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# Keeping Up With The Rules When Endorsing Crypto-Assets: Kimberly Kardashian

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## I. Introduction

On 3 October 2022, the United States Securities and Exchange Commission (**SEC**) published an order to institute cease-and-desist proceedings in the matter of Kimberly Kardashian (**Order**).[2] The Order announces charges against Ms Kardashian for "touting on social media a crypto asset security offered and sold by EthereumMax without disclosing the payment she received for the promotion", a violation of US federal securities law that was settled by payment of USD 1.26 million in penalties, disgorgement and interest.[3]

While studying the Order may seem a curious exercise in comparative law for a Luxembourg banking lawyer, it is nevertheless instructive. More and more banks provide services relating to crypto-assets (e.g. storage), as markets for these assets are attracting more attention from investors and are becoming more regulated, such as by the Markets in Crypto-Assets Regulation (**MiCA**).[4] One possible reason for the increased attention is that companies operating in these markets (in particular exchanges and platforms) enlist celebrities to endorse crypto-assets for marketing purposes.[5] Not without pushback: several regulators believe that celebrity endorsements spur investors to make bad investment decisions driven by "fear-of-missing-out" or "FOMO", and therefore scrutinise these endorsements.[6] And indeed, many investors have lost money in these markets due to bankruptcies, runs and plummeting asset values.[7] Nevertheless, some investors may still consider crypto-assets a worthwhile financial investment and banks may want to continue to offer their services.[8] Thus, a Luxembourg banking lawyer may want to know the applicable rules when platforms enlist celebrities to endorse the assets, to mitigate the associated legal risks.

The present purpose is to zoom in on one of those risks. The anti-touting rule mentioned in the Order essentially addresses the following question: *what information must be disclosed regarding the financial compensation paid by the issuer of crypto-assets to the celebrity in exchange for the endorsement, and what are the consequences of the failure to disclose this information?* The purpose of this *éclairage* is to consider that question through

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2 SEC, "Order instituting cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933, making findings, and imposing a cease-and-desist order", Administrative Proceeding No. 3-21197 (Kimberly Kardashian), 3 October 2022.

3 Order, section IV.C. SEC, "SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security", 3 October 2023 <www.sec.gov> accessed 1 March 2023.

4 A crypto-asset can be considered a digital representation of a value or right stored using distributed ledger or a similar technology (**DLT**). See Article 3.1.2 MiCA.

5 For some examples: N. PAHWA, "If You Bought Crypto Because of Larry David and Matt Damon, I'm Sorry", Slate, 11 February 2023 <slate.com> accessed 23 February 2023; Binance, "Christiano Ronaldo Launches First NFT Collection with Binance" <www.binance.com> accessed 23 February 2023.

6 Financial Conduct Authority, "Listening up to level up – regulating finance for the whole of the UK" (Speech by C. RANDELL, Chair), 20 May 2022; Financial Conduct Authority, "Young investors driven by competition and hype", Press release 20 Oct 2021; Financial Conduct Authority, "The risks of token regulation" (Speech by C. RANDELL, Chair), 6 September 2021; Autoriteit Financiele Markten, "The pitfalls of finfluencing", December 2021 <www.afm.nl> accessed 23 February 2023, 10; Commission de Surveillance du Secteur Financier, Communiqué "Guidance for consumers in the context of virtual assets", 27 April 2022 <www.cssf.lu> accessed 23 February 2023.

7 A. HARTMANS, "If you bought EMAX crypto tokens when Kim Kardashian promoted them on Instagram, you'd have lost over 95% of your money by now", *Business Insider*, 3 October 2022; K. HUANG, "Why Did FTX Collapse? Here's What to Know", *New York Times*, 10 November 2022; D. GURA, "Binance was once FTX's rival and possible savior. Now it's trying not to be its sequel", *NPR*, 16 December 2022, <https://www.npr.org/> last accessed 1 March 2023.

8 For anecdotal evidence, J. PINSKER, "The Investors Who Still Think Crypto Can Make Them Rich", *Wall Street Journal*, 21 February 2023.

a comparative lens, by considering the facts that gave rise to the Order (II), discussing the US rules underlying the Order (III), applying European Union (**EU**) and Luxembourg law to the facts (IV), and considering the implications in case of non-compliance for financial intermediaries (V). The discussion connects to the (foreign) literature on investment recommendations and influencers, topics which are relatively untouched in Luxembourg doctrine.[9] This *éclairage* seeks to fill that void and prospectively looks to the MICA rules, which will apply from January 2025.

## II. Facts

On 13 June 2021, Ms Kardashian posted the following message on her Instagram account:

*"YOU GUYS INTO CRYPTO???? THIS IS NOT FINANCIAL ADVICE BUT SHARING WHAT MY FRIENDS JUST TOLD ME ABOUT THE ETHEREUM MAX TOKEN! A FEW MINUTES AGO ETHEREUM MAX BURNED 400 TRILLION TOKENS – LITERALLY 50% OF THEIR ADMIN WALLET GIVING BACK TO THE ENTIRE E-MAX COMMUNITY [...] #AD*"[10]

Note that while Ms Kardashian did label the post as an advertisement by means of the hashtag "#AD", she did not mention in the post that she was paid $250,000 for this endorsement.[11]

The post also included a link to the EthereumMax website that provided more information on the EthereumMax (**EMAX**) tokens and purchase instructions.[12] According to the whitepaper, the EMAX token is a "culture token" that represents an "entry-point into an all-encompassing decentralized ecosystem that seeks to reward users for holding and participation" such as by "providing lifestyle perks with financial rewards".[13] The whitepaper suggests that beyond providing access to the ecosystem, EMAX tokens *inter alia* allow for payment processing, provide access to real-life experiences (e.g. VIP events) and a non-fungible token (NFT) marketplace, and provide staking rewards.[14] The documentation mentions several financial rewards for holding EMAX tokens. For example, EMAX holders receive a 6% yield on every transaction on the decentralised finance (DeFi) platforms operated by Ethereum Max in the ecosystem.[15] Also, by pairing EMAX with wETH, holders can create EMAX LP tokens that they can stake in exchange for XMAX, another token in the ecosystem.[16] Finally, the *burning* (destroying) of EMAX tokens should also be understood as a value-generating exercise: by burning tokens, the number of available EMAX tokens is reduced, such that the remaining tokens increase in price.[17]

Therefore, the publicly available information suggests that holdings EMAX tokens offers both utility (access to the platform and its services) and the promise of financial gains.

## III. US federal securities law

This section discusses the key points of the Order, focusing on (1) the qualification of the facts under US federal securities law, (2) which substantive requirements are imposed on communications involving crypto-assets by those rules, and (3) which powers the SEC has to enforce the requirements.

### *1 The EMAX Tokens Are Securities*

The SEC has issued the Order under the US Securities Act of 1933[18] (**1933 Act**). If crypto-assets can be qualified as *"securities"* under the 1933 Act, communications regarding those assets are subject to its provisions and the supervision of the SEC.[19] The SEC generally asserts its supervisory authority over market conduct involving crypto-assets by relying on a court-sanctioned interpretation of the notion

9 See *infra* Section IV.
10 Order, par 9.
11 Order, par 10.
12 Order, par 9; J. HYATT, "The Untold Story Behind Emax, The Cryptocurrency Kim Kardashian Got Busted For Hyping", *Forbes*, 11 November 2022.
13 Whitepaper, v1 October 2021, <https://ethereummax.org/wp-content/uploads/EthereumMax-Whitepaper-v1-Final.pdf> accessed 22 February 2023.
14 Whitepaper, page 8. The services had not yet been launched at the time. See D. NELSON, "What is Ethereum Max? Inside the Crypto Kim Kardashian Lost $1.2M Promoting", *Coindesk*, 10 October 2022.
15 E. NEWBERG, "What is Ethereum Max, and Why Are Celebs Promoting It", The Ascent (Motley Fool), 20 June 2021, <www.fool.com> accessed 22 February 2023; Ethereum Max, "Buying and selling crypto 101", <ethereummax.org> accessed 23 February 2023.
16 EthereumMax Quick Reference guide, <https://ethereummax.org/wp-content/uploads/EthereumMax-Quick-Reference-Guide.pdf> accessed 22 February 2023.
17 Standard microeconomic theory predicts that at the same level of demand for the tokens, the reduction of supply should increase the market price of the tokens, *ceteris paribus*. See also D. NELSON, *op. cit.*
18 US Code, Title 15, Section 2A.
19 If the tokens are qualified as commodities, the Commodity Futures Trading Commission (**CFTC**) has jurisdiction over the crypto-asset. Therefore, the CFTC and the SEC are the two US crypto market regulators.

of "investment contract", a *species* of "security" under the 1933 Act.[20] Specifically, the SEC applies the criteria formulated by the US Supreme Court in *SEC v. W.J. Howey Co.* to assess whether an specific investment qualifies as an investment contract.[21] In the Supreme Court's view, an investment contract is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party […]".[22] So, the test is "whether the scheme involves an *investment of money* in a *common enterprise* with *profits* to come solely *from the efforts of others*" (emphasis added).[23] Using this test, the SEC concludes that the EMAX tokens are investment contracts and that therefore, any communication in respect of those tokens must respect the requirements of the 1933 Act.[24]

***2 Celebrities Must Disclose Consideration***

In the Order, the SEC concludes that Ms Kardashian violated the "anti-touting" rule of the 1933 Act.[25] Touting is one of the "fraudulent interstate transactions" prohibited by the Act.[26] Specifically, pursuant to the anti-touting rule it is unlawful for any person to publish any notice, circular, advertisement, newspaper, article, letter, investment service, or communication "which, though not purporting to offer a security for sale, describes such security *for a consideration* received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, *without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof*" (emphasis added). Thus, in case a celebrity publishes a communication in exchange for a sum of money, the rule requires that the communication mentions the sum of money (to be) received by the celebrity. Because Ms Kardashian's post mentioned the EMAX token sale but not the payment, this rule was violated.[27]

***3 Violations can lead to fines, disgorgements and prohibitions***

The Order sets out a number of powers available to the SEC when enforcing the anti-touting rule, and which are exercised in Ms Kardashian's case.[28] First, the SEC issues a *cease-and-desist* order (essentially prohibiting Ms Kardashian from posting similar messages in the future) and Ms Kardashian undertakes to forego receiving compensation for touting for a period of three years.[29] Second, the SEC requires the disgorgement of the received payment including prejudgment interest.[30] Finally, the SEC imposes a fine ("civil money penalty") of USD 1.26 million in Ms Kardashian's case.[31] While it is not clear from the Order how the amount of the penalty was determined, SEC Chair Gary Gensler did mention elsewhere that the SEC has "limited resources" and seeks to bring cases that "help send a message to the market",[32] which could be understood as implying that Ms Kardashian's case was used for that purpose. [33]

## IV. EU and Luxembourg law

This section analyses the application of EU and Luxembourg securities and consumer law to the facts set out in II above if those facts would have taken place in Luxembourg. Specifically, it discusses (1) how the crypto-assets are qualified under those rules, (2) which requirements are imposed on communications in respect of crypto-assets under those rules, and (3) the powers of the *Commission de Surveillance du Secteur Financier* (**CSSF**) to enforce those rules.

***1 The EMAX Tokens Could Be Financial Instruments or Crypto-Assets***

The first step in the analysis is to consider whether the crypto-assets in question can be qualified as "financial instruments" in the sense of Directive 2014/65/EU (**MiFID II**) or "crypto-assets" in the sense of MiCA. These two frameworks determine the

20 G. GENSLER, "Crypto Markets", Speech at Penn Law Capital Markets Association Annual Conference, 4 April 2022; SEC Corporation Finance, "Framework for "Investment Contract" Analysis of Digital Assets", 3 April 2019 <www.sec.gov> accessed 23 February 2023.
21 *Securities and Exchange Commission v W.J. Howey Co.*, 328 U.S. 293 (1946).
22 Ibid.
23 Ibid.
24 Order, pars 6-8.
25 Order, par 12; Section 17(b) 1933 Act.
26 Subchapter I, Section 17 1933 Act.
27 Order, par 12.
28 NB: the SEC and Ms Kardashian have settled the charges, see Order, section II.
29 Order, par 15(a) and IV.A, IV.B. see Section 8A 1933 Act.
30 Section 8A, sub (e) 1933 Act, see Order, section IV.C.
31 Section 8A, sub (g)(1) and (g)(2) 1933 Act, see Order, section IV.C.
32 Economist, "Money Talks" Podcast, Episode "Wall Street's top cop" (Interview with Gensler), 26 October 2022.
33 See also D. NELSON, *op. cit*, quoting Mr Rosario.

application of substantive provisions regulating the content of the endorsements.[34] If they are financial instruments, the communications are subject to the national transpositions of MiFID II (the law of 30 April 2018, **L2018** and the law of 5 April 1993, **L1993**) and, if certain conditions are fulfilled, Regulation 596/2014 (**MAR**) (as implemented by the law of 23 December 2016, **L2016**).[35] MiFID II, as recently updated by Regulation (EU) 2022/858 (**DLTPR**), now specifies that those instruments can also be issued using DLT technology and L2018 states the same.[36] Generally, the approach taken is that if the crypto-assets have features that are substantially similar to financial instruments covered under MiFID II, such as equity securities or debt securities, the crypto-assets qualify as financial instruments.[37] Otherwise, they are subject to MICA, under which the EMAX tokens could qualify as "utility tokens" (a *species* of crypto-assets). [38] On the basis of the facts described above, it cannot be determined with certainty that the CSSF would qualify EMAX tokens as financial instruments or utility tokens.[39] The analysis below will explore both qualifications.

### *2 Celebrities Must Disclose Compensation*

MAR, MiFID II (i.e. L2018 and L1993) and MiCA all stipulate substantive requirements for communications regarding financial instruments respectively crypto-assets directed to the public. In addition, if those communications are directed to "consumers" in the sense of the EU consumer law directives as transposed and consolidated in the Luxembourg Consumer Code (**LCC**),[40] the communications must also meet the substantive requirements set out therein. Finally, where the communications are disseminated via the internet, the law of 14 August 2000 on electronic commerce which transposes the E-commerce Directive (**LEC**), is also applicable.[41]

#### *2.1 MAR*

MAR applies to communications regarding financial instruments that are directed to the public and can be classified as "investment recommendations", if the relevant financial instruments fall in the material scope of MAR. That material scope is limited to financial instruments (1) traded on a EU trading venue *ex* MiFID II (i.e. Regulated Market (**RM**), Multilateral Trading Facility (**MTF**) or Organised Trading Facility), (2) for which an application for admission has been filed (in case of a RM or MTF), or (3) not covered under (1) or (2) but whose price or value depends on the financial instruments covered under (1) or (2).[42] From the facts it cannot be determined if the EMAX tokens are in scope, but for the present analysis it is assumed that they are.

Pursuant to MAR, "investment recommendations" means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.[43] "Information recommending or suggesting an investment strategy" means either (1) information produced by "any […] person whose main business is to produce investment recommendations" (e.g., investment firm) or "a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer" or, (2) (in case of other persons) information which directly proposes a particular investment decision in respect of a financial instrument.[44]

MAR applies to communications on social media,[45] but more information is needed to figure if Ms Kardashian's post "expresses a particular

34 The qualification of crypto-assets as "virtual assets" *ex* Article 1 (20b) of the Law of 12 November 2004 on the fight against money laundering and terrorist financing (AML/CTF Law) matters in practice, but not for the present purposes. The AML/CTF Law does not seek to regulate communications to the public of the nature discussed here, but to extend the obligations of the AML/CTF Law to matters involving virtual assets following Directive (EU) 2018/843 (see Draft Bill 7467 (*Commentaire des articles*), 31). Therefore, this definition (with its exclusion of financial instruments, see also CSSF FAQ Q5) bears no relevance to the present analysis.

35 Article 1.26 L2018 and Article 2.1 MAR.

36 Article 18 Regulation (EU) 2022/858 amending Article 4.1.15 MiFID II; L2018, as updated by the Law of 15 March 2023 modifying *inter alia* L2018 and implementing DLTPR.

37 ESMA, "Annex 1: Legal qualification of crypto-assets – survey to NCAs", ESMA50-157-1384, January 2019.

38 Recital 6 and Article 2.3.a MiCA. A utility token is a token which is only intended to provide access to a good or a service supplied by the issuer of that token (Article 3.1.5 MiCA).

39 It seems that the CSSF considers the qualification on a case-by-case basis. See CSSF, "Annual Report 2021", p. 63 ('Therefore, it is crucial that initiators of such a project provide a detailed reasoned opinion to the CSSF to determine the different rights attached to these tokens […] with respect to the applicable regulatory frameworks.')

40 *Code de la Consommation*.

41 Loi du 14 août 2000 relative au commerce électronique and Directive 2000/31/EC on electronic commerce.

42 Article 3.1 MAR.

43 Article 3.1.35 MAR.

44 Article 3.1.34 MAR. It is not required that the person's main business is to produce recommendations. ESMA, "Questions and Answers on the Market Abuse Regulation", ESMA70-145-111, 23 September 2022, A8.3.

45 ESMA, "Statement on Investment Recommendations on Social Media", 28 October 2021, ESMA70-154-2780. The statement has

investment proposal" or "directly proposes a particular investment decision". Does the "giving back to the community" part fit into any of these two notions? According to ESMA, the substance of the communication must be assessed[46] and must include an element of opinion on the value of the instrument.[47] If the communication only provides "purely factual information", it does not constitute an investment recommendation under MAR.[48] Would the average member of the public interpret "giving back to the community" as an opinion on the value of the EMAX tokens? Again, that is unclear, but assuming that it is considered an opinion of value, Ms Kardashian's communication could be considered an investment recommendation.

In that case, MAR requires that persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy shall take reasonable care to ensure that such information is objectively presented, and to *disclose their interests* or indicate conflicts of interest concerning the financial instruments to which that information relates.[49] The regulatory technical standards set out in Commission Delegated Regulation (EU) 2016/958 (**MDA**) specify that the disclosures must mention all relationships and circumstances (of the persons producing the recommendations) that may reasonably be expected to impair the objectivity of the recommendation, including interests or conflicts of interest.[50] If the person is considered an "expert", additional disclosure obligations apply (not Ms Kardashian).[51] Receiving payment for the communication could be considered a circumstance that may impair its objectivity. Thus, it seems that Ms Kardashian's post would have violated MAR, as it should mention *that* she received payment from the issuer in exchange for the post, while not expressly requiring to include *the amount* of the payment. In that sense, MAR is less demanding than the 1933 Act.

### *2.2 MiFID II*

MiFID II (*c.q.* L1993) requires "marketing communications" in respect of financial instruments to be "identifiable as such".[52] The rule is used in other texts of financial services regulation, such as MiCA (see below), the EU Crowdfunding Regulation, the Insurance Distribution Directive and the Regulation on facilitating cross-border distribution of collective investment undertakings (**CBDR**).[53] In MiFID II, the rule applies to investment firms and credit institutions, which must also meet the supplemental requirements set out in Commission Delegated Regulation (EU) 2017/565.[54] What constitutes a marketing communication and when it is identifiable, is not further specified or prescribed in MiFID II and the delegated regulation.[55] In any case, the rule would not apply to Ms Kardashian's post, as she is not acting through one of the aforementioned regulated entities and there is no indication that providing investment services to third parties is her regular occupation or business (such that she would require the relevant authorisation).[56]

### *2.3 MiCA*

MiCA requires "marketing communications" in respect of crypto-assets to be "identifiable as such", without further explaining either of the two notions.[57] In addition, such communications must refer to the whitepaper (and the website where it is available), be consistent with the information in the whitepaper and contain a clear and prominent statement indicating *inter alia* the absence of approval by an authority[58]. As the recitals to MiCA specify that 'advertising messages' are marketing communications and given

been backed by several regulators. See for example, AMF France, "Investment recommendations on social media: the AMF backs ESMA's reminder", 29 October 2021, <amf-france.org> accessed 2 December 2022.

46 ESMA, *op. cit.*, A8.1.

47 ESMA, *op. cit.*, A8.4.

48 ESMA, *op. cit.*, A8.5.

49 Article 20.1 MAR.

50 Article 5.1 MDA.

51 Article 6 MDA.

52 Article 24.3 MiFID II; Article 37-3.2 L1993.

53 Article 27.1 Regulation (EU) 2020/1503 on European crowdfunding service providers for business; Article 17.2 Directive (EU) 2016/97 on insurance distribution; Article 4.1 Regulation (EU) 2019/1156 of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings.

54 Article 37-3.2 law of 5 April 1993 on the financial sector; Articles 36 and 44 Commission Delegated Regulation (EU) 2017/565.

55 ESMA, "MiFID – Conduct of Business, fair, clear and not misleading information, Peer Review Report", ESMA/2014/1485, 11 December 2014, par 15; M. BRENNCKE, "Art. 24 MiFID II", in: M. LEHMANN and C. KUMPAN (eds.), *European Financial Services Law - Article-by-Article Commentary* (Nomos Beck Hart 2019) p. 167.

56 More specifically, she does not meet the requirements of Article 4.1.1 MiFID II, as transposed in Article 1.16 law of 30 May 2018 on markets in financial instruments in conjunction with Article 1.9 law of 5 April 1993 on the financial sector. For the sake of brevity, her venture into financial services will be ignored. See C. MORRIS, "Kim Kardashian is launching a private equity fund with a partner who invested in Beats by Dre and Supreme", *Fortune*, September 7, 2022.

57 Article 6.1.a MiCA.

58 Article 6 MiCA. See also Dirk ZETZSCHE, F. ANNUNZIATA, D. ARNER and R. BUCKLEY, "The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy", *Capital Markets Law Journal*, 2021, Vol. 16, No. 2, p. 211.

the content of Ms Kardashian's post, it is reasonable to consider the post a marketing communication.[59] When is a marketing communication identifiable as such? Again, MiCA does not provide further guidance, but using other rules could be instructive. For example, according to ESMA's guidance under CBDR, marketing communications on social media are identifiable as such when they include a prominent disclosure of the text "marketing communication".[60] In ESMA's view, using the hashtag #MARKETINGCOMMUNICATION could meet the requirement, if the interface of the platform accentuates the font of the hashtag.[61] In that case, Ms Kardashian's post would be a violation of MiCA, as she only used the #AD hashtag and did not meet the other criteria either.

*2.4 Consumer law*

A communication in respect of a product by a "professional" to a consumer may be considered a "commercial practice", in the sense of the provisions of the LCC transposing the Unfair Commercial Practices Directive (**UCPD**).[62] A professional is a natural or legal person acting for purposes relating to his trade, business, craft or profession, including by means of anyone acting in the name of or on behalf of the trader.[63] A commercial practice is any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a professional, directly connected with the promotion, sale or supply of a product to consumers.[64] Her post clearly qualifies as a commercial practice, but would Ms Kardashian qualify as a professional in the sense of the LCC?

The answer to that question is not clear. The case law and discussions around the application of that definition to celebrities are inconclusive. There has been a push to include communications by "influencers", i.e. persons who have a greater than average reach/audience on a particular social media platform, and Ms Kardashian clearly falls in that group by popular standards.[65] Some authors posit that influencers can be qualified as (a) professionals on the basis of their behaviour[66] or (b) agents acting on behalf of a professional.[67] Other authors debate this view, advancing arguments that the influencer has his or her *own* product, especially if the influencer is self-employed.[68] This *éclairage* is not the forum to take a position in the debate, which relies in part on the interpretation of the CJEU's considerations in *Peek and Cloppenburg* and *Kamenova*.[69] In any case, the qualification is ultimately up to the national courts, based on the circumstances of the case.[70]

Assuming that a celebrity or influencer could indeed be considered to be a professional or acting on behalf of EthereumMax, Ms Kardashian's post could be considered a misleading commercial practice.[71] Failing to identify the commercial intent of the commercial practice if not already apparent from the context, where this causes or is likely to cause the average consumer to take a transactional decision that (s)he would not have taken otherwise, is a misleading omission.[72] The requisite commercial element is the fact that an influencer receives payment for the endorsement.[73] Ms Kardashian's omission to mention that she was remunerated could be considered a misleading commercial practice (the amount of the payment seems not required).[74] In theory this rule seems clear, but its application is not straightforward. First, the national courts in Member States differ with respect to the minimum level of disclosure of the commercial intent; some consider

59 Recital 14 MiCA.
60 ESMA, "Final Report - Guidelines on marketing communications under the Regulation on cross-border distribution of funds", ESMA34-45-1244, 27 May 2021, Guideline 4.
61 Ibid
62 Article L. 121-1 LCC et seq ; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.
63 Article L. 010-1.2 LCC.
64 Article L. 121-2.2 LCC.
65 European Commission, "Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market", 2021/C 526/01, 29 December 2021, 4.2.6. l
66 See e.g. C. RIEFA and L. CLAUSEN, "Towards Fairness in Digital Influencers' Marketing Practices", *Journal of European Consumer and Market Law*, 2/2019, p. 64-74.
67 European Commission, *op. cit.*, par 2.2; F. MICHAELSEN, L. COLLINI *et. al.*, "The impact of influencers on advertising and consumer protection in the Single Market", Publication for the committee on Internal Market and Consumer Protection (IMCO), 16 February 2022.
68 MICHAELSEN, COLLINI *et. al.*, *op. cit.*, p. 64.
69 In Case C-105/17 *Kamenova*, pars 36-38, the CJEU considered that the national court must assess on a case-by-case basis whether a person is considered a professional, and whether the person received remuneration is a relevant circumstance. In Case C-371/20 *Peek*, par 32, an advertorial from a media outlet was considered a commercial practice attributable to the trader.
70 RIEFA and CLAUSEN, *op. cit.*, p. 66.
71 The mere communication by the influencer, without receiving payment, is unlikely to be unfair under the general test laid down in Article L. 122-1.2 LCC. For a similar conclusion, see RIEFA and CLAUSEN, *op. cit.*, p. 66.
72 Article L. 122-3.2 LCC.
73 European Commission, *op. cit.*, pars. 4.2.6.
74 European Commission, *op. cit.*, pars. 4.2.6; RIEFA and CLAUSEN, *op. cit.*, p. 67.

#AD (advertisement) sufficient, while others require more specific disclosure.[75] Second, there must be a relationship of causality between the promotion and the purchase of the EMAX tokens by a consumer, which may be hard to establish.[76] Finally, the lack of standards of professional diligence applicable to influencers, may also complicate the finding of a misleading commercial practice.[77] All in all, Ms Kardashian's post may be in violation of the LCC, but it is far from certain that this violation could be established.

*2.5 E-commerce law*

A "commercial communication" disseminated using an "information society service" in the sense of the LEC, must be "clearly identifiable as such" .[78] A commercial communication is any communication "aimed at promoting, directly or indirectly, the products, services or image of an undertaking, organisation or a person performing a commercial, industrial, artisanal activity or liberal profession".[79] An information society service is any rendered service, normally against remuneration, at a distance by electronic means on the individual demand of an end user.[80] The rule is broad enough to cover the posts on social media platforms by influencers.[81] Again, there is no specific case law on when the communication is clearly identifiable, but it may be the case that ESMA's interpretation under CBDR (see above) could meet this standard.

***3 The CSSF Can Impose Similar Measures***

What are the powers of the CSSF to enforce the aforementioned rules in case of violation by celebrities' communications? The L2016 stipulates a number of administrative sanctions and measures under MAR,[82] including the types of powers stipulated in the Order. First, the CSSF can also issue an order 'requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct".[83] Furthermore, the CSSF can require the "disgorgement of the profits gained or losses avoided due to the infringement in so far as they can be determined".[84] Finally, the CSSF can also impose fines, that depend on whether the celebrity has acted as an individual or as a representative of a legal entity. If acting as an individual, the fine can be at most EUR 500,000,[85] otherwise it can run up to EUR 1 million.[86] In other words, the CSSF's powers are comparable to the SEC's powers in this respect. Similarly, the violation of the MiFID II rules can also be penalised by means of fines, orders to cease and desist and other measures.[87] In respect of misleading commercial practices under the LCC, the CSSF can impose a fine of up to EUR 120 000.[88] Finally, a violation of the LEC can lead to a fine of up to EUR 50 000 by the CSSF, following judgment by the court.[89]

## V. Liability of service providers

The foregoing analysis shows that Ms Kardashian's communication would have been in violation of MAR (if EMAX tokens would qualify as financial instruments), MiCA (if EMAX tokens would qualify as crypto-assets), and the LCC (in both cases). How would such violation affect the bank as a service provider in respect of the EMAX tokens which has not paid for the endorsement? Given that it is neither producing nor disseminating the communication and that it cannot be considered the professional behind the endorsement under the LCC, it would not be exposed to liability due to the violation. Does that change when the bank (1) reposts the endorsement on its own social media or (2) is mentioned in the communication as an intermediary? In the case of (1), reposting could be considered an act of dissemination under MAR and the bank would be violation of the delegated rules. The post would be considered a marketing communication under MiCA and MiFID II (*c.q.* L1993), as well as a commercial

75 F. PFLÜCKE, "Making influencers honest: the role of social media platforms in regulating disclosures", in: C. GOANTA and S. RANCHORDÁS, *The Regulation of Social Media Influencers* (Edward Elgar Publishing Limited 2020), p. 299-322.
76 MICHAELSEN, COLLINI et al, *op. cit.*, p. 64; RIEFA and CLAUSEN, *op. cit.*, p. 67.
77 RIEFA and CLAUSEN, *op. cit.*, p. 67.
78 Articles 2.f and 6.a 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. See MICHAELSEN, COLLINI *et al*, *op. cit*, p 65. See Article 47.a LEC.
79 Article 46 LEC.
80 Article 1.x LEC
81 See for an analysis under the E-Commerce Directive, J. TRZASKOWKI, "Identifying the Commercial Nature of 'Influencer Marketing' on the Internet", in: P. WAHLGREN (Ed.), *50 Years of Law and IT: The Swedish Law and Informatics Research Institute 1968-2018*, p. 81-100); MICHAELSEN, COLLINI et al, *op. cit*, p 65.
82 Article 12 L2016, implementing Article 30 MAR.
83 Article 12.2.1 L2016.
84
85 Article 12.2.10.c L2016.
86 Article 12.2.11.c L2016.
87 Articles 63 and 63-2a L1993.
88 Article L. 122-8.1 LCC.
89 Article 71-1 LEC.

practice under the LCC, and a national court could consider that the bank has also violated those rules by reposting if the post is considered to be a communication in the bank's own capacity. In case of (2), as long as the bank has not been involved in the communication or its preparation (including the financing of the payment), the bank avoids liability. From a risk minimisation perspective, it is thus better for the bank to limit its involvement.

## VI. Conclusion

The purpose of this *éclairage* was to analyse, under EU and Luxembourg law, the disclosure requirements regarding the financial compensation paid to the celebrity in an endorsement of crypto-assets and the consequences in case of non-compliance. The conclusion is that such endorsements are subject to a host of laws and regulations, which have in common that endorsements should clearly specify whether they are paid advertisements. The analysis also illustrates the differences of these frameworks with US federal securities law. The anti-touting rule has a wider material scope of application as it applies to *any* crypto-asset qualified as an investment contract (itself a broad notion), and expressly requires disclosure of the paid amount.

As the EU integrates crypto-assets in its regulatory space with the entry into force of the DLT Pilot Regime and the adoption of MiCA, issuers, celebrities *and* service providers must carefully re-assess their advertising and distribution strategies. The EMAX tokens debacle is but one of many cautionary tales from the US.[90] Following the order against Ms Kardashian, the SEC has issued a similar order against former basketball player Paul Pierce for a post on Twitter implicitly endorsing EMAX tokens.[91] Meanwhile, investors filed a class action lawsuit against Ms Kardashian, Mr Pierce and Floyd Mayweather over their endorsements, which was dismissed. The judge recognised the ability of the celebrities to "readily persuade millions of undiscerning followers to buy snake oil with unprecedented ease and reach" but stated that the law "expects investors to act reasonably before basing their bets on the *Zeitgeist* of the moment".[92] It is precisely this perennial balancing act, between protecting investors and relying on their powers of discernment, that continues to make the regulation of advertising in financial markets a thrilling area of law.

90 The SEC continues to enforce the anti-touting in this market. See e.g. SEC, "SEC Charges Crypto Entrepreneur Justin Sun and his Companies for Fraud and Other Securities Law Violations - Eight celebrities also charged for illegal touting of Sun's crypto asset securities", 22 March 2023.

91 SEC, "SEC Charges NBA Hall of Famer Paul Pierce for Unlawfully Touting and Making Misleading Statements about Crypto Security", 17 February 2023 <www.sec.gov> accessed 23 February 2023.

92 R. PICCIOTTO, "Federal judge dismisses crypto scam lawsuit against Kim Kardashian, Floyd Mayweather Jr.", *CNBC*, 7 December 2022 <https://www.cnbc.com> accessed 23 February 2023.

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