First, it emphasized the advertising nature of fake reviews.⁶⁴ On the other hand, it distinguished illustratively the fake reviews that can be pursued through the Lanham Act, for conveying description of facts; and those that fall out of the scope of the Act, for consisting in mere opinions.⁶⁵

Finally, regarding the principle of legality, it should be noted that convictions for defamatory fake reviews in the US are scarce. Be that as it may, in some proceedings, businesses have succeeded and have recovered large damage awards against the authors of defamatory reviews. Probably the most illustrative case is *Fireworks Restoration Co. v. Hosto*, in which the court sentenced the defendant for writing fake reviews on Google and Yahoo.⁶⁶ The defendant, a former partner of the plaintiff, used real customers' names and information and pretended to write on behalf of many unsatisfied consumers. The company won \$ 1,150,000, including \$ 150,000 in punitive damages.⁶⁷

In contrast, *Seaton v. TripAdvisor, LLC* is also a compelling case, even though the plaintiff's motion was dismissed twice. The origin of this procedure was TripAdvisor's online post listing the "10 dirtiest hotels in America in 2011." After the shortlist was published, the owner of the hotel that received the top ranking sued TripAdvisor, claiming compensation of five million dollars alleging defamation and false-light invasion of privacy, under the state law. TripAdvisor was acquitted both

⁶³ *Romeo and Juliette Laser Hair Removal, Inc. C. Assara I LLC*, 2016 WL 815,205 (S.D.N.Y. Feb 29, 2016).

⁶⁴ On this point, the decision states: "the defendants' anonymous comments recited above constitute commercial advertising or promotion. In pursuit of their commercial interest, the defendants repeatedly posted disparaging comments to public fora used by consumers to select laser hair removal services. By anonymously disparaging the plaintiff's business and simultaneously promotion Assara [their own business], the defendants acted in pursuit of their economic interest".

⁶⁵ "The plaintiff has shown that defendant Assara, which acted through its employees and officers, as well as defendant Shuman, made false statements about the plaintiff's business by describing experiences that had not occurred. The statements by Assara and Shuman were literally false as a factual matter since they described persons who were not Romeo and Juliette customers and experiences with the plaintiff's services that those fictitious customers did not have". On the contrary, a different defendant was acquitted since 'his posting under his three pseudonyms principally repeat that the service was slow or that the plaintiff's employees were rude. These are largely matters of opinion and the plaintiff has not shown that they are actionable as false statements of fact".

⁶⁶ *Fireworks Restoration Co. V. Hosto*, 371 SW3d 83 (Mo. Ct. App. 2012).

⁶⁷ Other cases that held businesses or people liable for publishing defamatory fake reviews are *Sanders v. Walsh*, 219 Cal. App. 4th 855 (2013), and *Dietz Dev., LLC and Dietz V. Pérez*, Case Num. 2012–16,249, Fairfax County Circuit Court (Oct. 31, 2012).

in the first and second instance, on the grounds of the list's hyperbolic character, which granted the list the protection of the First Amendment.⁶⁸

Enforcement in European countries

In the European countries that we have analysed, the number of decision on fake reviews is substantially lower.

In the UK, the CMA has dealt five times with the question of fake reviews, although so far it has not imposed any fine, having preferred to seek consensual solutions with the stakeholders.

In the first case, at CMA's request, five online review sites agreed to improve their practices regarding their consumer rating systems. These improvements addressed concerns raised following a call for information by the CMA on online reviews and endorsements. The CMA's call for information highlighted a number of concerns about the rating systems of these websites, including the potential for some review websites' practices to prevent some genuine negative reviews from being published and the practice of not checking reviews in a sufficiently rigorous manner and essential information not being brought to users' attention.⁶⁹

In the second case, in context of a consumer law investigation, CMA found that between 2014 and 2015, the company, Total SEO & Marketing Ltd had written over 800 fake positive reviews for 86 small businesses that were published across 26 different websites.⁷⁰ The procedure was terminated, once Total SEO and its directors communicated to the CMA that they had ceased the practice of writing fake reviews for their clients and would take steps to remove the fake reviews posted online. Alongside this action, the CMA wrote to Total SEO's clients to warn them that third parties' writing of fake reviews on their behalf might lead to them to break the law themselves.

In June 2019, the CMA launched a work program aimed at tackling fake and misleading online reviews. Among other actions, the CMA urged Facebook and eBay to act to stop the sale of fake reviews through their sites. After performing some web sweeps in the period November 2018 to June 2019, the British Commission was concerned about over 100 eBay listings, offering fake reviews for sale. It also identified 26 Facebook groups where people offered to write fake reviews or businesses recruited people to do so on popular review sites. The CMA made it clear that it was not alleging that Facebook or eBay intentionally allowed this content to appear on their websites and stressed that both companies were cooperating in the removal of fake reviews. Finally, it is interesting to underline that, according to the CMA press

⁶⁸ *Seaton v. TripAdvisor, LLC*, 728 F.3d 592 (6th Cir. 2013).

⁶⁹ 'Online review sites commit to improve practices', CMA, Press Release 11.02.2016. Available at: <https://www.gov.uk/government/news/online-review-sites-commit-to-improve-practices>.

⁷⁰ 'CMA takes enforcement action against fake online reviews', CMA, Press Release 4.03.2016. Available at: <https://www.gov.uk/government/news/cma-takes-enforcement-action-against-fake-online-reviews>.

release, this action with Facebook and eBay is the “first phase in a wider program of CMA work aimed at tackling fake and misleading reviews.”⁷¹

In the similar vein, in the context of the COVID-19 pandemic, the CMA began an investigation into fake and misleading reviews in an attempt “to make sure customers are being protected when they are shopping online.”⁷² This investigation was aimed towards protecting consumers who turned to online shopping, during the lockdown imposed due to the COVID-19 pandemic. Among the platforms investigated are Instagram, Facebook, and eBay, which have already announced their commitment to take action to tackle the trading of fake and misleading reviews. In this sense, for example, Instagram has committed to updating and revising its policy guidelines to clarify that it prohibits fake and misleading reviews and has taken down the content that the CMA had identified and brought to its attention. It also has removed similar content that it identified on its own and has agreed to put in place robust systems to detect and remove this kind of harmful material from its website in the future.

In April 2021, a follow-up investigation found evidences that illegal trades in fake reviews were still taking place on both Facebook and Instagram and the CMA intervened again. As a result, Facebook removed 16,000 groups that were dealing in fake and misleading reviews, and made further changes to its systems for identifying, removing and preventing such content on its social media platforms.⁷³ This latest intervention by the CMA has been considerably more substantial than 2020’s action, when Facebook merely removed 188 groups and disabled 24 user accounts.

It is worth noting how since 2019, the CMA’s activity to fight fake reviews is intensifying, ranging from some specific actions to constant supervision, in dialogue with the leading digital platforms of the Internet. This activity is not temporary and seems to take hold. In fact, the British Government recently announced that during 2021 a dedicated Digital Markets Unit (DMU) will be set up within the CMA. The DMU will oversee plans to give consumers more choice and control over their data, promote online competition and crack down on unfair practices like fake reviews.⁷⁴

At the self-regulatory level, in 2012 the British Advertising Standards Authority (ASA) tackled a complaint against TripAdvisor related to the reliability of its rating system. The complaint was made by two British hoteliers who were upset by different negative reviews on TripAdvisor, which they considered fraudulent. The hoteliers requested the ASA to declare misleading the claim contained in the TripAdvisor webpage: “evaluations you can trust.” Following a very questionable

⁷¹ ‘CMA expects Facebook and eBay to tackle sale of fake reviews’, CMA, Press Release 21.06.2019. Available at: <https://www.gov.uk/government/news/cma-expects-facebook-and-ebay-to-tackle-sale-of-fake-reviews>.

⁷² ‘CMA investigates misleading online reviews’, CMA, Press Release 22.05.2020. Available at: <https://www.gov.uk/government/news/cma-investigates-misleading-online-reviews>.

⁷³ ‘CMA intervention leads to further Facebook action on fake reviews’, CMA, Press Release 09.04.2021. Available at: <https://www.gov.uk/government/news/cma-intervention-leads-to-further-facebook-action-on-fake-reviews>.

⁷⁴ ‘New watchdog to boost online competition launches’, Department for Digital, Culture, Media & Sport, Competition and Markets Authority, Press Release 07.04.2021. Available at: <https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches--3>.

line of reasoning, the ASA upheld the complaint, stating that the company's claim suggested that all the evaluations hosted in TripAdvisor were reliable, which evidently was not the case. For this reason, the ASA demanded that the platform withdraw the claim from its website and avoid using it in the rest of its commercial communications.⁷⁵

In Italy, in 2014 TripAdvisor was fined with € 500,000 for misleading advertising. On grounds very similar to those used in 2012 by the ASA, the Italian Autorità Garante della Concorrenza e del Mercato (AGCM) considered that the advertising slogans used by TripAdvisor, which categorically underlined the reliable nature of the information contained in its platform, did not correspond to an effective control of fake reviews. Therefore, the AGCM concluded that TripAdvisor's slogans constituted a form of deceptive advertising.⁷⁶ However, this decision was annulled months later in court for two reasons. On the one hand, the court understood that TripAdvisor's advertising claims did not totally exclude the possibility of some fake reviews on its platform, not least because it was impossible to guarantee. On the other hand, the court ruled that the fact that TripAdvisor had some mechanisms to filter, denounce and respond to negative reviews was firm enough reason to conclude that its rating system was reliable, and therefore the claim in its advertising was not misleading.⁷⁷

More recently, an Italian criminal court imposed a 9 months of imprisonment and a payment of € 8000 for damages to the owner of Promosalento, a company that published fake reviews about hotels and restaurants on TripAdvisor.⁷⁸ Promosalento charged € 100 for 10 favourable reviews, with the price dropping to € 240 for 30. The fraudster offered his services to over 1000 hotels and restaurants. This decision is the first court ruling that condemns a company specifically dedicated to the publication of fake reviews. In this sense, perhaps with a point of pomp, the decision was described as a "historical moment for the Internet" by TripAdvisor's Vice President.⁷⁹

In Spain, administrative authorities have not carried out any investigation nor opened any sanctioning procedure for the publication of fake reviews hitherto.

⁷⁵ ASA Ruling on TripAdvisor. 1.02.2012. The resolution, which was available on the Internet, is no longer accessible from the ASA webpage. For a comment on it, see: 'TripAdvisor banned from claiming its reviews are real', *The Telegraph*, 1.02.2012. Available at: <https://www.telegraph.co.uk/travel/news/TripAdvisor-banned-from-claiming-its-reviews-are-real/>.

⁷⁶ 'Mezzo milione di fines a TripAdvisor', Autorità Garante della Concorrenza e del Mercato, Press Release 22.12.2014. Available at: <https://www.agcm.it/media/dettaglio-notizia?id=c1fd3bc3-1026-4fac-b0f3-940fad4f3df5&parent=News&parentUrl=/media/news>.

⁷⁷ Judgment of July 13, 2015, Tribunale Amministrativo Regionale per il Lazio, Sezione Prima. For a detailed explanation of this case, see Klun and Spagnesi (2018, pp. 107–141).

⁷⁸ For more information on the issue, see: 'Mille recensioni (false) to pay its TripAdvisor: condanna a 9 mesi', *Corriere della Sera*, 12.09.2018. Available at: https://www.corriere.it/cronache/18_settembre_12/mille-recensioni-false-pagamento-TripAdvisor-condanna-9-mesi-bc79cc70-b664-11e8-83fc-d7dcaacea02b.shtml?refresh_ce-cp.

⁷⁹ 'TripAdvisor announces a historic legal ruling in the fight against paid opinion fraud', TripAdvisor Media Center, Press Release 12.09.2018. Available at: <https://TripAdvisor.mediaroom.com/press-releases?item=126072>.

Nevertheless, there are two judicial decisions regarding the publication of negative reviews on TripAdvisor, both from 2019.

The first procedure was initiated by a Valencian hotelier regarding two negative reviews posted in TripAdvisor.⁸⁰ The hotelier, who claimed € 600,000 in damages, sued TripAdvisor for violating the principle of fair competition in three ways, by hosting a profile of his restaurants without his consent, by allowing the publication of unfair negative comments about them and by taking advantage of his reputation to promote the platform.⁸¹ The court dismissed the claim, on the understanding that the reviewer's right to freedom of expression and the customers' right to information trumped the hotelier's right to data protection and that TripAdvisor's review filtering system was effective enough. The court noted also that TripAdvisor contacted with the reviewer, who upheld his comments and that TripAdvisor had removed some of the more negative comments.⁸²

In the second case, the plaintiff sued TripAdvisor for a review that said, "It is theft. A fraud. They steal from you," among other negative comments.⁸³ In this case, instead of grounding his claim in the principle of fair competition, the hotelier based it on his right to honour i.e. on the principle of legality.⁸⁴ Unlike the previous case, TripAdvisor neither responded to the hotelier's complaint nor defended itself in court. The court ruled against TripAdvisor and ordered the company to delete the review and substitute it with a link to the judicial decision. Moreover, TripAdvisor was ordered to pay the hotelier € 300 in damages. Regardless of the limited amount of compensation, this was probably the first time that a court condemned TripAdvisor for the content of the reviews it publishes. TripAdvisor has appealed the judicial decision, and it remains to be seen whether Spanish superior courts. *Tribunales Superiores de Justicia* and *Tribunal Supremo* would uphold or annul the ruling.

Conclusion: toward a more effective regulation of fake reviews

The publication of fake reviews on Internet platforms is clearly a form of illegal advertising. First and foremost, it constitutes a type of covert commercial communication, against the principle of authenticity in advertising. Moreover, fake reviews usually breach the principle of truthfulness, insofar as they offer biased, exaggerated,

⁸⁰ 'Dos restaurantes valencianos reclaman 600.000 euros a TripAdvisor por malas críticas', *Levante EMV*, 16.05.2019. Available at: <https://www.levante-emv.com/economia/2019/05/16/restaurantes-valencia-denuncia-TripAdvisor/1875607.html>.

⁸¹ The claim was grounded on the Spanish Regulation num. 3/1991, 10.01.1991, on Unfair Competition (Ley 3/1991, de 10 de enero, de Competencia Desleal), which is the Spanish regulation that incorporates the provisions of the MCAD and UCPD.

⁸² Decision of Juzgado de lo Mercantil number 7 of Barcelona, 18.09.2019.

⁸³ 'El hostelero de Mérida que venció a TripAdvisor', *El País*, 22.12.2019. Available at: https://elpais.com/economia/2019/12/21/actualidad/1576933011_534828.html. Decision of Juzgado de Primera Instancia e Instrucción of Mérida, 27.11.2019.

⁸⁴ The claim was grounded on the Spanish Regulation 1/1982, 15.05.1982, on the civil protection of the right to honour, privacy and self-image (Ley Orgánica 1/1982, de 15 de mayo, de protección civil del derecho al honour, la intimidad y la propia imagen).

or false information. Negative fake reviews also contravene the principle of fairness in trade and can be considered a form of denigrating advertising. Finally, most negative fake reviews may also violate competitors' right to honour.

Both the US and the European legal frameworks contain provisions that make the publication of fake reviews unlawful. Besides, the publication of fake reviews violates the most widespread self-regulation advertising standards and codes, like the AMCC of the ICC, as we have seen in the above.

In the US, prosecution of online fake reviews is a priori more complicated than the EU, for two reasons. On the one hand, at the federal level, the right to bring a legal action against covert and misleading advertising is restricted to the FTC, so the right of individuals to file a lawsuit depends on the state's legislation. On the other hand, the FCDA excludes any liability of Internet platforms for third-party product reviews posted on their sites. To fight fake reviews more effectively, it would be advisable to replace FCDA's exclusion of liability with a more nuanced exclusion, such as the one established in the EU E-Commerce Directive or the US Digital Millennium Copyright Act, in accordance with the principle of notice and take down. Despite the difficulties, the US seem to be able to play a leading role in the fight against fake reviews, as the study of existing case law has shown.

Despite their more flexible and protectionist consumer legislations, European countries that we have analysed seem to offer weaker answers to the phenomenon of fake reviews. Although the British CMA has not yet imposed any monetary fine so far, it has shown positive developments in recent years, such as opening different investigations on the issue and maintaining an open dialogue with some of the most popular Internet platforms. In contrast, neither the Italian AGCM nor any of the 17 Spanish regional authorities have taken actions, if we exclude the 2014 AGCM decision which was annulled in court. In these countries, there have been a couple of interesting judicial decisions that can be a landmark in the fight against fake reviews. In any case, it remains to be seen whether these decisions are upheld by the Regional or Supreme Courts.

A few existing decisions regarding fake reviews allow four conclusions to be drawn. First, the comparison between the number of sanctions imposed in the US and Europe shows that US authorities are much more active in the fight against fake reviews. Among others, a probable reason for this difference is the longer tradition and more resources of the FTC, in comparison to the European agencies. In fact, the FTC employs more than 1100 persons, for 600 of the British CMA and 285 of the Italian AGCM; FTC's budget quadruples that of the British and Italian organisations.⁸⁵ In this sense, Spain represents a separate case since its legal system entrusts the protection of consumers to seventeen regional authorities. Whilst this fragmentation might be useful in protecting consumers against illegal local businesses' practices, the fragmentation is highly inefficient when it comes to protecting them from abuse by large corporations. Perhaps the establishment of a European agency

⁸⁵ Figures have been collected from FTC, CMA and AGCM 2018 Annual Reports, which can be found on their websites: FTC: <https://www.ftc.gov>; CMA: <https://www.gov.uk/government/organisations/competition-and-markets-authority>; AGCM: <https://www.agcm.it>.

dedicated to the protection of consumers at the European level could alleviate the shortage by pooling resources, necessary to face complex and supranational challenges, such as the publication of fake reviews online.

Second, administrative bodies (both in the US and in Europe) are focusing more on positive than negative fake reviews. This is probably because the most flagrant negative fake reviews are eliminated directly by the platforms themselves, while less serious comments such as writing that a hotel is uncomfortable, a film boring, or a waiter rude, have a presumption of protection under freedom of expression, and their falsehood is almost impossible to prove.

Third, so far, all but one of the sanctions have been imposed were on those who promote or publish fake reviews, but not on online platforms that host them. Even though the expectations placed on digital platforms' responsibility are growing, the FCDA exclusion of liability and the safe harbour of Article 14 of the E-Commerce Directive continue to hamper enforcement activities and would benefit from a review, which currently is on the way in the EU.

Fourth, the enforcement mechanisms provided under European and American regulations are in practice not working sufficiently well to eradicate fake reviews. This is demonstrated by the enormous imbalance between the widespread phenomenon of fake reviews and the few existing decisions sanctioning them. Despite clearly establishing the illegality of fake reviews, both European and American Advertising and Consumer Law appear to be weak method of control.

In order to fight fake reviews effectively, a joint commitment of public authorities and Internet platforms is required. Due to the magnitude and complexity of the issue, it seems that leaving the fight against fake reviews in the hands of misled citizens or victimised traders is tantamount to perpetuating the problem.

Firstly, public authorities can adapt legal frameworks to facilitate the prosecution of fake reviews. To do so, first of all, the rules regarding standing in proceedings against illegal advertising could be relaxed, opening the door to more flexible avenues for individual and collective redress in Consumer Law. Second, without repealing the safe harbour provisions, both American and European regulations could incorporate certain transparency and information requirements to platforms, like the compulsory disclosure of their systems of verification, or the right of rebuttal of affected parties. Similar provisions have recently been incorporated in the EU, for example, in the latest reform of the audiovisual directive concerning commercial communications or hate speech (Art. 28 *ter* Directive 2018/1808). Third, public authorities at federal, EU, and national levels could promote associations of consumers and users to facilitate the defence of their collective interests. Finally, public authorities should provide regulatory bodies (like FTC, CMA, or AGCM) with sufficient human power, financial resources, and legal instruments to deal with fake reviews, keeping in mind that systematic enforcement, in addition to being necessary, is undoubtedly costly. As we have pointed out, the creation of a specific European agency or working party on online consumer protection may be convenient.

For their part, Internet platforms should reinforce their commitment to the creation of more transparent online marketplaces. This commitment can be materialized, first, in the design of more transparent rating systems, which entails the implementation of quality controls for improved authenticity of reviews, and the effort to

encourage more real consumers to leave accurate reviews. There are already positive initiatives in this direction, like the principles for the collection, moderation, and publication of online reviews published in 2018 by the International Organization for Standardization.⁸⁶ Furthermore, digital platforms can collaborate with public authorities in the fight against fake reviews in many ways through exchanging information, reporting offenders, and educating their users.

Finally, consumers and traders can also collaborate in the fight against online fake reviews. First, they can report to the platform and, in the most serious cases, to public authorities, the reviews they consider false. Second, the users can write honest and balanced reviews, which will make the overall ratings more truthful and reliable. Last but not least, the users can punish through their consumption choices those companies that resort to these practices.

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⁸⁶ International Organization for Standardization, ‘Online consumer reviews – Principles and requirements for their collection, moderation and publication’, 2018, ISO 20,488:2018.

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