

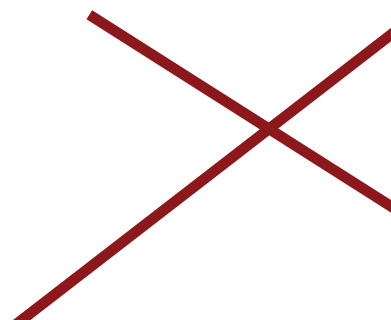
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Litigation & Arbitration

Understanding the Legal Framework of Influencer Marketing in the EU

Newsletter



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Introduction

In our newsletters, we typically delve into the intricacies of litigation and arbitration, focusing on the institutions and regulations that govern disputes. However, we've recently developed a unique interest in the art of influencing people, not within the courtroom, but in everyday life. As such, we're thrilled to introduce our latest edition dedicated to influencers and the legal landscape—or lack thereof—surrounding their activities. Who exactly are these influencers? What regulations govern their operations, if any? And what responsibilities do they bear for the information they disseminate?

From social media personalities to celebrity endorsers, influencers manifest in various forms and possess diverse audiences and reach. Yet, despite their significant impact on society, the realm of influencer marketing often exists within a gray area of regulation. While certain jurisdictions have specific guidelines concerning the disclosure of sponsored content, many others lack comprehensive rules. This discrepancy can give rise to issues concerning transparency and authenticity, particularly when influencers endorse products or services without adequately disclosing their affiliations with brands.

Equally significant is the exploration of the responsibilities that influencers bear for the information they disseminate. With their substantial reach and influence, they carry a duty to uphold the accuracy and integrity of the content they share. This includes maintaining transparency regarding any conflicts of interest and adhering to ethical standards, particularly when endorsing products or providing advice, including on health-related matters.

In an age where opinions hold increasing sway over our decisions, whether in choosing clothing, food, or even seeking information about medications, understanding the landscape of influence is paramount. We invite you to join us in unraveling this complex and ever-evolving terrain in our upcoming exploration.

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| Belgium



Influencer Legislation

Influencer advertising and marketing has been one of the fastest growing industries over the past decade. The Cambridge dictionary defines an influencer as "a person who is paid by a company to show and describe the company's products and services on social media and encourage others to buy them". Companies have started to realize the huge impact of influencers through social media content. However, several legal issues have come to the fore in relation to commercial advertising and consumer protection as they relate to commercial social media content.

While Belgium does not have specific legislation, influencers promoting goods and services are subject to a number of general consumer protection and unfair commercial practices laws. The law on misleading advertising is harmonized across the EU via the implementation of the Unfair Commercial Practices Directive (2005/29/EC) (UCPD), as amended by the Omnibus Directive (Directive (EU) 2019/2161). The Belgian legislator has transposed these Directives and incorporated them into Book VI of the Belgian Code of Economic Law.

Influencers qualify as enterprises

According to European Union (and therefore Belgian) law, influencers who are content creators and who regularly promote or sell products qualify as a "business". Consequently, they must have a VAT number and comply with the Belgian Code of Economic Law, including consumer protection law and the provisions on unfair market practices.

However, influencers who engage in social media on an occasional, non-professional basis and who do not receive compensation for publishing social media content are deemed to express their opinions as private individuals and not as companies. They don't need to have a VAT number nor do they fall under the provisions of the Belgian Economic Code.

The obligations of an influencer as a company

Disclosure of the commercial nature of posts

Influencers often combine commercial and non-commercial posts, and users may believe that a particular post reflects the influencer's mere view on a product or service when, in fact, they are being paid for endorsing these. The commercial nature of an influencer's posts may not always be apparent.

As a result, such commercial social media posts may potentially mislead consumers and constitute an unfair market practice. Indeed, consumers must be able to tell when influencers are promoting as opposed to simply expressing their view on a product or service. Otherwise consumers are likely to be misled. For this reason, influencers must disclose the commercial nature of commercial posts, as these are considered advertising. The Economic Inspection of the Belgian

SFD Economy applies the following rules in relation to such mandatory disclosure:

- The post must be 'tagged' with an unambiguous word that is clear to everyone, such as 'advertising', 'publicity',....
- This tag should also be immediately visible to followers without them having to open the message, and should not be placed at the end of the message, between different hashtags, or as the last hashtag. Preferably, the tag should be placed at the top of the post or on the photo or video. The tag should be clear and should not blend into the background. The tag should contrast well with the background in terms of color and font.
- The tag must be in the same language as the post.
- Tags like "collaboration", "sponsored", "partner", "ambassador", "thanks to", "commissioned by" and abbreviations like "pub", "adv" are not considered sufficiently clear.
- The tag "sponsored" can be used when: (1) there is no agreement with the brand/company and they have no expectations regarding the number or content of the influencer's posts, (2) there is no contract associated with the post, and (3) the influencer does not receive a click-based commission. Even if the influencer's post is sponsored, they must still use the tags "advertising" or "publicity" if doing so better reflects the content or commercial nature of the post and makes it clearer to the influencer's target audience.

- The brand or company being advertised must be tagged or clearly stated.

It is also advisable to use any labels offered by the platforms themselves, where available, such as Instagram's "Paid Partnership" label and YouTube's "Contains paid promotion" label.

If an influencer receives compensation for a post, it is considered advertising and the influencer must disclose the commercial nature of the post. However, compensation does not necessarily mean money and may include other benefits such as discounts, gifts, or invitations to events. Also, whether or not there is an actual agreement between the influencer and the company is irrelevant for a post to qualify as advertising.

In addition to the hard rules of the Belgian Commercial Code, the soft rules of the Belgian Code of Ethics on Advertising may also apply. This code of ethics provides that when endorsing a product, the influencer should provide clear and honest information about it.

Mandatory legal information

As mentioned above, influencers are treated as businesses under the Belgian Economic Code. Therefore, like all companies, influencers must be registered with the Belgian Crossroads Bank for Enterprises and hold a VAT number.

Furthermore, the legal details of the company must be mentioned on the social media pages and website(s). This includes the company number, the business address and an email address.

Responsibilities of advertisers

When companies engage influencers for advertising services, they are responsible

for ensuring that the influencers' content complies with unfair market practices and misleading advertising statutory provisions. The President of the Antwerp Commercial Court has ruled that a company using the services of a third party to create and publish advertising for the benefit of a company remains responsible for the content of the advertising.

As a result, if a company uses the services of an influencer to create and publish advertisements, that company may be held liable for any violation by the influencer of the provisions on unfair market practices and consumer law.

It is therefore advisable for companies using influencers to have in place a written social media advertising policy and to ensure that any influencers used by the company comply with this policy.



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Czech Republic

Influencer and marketing: legal framework in the Czech Republic

In recent years, a massive shift of audiences from traditional media, especially television, to social media and streaming platforms has occurred. Along with audiences, advertising for products and services has also shifted to these platforms. In particular, influencers, who often have higher ratings than TV shows, are often used as vehicles for advertising. The Czech legislator has not yet reacted to this rapid development by adopting legislation specifically regulating influencer marketing. However, influencer activity in the Czech Republic does not operate in a legal vacuum, but is subject to existing general advertising and consumer protection legislation. In, there is also self-regulation in practice, such as the Influencer Code of Conduct issued by the Association for Internet Development, which contains a set of rules related to influencer advertising.

Cooperation of advertisers with influencers

It is necessary to look first at the legal rules of cooperation between advertisers and influencers. The current laws of contract of the Czech Republic do not provide for a specific type of contract that would apply to this type of cooperation. Therefore, in practice, the parties use their contractual freedom and regulate their mutual rights and duties according to their needs. These partnership arrangements usually contain provisions that define the subject of the



business relationship including aspects such as the product to be advertised, how long it is to appear on the screen, on which platform, what is to be said/written about the product, among many others.

Advertisers willing to use an advertisement created by an influencer must consider the need for a licensing clause in the contract. The influencer's creation is a copyrighted work and a license is required for use. Advertisers also often have an interest in ensuring that the influencer does not promote competing products or services. In this case, it is appropriate to negotiate an exclusivity clause that prohibits the influencer from promoting competing products for the term of the contract. It is also a good idea to negotiate a penalty for breach of this and other obligations. Typically, the contract will also include the negotiation of a fee for the influencer's services. Although contracts may be entered into orally, it is recommended that they be made in writing.

Regulation of the content and dissemination of the advertisement

The basic rules on advertising in the Czech Republic are laid down in Act No. 40/1995 Coll. on the Regulation of Advertising. According to this act, advertising is defined

as "an announcement, demonstration or other presentation disseminated, in particular, through the media, with the purpose of promoting a business activity". The promotional posts of influencers undoubtedly satisfy this definition and are therefore subject to the rules set forth in the Act.

The first requirement is that the communication be clearly and conspicuously labeled as an advertisement.

In other words, consumers must be able to tell from the communication that it is an advertisement. This requirement may be satisfied by simply mentioning the promotional nature of the post. As outlined in the Influencer Code of Conduct, the influencer must adjust the mention to the intended target audience. This means that if 25% or more of the intended audience is under the age of 18, the mention must be understandable to them. In terms of restrictions on advertising content, influencer marketing is subject to a prohibition on misleading advertising. This means that advertising must not mislead the consumer about the characteristics, composition or suitability of the product for a particular purpose. This requirement stems from Directive 2005/29/EC on unfair business-to-consumer commercial practices, which the Czech Advertising Regulation Act implements.

Advertising for illegal drugs is also prohibited. As for legal substances, such as alcohol or tobacco products, influencer marketing must comply with the specific requirements for promoting these substances imposed by the Advertising Regulation Act.

Liability for the content of the post

In general, the influencer and the advertiser are jointly and severally liable for breach of the content restrictions under the Advertising Regulation Act. However, advertisers may be exempted from liability if it is established that the influencer did not follow the advertiser's instructions. Furthermore, the influencer as the distributor of the advertisement will be solely responsible for its dissemination, typically in the cases of hidden advertising.



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| France

Commercial Influence in France

On June 9, 2023, France enacted Law No. 2023-451 of June 9, 2023, "aiming to regulate commercial influence and combat the abuse of influencers on social networks" ("**Law 2023-451**").

This landmark legislation seeks to establish a legal framework to curb abuses of commercial influence and to address the ethical issues arising from their online activities, regardless of the country of residence of the influencer when the target audience is French.

The purpose of Law 2023-451 is to maximize the authenticity and transparency of commercial influence on social networks, to prevent deceptive practices and to allow consumers to make informed choices.

Law 2023-451 defines and regulates the activity of online commercial influence and provides for (i) criminal penalties in case of non-compliance with certain provisions; (ii) mandatory rules on contracts between influencers and advertisers and their agents, and (iii) joint and several liability between them for damages to third parties.

Online Commercial Influence In France

Definition. Law 2023-451 regulates the activity of commercial influence and defines it accordingly: "Natural or legal persons who, for consideration, use their notoriety among their audience to communicate content to the public by electronic means with a view to promoting, directly or indirectly, goods, services or any cause whatsoever, engage in the activity of commercial influence by electronic **means**¹."



A key concept in this definition is "notoriety". The issue that may arise is how many followers are required for one's reputation to be considered notorious?

Establishment outside the EEA or Switzerland. If the Influencer is established outside the European Economic Area (which includes all EU member states) or Switzerland, e.g., in Dubai, it must: (i) designate a legal representative within the EU, to ensure the compliance of the contract targeting French public and respond to any request from administrative and/or judicial authorities; and (ii) take out insurance.

The Law specifies that the terms of application of this article shall be specified by decree which, as of today, has not yet been published

Do's and Don'ts of Online Commercial Influence, criminally sanctioned

Law 2023-451 provides specific rules related to the promotion of goods and services and starts by detailing what promotions are prohibited.

Promotional bans on certain goods and services. The Law includes the same

¹ "Les personnes physiques ou morales qui, à titre onéreux, mobilisent leur notoriété auprès de leur audience pour communiquer au public, par voie électronique, des contenus visant à faire la promotion, directement ou indirectement, de biens, de services ou d'une cause quelconque exercent l'activité d'influence commerciale par voie électronique."

restrictions that apply to traditional advertising (e.g., cigarettes; soda), but goes further to include specific restrictions to protect young audiences, such as:

- Esthetic procedures in breach of the rules under the French Code of Public Health Code, e.g.: hyaluronic acid injections by non-qualified doctors;
- Alternative products or methods to therapeutic treatments without medical validation, e.g.: dietary supplements;
- Nicotine-base products;
- Non-domestic animals;
- Several financial products, e.g., financial contracts and services related to digital assets without proper registration or approval (which includes crypto currencies); and
- subscriptions to sports tips and predictions if the concerned platform enables to exclude minors.

Breach of any of these prohibitions is a criminal offense that attracts the following penalties: imprisonment for up to two years and a fine of up to 300,000 euros (1,5 million euros if the author is a company); unless other existing criminal sanctions, more specific (e.g., those relating to financial products) are qualified.

Additionally, a definitive or temporary ban on practicing their professional activity can be ordered.

Label requirements. Influencers are required to explicitly inform consumers on the following:

- Any commercial relationship associated with the posted content by prominently displaying the terms “*advertisement*” or “*commercial collaboration*” on their promotional content throughout the entire duration of the promotion.

Violation of this obligation is a criminal offense punishable by imprisonment of up to two years and a fine of up to 300,000 euros (1.5 million euros if the author is a company).

- Altered images throughout their display. Images that have been manipulated to alter body shape or facial appearance should be labeled “retouched image”; images that have been generated by artificial intelligence to represent faces or figures must be labeled “virtual image”.

Failure to comply with this obligation is a criminal offense punishable by imprisonment for up to one year and a fine of up to 4,500 euros (22,500 euros if the author is a company).

Accordingly, the hashtags #ad and #sp can no longer be considered as sufficient information.

The Law states that the procedures for applying the provisions on labeling requirements will be defined by decree. To date, no decree has been enacted, which means that the effectiveness of this framework - in particular, criminal prosecution in the event of violations - may be questioned.

Promotion of available and legal goods. The Law establishes that influencers are liable for the delivery of the goods they sell to customers, even if they are not responsible



for such delivery. In addition, the Influencer must ensure that the goods he or she sells are available and legal (e.g., not counterfeit).

Influencers' Agents and Advertisers' duties and liability

Influencer's agents. The Law includes a definition of an influencer's agent and requires such agents to take all necessary steps "*to ensure the defense of the interests of the persons they represent, to avoid situations of conflict of interest and to ensure that their activity is in compliance with this Law*".

Contracts with Advertisers or Influencers. The Law provides binding rules for contracts between influencers and their agents or between influencers and advertisers.

They must be in writing and include (e.g., mission; remuneration; choice of French law if the target is mainly in France).

However, such strict rules will not apply to all influencers and will depend on the consideration (monetary or in kind) received by the influencer. The threshold will be determined by a decree, which has not yet been issued.

Joint and several liability. The advertiser ("and, as the case may be, its representative"), the person exercising online commercial influence and, as the case may be, the influencer's representative are jointly and severally liable for damages caused to third parties in the performance of the contract they have entered into.

Criminal liability. Under the French Criminal Code, any accomplice to a crime may be held criminally liable under the same circumstances as the perpetrator of the crime. Accordingly, if an Influencer is prosecuted for violating his/her duties under the law, the Advertiser and/or its agent could be prosecuted if it is established that they acted as an accomplice, e.g.: they knowingly facilitated the offense.

Providers' duties and liability

The law requires hosting service providers, online platform providers and intermediary service providers to establish procedures for handling alerts and/or complaints related to online commercial influence.

There is no specific liability for non-compliance.

However, liability of such providers could be sought on the basis of the new Digital Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act)). In fact, the implementation of the provisions relating to providers is subject to the entry into force of the Digital Act (which occurred on February 17, 2024).

Conclusion

If French common law (civil or criminal) already provided (before the law) legal tools to prevent abuses, the law clarifies the legal framework of online influencers and the liability of each actor.

However, the law raises some questions and expressly states that the conditions of application of some of its provisions (some of them important) will have to be supplemented by decrees that are yet to be issued.

Nevertheless, Law 2023-451 should be welcomed as an important step in the regulation of the digital landscape.



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| Hungary



In today's world, social media is not only a platform for connecting and consuming content, but also a powerful tool for businesses to reach their target audience with their products and services. One of the most common and effective methods of advertising through social media is influencer marketing. Essentially, influencer marketing involves companies partnering with well-known influencers on social platforms who have the potential to increase the popularity and sales of a product or service via their dedicated social media followers.

Influencers and Shared Content

According to the Information Notice on Influencer Marketing issued by the Hungarian Competition Authority (the "**Authority**"), an influencer is defined as an individual or entity capable of influencing and shaping consumer opinion in the digital space. This influence may be exerted either on an ad hoc basis or in the course of a long-term cooperation by creating and publishing online content on the influencer's own website, social media page or other online platforms. It is therefore clear that, according to the law, influencers are not limited to natural persons and may even encompass digital characters or avatars.

Influencers typically have a dedicated base of followers whose opinions and purchasing habits can be significantly influenced. Because the influencer advertises a certain product or service on his/her platform, consumers often associate the advertised product or service with high quality, which, in turn, drives sales.

Influencers engage in marketing activities by sharing digital content on their associated platforms. The most typical form of digital content consists of posts shared on social media sites, but such content can take other forms too such as reviews or comments. According to the Authority's practice, content can be an opinion, a spontaneous reaction, the use of a hashtag (#), a link, the sharing of another post or even an article that generates interest.

Typically, influencer marketing involves payment of a certain remuneration. Such remuneration may consist of direct monetary compensation, and any other incentives offered in consideration for the posting of content. In one case, the Authority considered watches mentioned in Facebook posts to be consideration that the influencer could keep in return for the post. Essentially, anything of value that the influencer would otherwise have to pay for can be considered remuneration.

Influencer Marketing as Commercial Practice

Hungary's implementation of Directive 2005/29/EC of the European Parliament and of the Council (the "**Unfair Commercial Practices Act**") applies to commercial practices against consumers before, during and after the completion of a commercial

transaction. A commercial practice includes any conduct, action, omission, advertising, marketing or other commercial communication by a business or by a person acting for or on behalf of a business that is directly related to the sale, supply or promotion of a product or service to consumers.

Influencer marketing qualifies as a commercial practice because of the large follower base of influencers who typically engage in activities intended to promote sales. As a result, the content shared by an influencer must comply with the provisions of the Unfair Commercial Practices Act.

Disclosure of the Paid Nature of Advertisements

Because influencers are typically paid for their marketing activities, content shared with a potential to influence a broad audience cannot be considered entirely objective and independent. Disclosure of the paid nature of such posts is critical to enabling consumers to make informed decisions. Content shared by influencers often reflects business considerations rather than their genuine opinions or experiences.

Currently, there is no standard practice for indicating that a post is a paid advertisement. This is mainly due to the variety of platforms used to publish digital content and the different types of posts.

However, the Authority has outlined some general, standard requirements that influencers must consider when publishing content for a fee. Any type of business relationship or partnership between the influencer and the advertiser must be clearly and accurately disclosed to consumers.



Where the platform allows for uniform disclosure of business relationships, such as on Instagram, this should be done to ensure consistent and recognizable labeling.

If a platform does not provide a uniform disclosure option, it should be clearly identified separately from the text, preferably at the beginning. If hashtags (#) are used in the post, the disclosure should precede any other tagged labels.

According to the Authority's guidelines, terms such as "advertisement," "ad," or "sponsored content" are recommended for text-based disclosures. The use of foreign language markings is only acceptable if the content itself is in a foreign language. For posts in Hungarian, the disclosure of the paid nature of the advertisement should be in Hungarian.

Responsibility for Content

Under the Hungarian Unfair Commercial Practices Act, responsibility for unfair commercial practices follows the "interest principle". This means that the primary responsibility lies with the company with a direct interest in the sale or promotion of the product or service involved in the commercial practice. Such an entity is considered to be the advertiser.

However, in the Authority's practice, several parties may be held liable for the same conduct.

In addition to the advertiser, influencers who make a profit out of promoting certain products or services may also be held liable. However, influencers may be exempted from liability if they can successfully prove that they acted in reliance with clear and precise instructions from the advertiser when creating and sharing digital content. However, even in such cases, influencers are expected to report to the advertiser in writing any perceived legal violations of the instructions provided.

Currently, advertisers are increasingly engaging influencers through agencies. These agencies serve as professional content filters and assist in shaping the influencer's marketing strategy. Such agencies may be held responsible if

the violation is related to the manner in which the commercial communication is published or disseminated and goes beyond the mere implementation of the instructions provided by the advertiser.



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Italy

In today's digital age, the rise of influencers as powerful marketing tools has transformed the advertising landscape. However, the regulatory framework surrounding influencer advertising is complex and unclear, often encompassing various laws, guidelines and self-regulatory codes.

In this article, we will explore the legal intricacies surrounding the status of influencers, taking into account that in Italy there are no ad hoc laws defining influencers and regulating their activities and responsibilities, or the liability of those who use influencers to promote goods and services. Particular attention must therefore be paid to the regulatory map outlined in the Italian Consolidated Law on Audiovisual and Radio Media Services ("Consolidated Law") and the Guidelines ("Guidelines") issued by the Italian Authority for the Guarantee of Communications ("AGCOM") to ensure compliance by influencers with the provisions of the Consolidated Law (Resolution 7/CONS) and other relevant regulatory frameworks.

Legal framework: AGCOM Guidelines

Purpose

The Guidelines serve as a cornerstone for regulating influencer advertising in Italy, providing a roadmap for compliance with the Consolidated Act and has a purpose *“to identify the provisions of the Consolidation Act that influencers are required to comply with”*.

In this regard, it must be observed that “at least” some provisions of the Consolidated Act are applicable to influencers, which



means, (a), entrusting, in the absence of legislative and constitutional coverage, to an **independent administrative authority** (which AGCOM is) a properly **legislative** function and (b) **it cannot be excluded** that other provisions also apply, at least from the point of view of AGCOM's interpretation.

Content of the provisions (in general)

As to content of the provisions (in general) there is some ambiguity. Specifically, the application of selected provisions of the Consolidated Act is envisaged for **“major” influencers**, isolated by “capacity” of influence measured on certain parameters, which will be addressed below. Furthermore, two provisions of the Consolidated Act also apply to the content of (and thus to) **“minor” influencers**, specifically, Articles 41 and 42 of the Consolidated Act.

Several criteria are established on the scope of application.

First of all, the subordination of the influencers' activity to **Italian jurisdiction**. It is worth dwelling on this aspect for a moment. Based on Article 2 of the Consolidation Act the Italian jurisdiction is determined for the influencers' activity when:

- Their **head office** is in Italy and **editorial decisions** on the audiovisual media service are made in the territory of Italy;
 - their **head office** is in Italy and **editorial decisions** are made elsewhere, if a significant part of the employees performing the audiovisual media service linked to the programs operate in the territory of Italy;
 - although the head office is located elsewhere, **editorial decisions** are made in Italy and a significant **part of the employees performing** the audiovisual media service activity operates on the Italian territory;
 - a **significant part of the employees performing** the activity of audiovisual media service related to programs operates both in Italy and elsewhere, if its head office **is in Italy**;
 - in the absence of the conditions set out above, if the **activity was started in and in compliance with the laws of Italy, maintaining over time a stable and effective link with the Italian economy.**
- ii.** substantial link to the **Italian economy**;
 - iii.** use of the **Italian language** if the communication is explicitly addressed to users on Italian territory;
 - iv.** the **economic activity** must qualify as a “**service**” within the meaning of the Treaty on European Union, and liable to generate a **direct income** (agreement with the person benefiting from the advertising) or **indirect income** (agreement with the intermediary disseminating the published content) - resulting at the same time, and therefore, “risky”;
 - v.** conduction by **real** or **virtual** persons, e.g. avatars. In this latter case, the party subject to the obligations is considered to be the individual who “uses” the virtual character for profit;
 - vi.** the activity must be one over which the Influencer has control over its content, even if only in terms of its organization, including the selection and “composition” of images and sound.

In terms of the **activity qualifying** as “dissemination of content published online”, the following criteria must be met:

- i.** the necessary mediation by platforms or social media, responsible for the dissemination of the published content, making it accessible to the “general public” on Italian territory, at the request of the interested parties (so it is not an offer to the public) provided that it has a significant impact on the public;

With regard to the “major influencer” classification, certain requirements for the activity are specified to determine the “**professional**” nature of the service, thus calling for the application of the provisions of the Consolidation Act, with the provision, however, that Articles 40 and 41 of the Consolidation Act apply to anyone exercising the activity of influencer.

In order for an influencer to qualify as “major influencer”, all of the following criteria must be satisfied:

- i. no less than one million subscribers across all platforms and social media on which the influencer operates;
- ii. the average *engagement rate* must be 2% or more over the last 6 months;
- iii. compliance of the activity with the Guidelines in the previous year (for at least 24 pieces of content). This is seemingly an ill-defined requirement: if the content is not compliant, the Guidelines do not apply. So perhaps it is a requirement for the "stability" of the activity (so much so that it is irrelevant for "minor" influencers, characterized only - and conversely - by the absence of the first two requirements).

Content of the provisions (in particular)

In order for the Guidelines to apply, the influencers must be "media service providers" (also in a broad sense). In particular, this means that they must be the individual or legal person responsible for selecting the audiovisual content of the audiovisual media service and determining how it is organized. Editorial responsibility is therefore of central importance.

Secondly, "audiovisual media service" means a service (in accordance with European law on the freedom to provide services) the principal purpose of which is "the provision to the general public by electronic communications networks of programs under the editorial responsibility of a media service provider for information, entertainment or educational purposes".

Finally, the medium of the service must be "audiovisual", which refers to a television broadcast, an on-demand audiovisual media service or an audiovisual commercial communication.



It should also be noted that for the purposes of the Consolidation Act, the influencer's activity must involve audiovisual commercial communication. This will be defined by the presence of "images, whether aural or not, intended to promote, directly or indirectly, the goods, services or image of a natural or legal person engaged in an economic activity, including, inter alia, [...] sponsorship [contribution by a third party to "promote the name, image, brand, activities or accompanying in a program [even by mere reference to a brand] or in a user-generated video in consideration for payment or other type of consideration for self-promotional purposes". This communication must occur online and with a necessary degree of involvement by platforms or social media.

In relation to the existence of editorial responsibility, i.e. "the exercise of effective control over both the selection of programs, including data programs, and their organization into a chronological schedule, in the case of television or radio broadcasts, or into a catalogue, in the case of on-demand audiovisual media services", it should be clarified that the influencer is only required to "organize" the content.

Editorial responsibility, on the other hand, distinguishes the activity of the influencers from the "video-sharing platform service", i.e. a service (again according to the EU perspective) for the purpose of providing programs, user-generated videos, or both, intended for the general public to inform, entertain or educate by electronic communications networks, the organization of which is determined by the provider, but "without editorial responsibility" for the content to which it contributes.

Any content by influencers, whether major or not, will be subject, as expected, to the rules on video-sharing platforms and, in particular, with regard to: a) the establishment of Italian jurisdiction (with criteria that are partially different from those of the media service provider); b) AGCOM's power to restrict the freedom of transmission; (c) the creation of a special list; (d) the duty to adopt appropriate measures, including for the protection of minors, rules against hatred and against the commission of crimes, and, to the extent relevant here, to comply with the general principles on commercial communications.

Major influencers are then required to comply with a complex set of principles, namely:

i. general principles applicable to media services (i.e. the guarantee of freedom and

pluralism, the protection of the freedom of speech of each individual, the principle of non-discrimination, etc.);

ii. principles laid down in several provisions of the Consolidated Act, some of which are expressly referred to (such as the truthful presentation of facts and events, the protection of copyright and related rights, provisions on the protection of minors, the person and sport, etc.).

The rules described so far refer to the conduct of the Influencer as such, when and if it is relevant to the Consolidation Act. However, in relation to the influencer's "influence" on the "promotion", the Guidelines expand the rules on "audiovisual and radio commercial communications".

Legal framework: the other sets of rules

The activity of an influencer is also subject to the combination of other sets of rules. Some of them are worth considering.

The Self-Disciplinary Code and, in particular, the Digital Chart

The Digital Chart is a first disciplinary complex expressly referred to by the Guidelines and is the advertising self-disciplinary code. In this disciplinary context, the transparency of communication is not so much and only in itself, but should be reviewed from the **visual angle of its (natural) influence on the consumer** in the perspective of the relevance of commercial communication for the **economic process**; therefore, in a relational view. The prominence of the Chart in the Guidelines seems not only to cause that AGCOM (competent

to impose sanctions for the violation of all the Guidelines) is also subject to its observance; but, and above all, it seems that the inclusion in the Guidelines specifies in the digital area and, in particular, of the influencers, the transparency of communication assumes an objective function, precisely in itself, and not already a relational one.

The discipline of misleading advertising

To protect the **market**, and in particular, competing **companies** (in the broad and European sense, i.e. professionals) there is, as is well known, the discipline on **misleading advertising**. Discipline that can probably only apply to influencers in their capacity as businesses. It is an application that, however, although it also lends itself to (indirect) consumer protection, it is to be considered in the **relationship between businesses** (of the unfair diversion of customers), which justifies the competence of the Antitrust Authority.

The discipline of unfair commercial practices

The discipline of unfair commercial practices is also oriented towards the protection of the market through the **protection of consumers' freedom of choice**. The application of such discipline to the activity of influencers, as a business activity in itself, and as an activity promoting the products of others, is clear.

What should be pointed out in this regard is the relevance of age (particularly significant for influencers), and of **the new discipline on reviews**.

Finally, and as a possible avenue for class actions, it should be highlighted the new possibility that “consumers harmed by unfair commercial practices may also bring an action **before the ordinary courts to obtain proportionate and effective remedies, including compensation for the harm suffered and, where applicable, reduction of the price or termination of the contract**, taking into account, where appropriate, the gravity and nature of the unfair commercial practice, the harm suffered and other relevant circumstances. This shall be without prejudice to other remedies available to consumers”.

Coming law and conclusions

From the point of view of the company using an influencer, there are several risks that need to be addressed: the company's reputational risk, ensuring that the influencer's influence is not damaged by his/her behavior, and, perhaps even more importantly, ensuring that the influencer's activity complies with the applicable rules.

In this respect it would appear that the rules (also because they are essentially legal) allow for the influencer's activity to be regarded, from the perspective of the company that uses the influencer, as liability for a dangerous activity. As result, proof of damage and of the causal link would suffice for a conviction, unless it is proved that all measures appropriate to avoid the damage were taken.

Finally, it seems appropriate to make a few comments on the much-discussed draft law in Italy on the use of proceeds from the sale of products for charitable purposes.

The integration of profit and charity has never been straightforward and is viewed with some suspicion: especially in the past, donations have in some cases been interpreted as stepping beyond the corporate purpose of companies.

The **Italian draft law's scheme on the on allocation for charitable purposes** of proceeds from the sale of products:

- i.** only applies to products that have **packaging** bearing the prescribed information (recipient of the charity; purpose; amount, total, percentage, or per unit of product);
- ii.** describes the information that must also be provided in advertising;
- iii.** either by the **manufacturer or professional** (who is not a manufacturer but an intermediary) or by **the person advertising the product**;
- iv.** applies only if there is a **mix of proceeds and charity**;
- v.** **does not** apply to all charitable purposes but only to specific entities (e.g. non-governmental organizations, the Central Institute for the support of the clergy of the Italian Catholic Church, universities, legal persons established in the Mezzogiorno that exclusively pursue scientific research purposes, public entities that carry out research activities, and some others).

This latter point raises the question of the **possibility of charitable activities (drawn from the proceeds of the products) by companies to different entities.**

As seems evident, the legal framework surrounding influencers' advertising is

intricate, with multiple layers of regulation; however, to date it does not seem to have the necessary coverage. Current Italian regulations offer only partial guidance on how to regulate these emerging practices, leaving room for ambiguous interpretations and legal uncertainties. Meanwhile, it is essential to define with clarity the rights, obligations and responsibilities of influencers, the companies employing them and the consumers involved.



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Influencer marketing has become a cornerstone of the digital economy, with an estimated global worth of over €21.1 billion. Given the exponential growth of this phenomenon, together with the fact that influencer marketing is typically targeted at young people, local and EU lawmakers felt it was time to create a framework that would ensure consumer rights are protected while also acknowledging the role of social network influencers.

Content Monetization in a Nutshell

As the content monetization economy continues to grow, influencer marketing is one of the business models that is gaining momentum - where influencers earn money by creating content for social media platforms. According to SignalFire, there are more than 50 million content creators worldwide, of which 2 million can make a full-time living from content creation. Essentially, influencer marketing is a collaboration between popular social media users, or influencers, and brands to promote a brand's products or services. This concept is not new to the Internet age; these partnerships have existed since the dawn of social media. As early as 2009, the U.S. Federal Trade Commission was among the first to regulate influencers with its "Mommy Blogger Law".



Regulating Influencers

European consumer law does not provide a clear definition of influencers. The European Commission is currently looking at different options to establish a legal framework for this specific commercial practice. However, despite the absence of a legal definition of influencers, Directive 2005/29/EC (the "**UCPD**" or the "**Directive**") contains a definition of traders. The UCPD clearly states that "trader" means any natural or legal person who, in commercial practices covered by the Directive, is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader;

This definition suggests that if a social media user generates revenue by monetizing content and engages in commercial practices towards consumers, they do qualify as traders and are therefore subject to extensive EU and national consumer protection legislation. The concept of commercial practices is broadly interpreted. It includes communications intended to promote or sell products or services. Therefore, reviews are also

considered commercial practices. Simply put, an "influencer" is considered to be engaging in advertising. When someone reviews a product for a fee, they are using their promotional skills to increase sales. Conversely, if an airline pilot buys a lipstick that you are promoting, which is completely unrelated to their profession and is an additional item they want to purchase, they are considered your consumer. This is also supported by case law.

To help influencers adjust to the new framework, the EU Commission has launched an Influencer Legal Hub. Justice Commissioner Didier Reynders said:

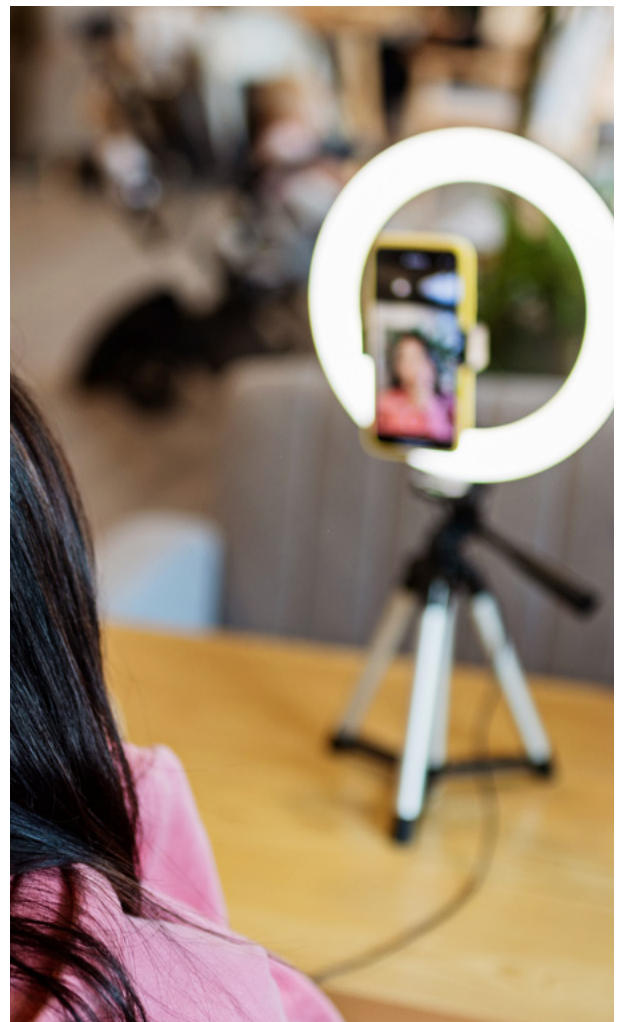
"The business of influencers is thriving and a lot of consumers - often young people or even children - trust their recommendations. This business model, however, also comes with legal obligations. Influencers too must follow fair commercial practices and their followers are entitled to transparent and reliable information."

As influencers are considered equivalent to their peers who promote products offline, they are also regulated by national consumer authorities. To protect cross-border purchases, a network of national public enforcement agencies has teamed up. The Consumer Protection Cooperation has the ability to detect irregularities and take swift action against rogue traders.

Advertising nature of Influencer Marketing

While influencer marketing strives to appear as organic and natural, the law is clear in that it must comply with consumer protection principles and regulations.

Influencers must always disclose the underlying commercial element of their content. This is in line with industry standards in other advertising sectors, including TV marketing and door-to-door marketing. The European Court of Justice highlighted this in the Peek and Cloppenburg case, where advertising services were provided in exchange for copyrighted photographs. This case gave clarity to the UCPD and highlighted one of the key obligations under the Directive applicable to influencers.



The UCPD Annex lists practices that are considered inherently unfair. One unfair practice that the European Commission has confirmed is directly relevant to influencer marketing is advertorials.

Advertorials refer to media content that presents information about a product or service in a manner that may appear objective, similar to non-sponsored content, but contains promotional elements. This has the potential to mislead consumers. Point 11 of the Directive's Annex specifically prohibits undisclosed advertorials. Any link between payment or the provision of anything of "value" to a party and an advertising service must be disclosed to consumers. This disclosure requirement extends to scenarios where the influencer is in receipt of non-monetary perks including, for example, a free haircut, a car driving test, or a free hotel stay.

What this means for you

It is estimated that in 2023, influencer marketing has grown into a \$20 billion industry. This represents a significant increase of 29% from the previous year. Whether you are directly involved or not, there is no doubt that influencer marketing will impact a decision or outcome. Whether you hire content creators to promote your business or are a content creator yourself, it is important to understand the legal implications.



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Influencer marketing is a form of marketing where a company or advertiser uses influencers in their marketing communications. The purpose of this type of marketing is typically to build a brand or increase sales by associating certain products with influencers who have influence over the target audience. For example, influencer marketing can involve product placement in photos and videos posted on social media platforms such as Facebook, SnapChat, Instagram and TikTok. It can also involve paying influencers to promote and endorse specific brands in their written content and through social media posts.

Legal Framework

The Norwegian Marketing Control Act (the "**MCA**") implements European Parliament Directive 2005/29/EC on the prohibition of hidden advertising. The ability to separate marketing from other content is fundamental to ensuring that consumers are not exposed to covert commercial influence. Marketing on social media platforms is also subject to the MCA's rules on the prohibition of unreasonable and misleading advertising.

Significantly, that marketing on YouTube, TikTok and similar video sharing platforms must also comply with the rules under the Norwegian Broadcasting Act. For example, influencers must ensure that they clearly distinguish between editorial and commercial content. Under no circumstances is it allowed to use marketing methods affecting people's subconscious.



The Rules

To comply with the above laws, influencers must clearly mark any content that is intended to promote a sale or service on social media platforms. There is no explicit legislation on specific labeling requirements. However, according to the guidelines of the Norwegian Consumer Authority, which oversees the MCA, such mentions should (i) be separated from the rest of the content, (ii) the font and color should be clear, and (iii) the font size should be a certain size. The use of words such as "advertisement" or "solicitation" should also be sufficiently clear. However, the Consumer Authority does not recommend the use of words such as "ad" or "ad links" as they are easily overlooked - especially in stories and videos.

Crucially, consumers must be able to tell immediately that a social media post includes marketing. However, whether a post clearly appears to be marketing must be determined on a case-by-case basis.

There are many different social media platforms that can be used for influencer marketing purposes. Therefore, in order to be sufficiently clear, the labeling must be adapted to the environment of the relevant social media platform. For example, in a decision

of the Norwegian Market Council (case MR-2021-349), the Council emphasized that Instagram stories can have a duration of only 5 to 6 seconds and therefore marketing in such short clips must be even clearer.

Responsibility for content and consequences of breach

When advertisers use influencers to market products or services, they are primarily responsible for ensuring compliance. However, influencers who publish marketing may be liable as accessories.

In the event of a breach of the marketing statutory rules, the Norwegian Consumer Authority may issue decisions imposing bans, orders, penalties or fines for non-compliance.



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| Poland

Introduction

In Poland, there is no law that deals specifically with influencers. It does not mean that existing law does not affect their actions. It's quite to the contrary.

This powerful market needs clear rules to increase the transparency of marketing and boost the fight against unfair competition.

In 2022, the President of the Office of Competition and Consumer Protection published Guidelines regarding content that constitutes advertising by influencers on social media ("Guidelines"), which though soft law, show the President of the Office of Competition and Consumer Protection's attitude towards interpreting existing law.

In the Guidelines, there is a specific focus on the correct flagging of advertising. The information must be legible, understandable and unambiguous. The main allegation made towards influencers is that they fail to mark advertising materials properly, which gives the impression that their posts are not advertisements, when it's clear that the opposite is true. The advertising material should be distinguished from neutral information regardless of whether it is self-promotion or advertising third parties' products.

What is interesting is that the Guidelines are against using abbreviations (e.g. ad, advert) and wording in English (e.g. collaboration, advertisement) even if these abbreviations and words are commonly used in social media posts as English loanwords are widespread on the Internet. The issue of



using English abbreviations was raised in decisions relating to influencers: Decision No. RBG - 6/2023, Decision No. RBG - 7/2023, and Decision No. RBG - 8/2023.

In Polish law, there is no legal definition of an influencer. In the Guidelines, an influencer is defined as a "creator actively running their social media, communicating with followers. By publishing, an influencer can influence the opinions, decisions, or behavior of others. An influencer is an entrepreneur if he conducts profit-gaining activity, carried out in his own name and on a continuous basis (see Art. 3, Act of March 6, 2018 Entrepreneurs' law). This also applies to situations where an influencer has not registered his or her business". As we can see, the definition is very broad.

Polish law covers many regimes which may govern influencers' activities. Below we list the most common ones. The activities of influencers are currently mostly analysed with respect to their advertising activity.

But some influencers also are sellers and in those instances, the Act on consumer rights applies.

Influencers' liability under the Act on combating unfair competition and the Act on combating unfair market practices

The Act on combating unfair competition regulates B2B relationships, while the Act on combating unfair market practices regulates B2C relationships.

In practice, the activities of influencers are usually analysed in the context of advertisements being contrary to the law, or surreptitious advertising. Very often, misleading advertising appears when limited information on the product is given or incomplete information on the promotion is provided, giving the impression that a product or promotion is available for everyone, while in reality, there are certain conditions for purchasing a product or taking part in the promotion that must be fulfilled.

If found liable, the influencer can, in particular, be obliged to:

- refrain from taking unlawful actions,
- remove the consequences of such actions,
- make the aforementioned statement of the required content and form,
- pay a sum of money for a specific social purpose,
- pay monetary compensation,
- repair the damage caused.

Influencer's liability under the Polish Civil Code

Influencers' conduct can affect various spheres of their followers' lives. Not only can it be misleading, but it can also infringe their personal rights (Article 23 of the Polish

Civil Code). Under the Polish law, this will be the case if a post published by an influencer is offensive, racist, homophobic, offends religious feelings, or infringes on someone's right to their name or image. Since the catalog of personal rights in the Polish legal system is very broad, breaches can occur in a number of other ways. Each time, the influencer may first be requested by the party concerned to desist from such unlawful conduct and take measures to eliminate its effects (e.g., to publish a statement of the requested content on his social media account). It is also possible to demand that the influencer pay monetary compensation or certain amount of money to a designated social purpose (Article 24 of the Polish Civil Code). In addition, if the influencer's conduct has caused property damage, the affected party may demand compensation (Article 415 of the Polish Civil Code).

As for civil liability, the influencer can, in particular, be obliged to:

- refrain from taking unlawful actions,
- eliminate the consequences of such actions,
- make the aforementioned statement of the required content and form,
- pay a sum of money for a specific social purpose,
- pay monetary compensation,
- repair the damage caused.

Influencer's liability under the Act on Competition and Consumer Protection

Influencers may also be held liable under the Act on Competition and Consumer Protection of February 16, 2007 for practices that breach the collective interests of consumers. A practice that breaches the collective interests of consumers is defined as conduct that is contrary to the law or good practice (Article 24 of the said Act). The surreptitious advertising is an example of such a practice (i.e., presenting content that gives the impression of neutral information and encourages the purchase of goods or services in return for payment).

From the point of view of the Polish influencer, administrative penalties appear as more severe. This is because practices that breach the collective interests of consumers can be penalized by the President of the Office of Competition and Consumer Protection with a fine of up to 10% of the turnover achieved in the financial year preceding the penalty. The penalty can be imposed even if the influencer was unaware that her/his conduct was illegal.

However, this is not all. If an influencer fails to cooperate with the President of the Office of Competition and Consumer Protection, i.e. fails to provide the requested information or provides incorrect or misleading information, the President may also impose a fine of up to 3% of the turnover achieved in the financial year preceding the year of the fine.

Other laws

There are some specific regimes governing advertising concerning, for instance, consumer credit, alcohol products, and medicines which have specific and stringent

rules of advertising. Influencers tend to forget about these as they mostly concentrate on the advertisement being "catchy". But recent criminal proceedings instituted against some influencers promoting alcohol show that the problem is serious and should not be neglected.

Examples of penalties imposed on Polish influencers by the President of the Office of Competition and Consumer Protection

The abovementioned regulations governing administrative liability of influencers are not dead. The President of the Office of Competition and Consumer Protection actively fights against breaches committed by influencers. To date, a number of fining decisions have been issued, for example:

- Decision No. RBG - 3/2022 of June 20, 2022 imposing a fine of PLN 30,000.00 on *Julia Kuczyńska - Maffashion* - a Polish fashion blogger and actress. The penalty was imposed for failing to provide information requested by the President of the Office of Competition and Consumer Protection for the purpose of an investigation to determine whether the actions taken by entities that publish social network advertising (Instagram, Facebook, Youtube, TikTok, blogs) do not mislead consumers about the way the advertising content is presented on the social media. The decision is final.
- Decision No. RBG - 6/2022 of June 20, 2022 imposing a fine of PLN 50,000.00 on *Marek Kruszela - Kruszwil* - a Polish youtuber and singer. The penalty was imposed for failing to provide the information requested by the President

of the Office of Competition and Consumer Protection for the purpose of an investigation to determine whether the actions taken by entities that publish social network advertising (Instagram, Facebook, Youtube, TikTok, blogs) do not mislead consumers in the way the advertising content is presented on the social media. The youtuber has appealed the decision to the Competition Court. However, the court dismissed the appeal. No information is available as to whether the Court's ruling has been appealed again.

- Decision No. RBG - 7/2023 of August 22, 2023 imposing a fine of PLN 16,908.00 on *Katarzyna Dziurska*, a Polish fitness trainer. The penalty was imposed for failing to unambiguously identify as advertising certain posts and accounts on her Instagram account where products of other advertisers are promoted in return for payment. The decision is final.

Important

- If an influencer's advertising is contrary to the law, not only the influencer, but also other entities collaborating with him or her (advertisers, advertising agencies) may be held liable.

Decision No. RBG - 9/2023 of August 23, 2023, imposed a fine of PLN 5,016,236.00 on Olimp Laboratories for using posts and reports that had appeared on influencers' social media accounts, including Instagram, to promote its own products, in a situation where Olimp Laboratories paid the influencers for such promotion, which is not clear from the content or images or easily spotted by consumers.

In separate decisions, the President of the Office of Competition and Consumer Protection also fined three influencers collaborating with Olimp Laboratories.

- The above mentioned liability regimes are not mutually exclusive. For instance, an influencer can be simultaneously held liable under civil law and under the Act on Competition and Consumer Protection.

That's why it's crucial to establish terms of collaborating with influencers and the form of marketing in such a way as to be on the safe side.



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| Portugal

Digital Influencers: Legal Landscape in Portugal

In an ever-evolving digital world, influencers play an increasingly significant role in the way brands, products and even social issues are perceived. However, with their growing influence comes the need for greater transparency and accountability. In Portugal, as elsewhere, there are specific rules and regulations that influencers must adhere to when sharing content on their digital platforms.

Although this issue has not been specifically addressed by the Portuguese legal system, there are rules that influencers need to follow, especially when related to advertising.

Advertising is a crucial aspect of the professional activities of influencers. According to the Portuguese Advertising Code and the guidelines of the Media Regulatory Authority, any sponsored or promotional content must be clearly identified as such. This means that when influencers receive offers or are paid to promote a product or service, they must disclose this clearly and visibly, for example using a hashtag such as #pub or #partnership.

The Advertising Code clearly defines advertising as "(...) any form of communication by public or private entities, in the course of a commercial, industrial, craft or professional activity, directly or indirectly aimed at promoting goods or services with



a view to their commercialization or sale; the promotion of ideas, principles, initiatives or institutions" - Article 3.

Therefore, advertising through social networks falls within the scope and concept of advertising content, taking into account that influencers are usually in receipt of goods, services or some form of monetary compensation. Therefore, they are required to identify the content as advertising and comply with the current legislation on advertising and gambling.

As a result, the Portuguese Directorate-General for Consumers and other stakeholders in the digital communication sector, have developed A Guide for Influencers and Advertisers to raise awareness on the need to be legally compliant and promote good practices in commercial communication in the digital environment. The Guide focuses on the need to respect the principles laid down in the Advertising Code, such as lawfulness, identifiability, truthfulness and respect for consumer rights, as well as clearly identifying a set of good and bad practices to be followed.

It is worth noting that in publications with a commercial content, in addition to complying with the legal rules, a standard of social responsibility must be adopted, with a particular focus on the following issues:

- Consumer credit: article 5 of Decree-Law no. 133/2099, of 2 June;
- Health claims: Regulation (EC) no. 1924/2006 of the European Parliament and of the Council of 20 December;
- Health advertising practices: art. 7 of Decree-Law no. 238/2015, of 14 October;
- Minors: article 14 of the Advertising Code;
- Testimonial advertising: article 15 of the Advertising Code;
- Alcoholic beverages: article 17 of the Advertising Code;
- Gambling and betting: article 21 of the Advertising Code.

With regard to alcoholic beverages and gambling, for example, it is important to remember that easy access to smartphones, tablets and computers makes it easier for young people to use social networks, many before the age of 13, despite the restrictions imposed by the platforms themselves.

It therefore seems essential to protect minors from exposure to advertising and gambling for their well-being and healthy development.

Influencers must comply with applicable laws and regulations intended to protect

minors from exposure to content deemed "inappropriate". Accordingly, the Advertising Code sets out rules and ethical principles for advertising, including specific restrictions on alcoholic beverages and gambling - Articles 14, 17(1)(a) and (5) and 21(2) to (5).

Clearly, the digital landscape is in constant flux, and the legal challenges facing influencers are dynamic and multifaceted.

However, by understanding and complying with existing regulations, influencers can not only protect themselves, but also maintain the integrity and trust of their followers and business partners.



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Influencers and their business activities have become an integral part of advertising and marketing tools in Slovakia. Their business activities may include not only the promotion of third-party goods and services, but also their own products and services. However, this is an emerging area where only certain areas are defined by specific laws.

The legal framework for influencers can be divided into three blocs:

- a. Legal framework related to “standard” advertising and marketing tools. This is not specific for influencers, but still binding on them.
- b. Legal framework recognizing the existence of influencers and their specific business through social media.
- c. Soft law – Code of Ethics, which is gradually establishing self-regulation.

Ad A: Common advertising and marketing tools

This area of law applies not only to influencers, but also to other marketers, advertisers and others, depending on the scope of the influencer's business. This area of the law is characterized by the fact that it is the object and not the subject that is relevant. This means that the influencer needs to find out whether a particular law or regulation applies to him or her based on his/her activities.

Here we can include:

- legal protection of the consumers (In Slovakia there are more legal acts in this area),

- intellectual and industrial property rights (particularly copyright and trademarks),
- advertising law,
- GDPR and data privacy.

Moreover, as entrepreneurs in other business activities, influencers enter into various contracts. These contracts must be carefully drafted to protect the interests of all parties involved, outlining their scope of work, compensation, intellectual property rights, and other key terms.

Also, taxation, accounting and corporate law (influencers perform their activities primarily via limited liability companies or trades) are, naturally, applicable.

Ad B: Specific legal framework stipulating influencers

Slovakia's Media Services Act is a specific law that applies to influencers (among others) and has been widely discussed in the influencer community. The relevant regulatory body (the Media Services Council) also drafted a publicly-available F&Q following these discussions. The purpose was to have some supervision over legal and natural persons who generate income (or aim to generate income or reach the general public) by publishing/sharing a video channel on a video sharing platform such as YouTube, Facebook Watch or TikTok.

The Media Services Act draw a distinction between influencers performing their activities as individuals or as legal entities.

Individuals are only required to register no later than the first day of the start of their activity. Legal persons, on the other hand, are required to obtain authorization if they qualify as providers of audiovisual media services on demand, and the provider creates them with the intention of promoting his paid activities or placing advertisements within the videos.

Depending on the activity, the Media Services Act imposes other obligations on influencers which are more related to promotion/advertising.

Ad C: Soft law – Code of Ethics

In addition to the above, a body of "soft law" is slowly emerging. In Slovakia, the Influencer Marketing Code (the "Code") was developed on the initiative of civil associations. The Code establishes the basic framework of ethical rules for the work of influencers and with influencers in commercial marketing activities and advertising via the Internet. The Code sets out to provide guidance and support to influencers and advertisers in their business relations in order to ensure that the commercial activities or advertising carried out by influencers comply with ethical rules.

The Code is directly binding only on its signatories. For influencers who are not directly committed to fulfilling their obligations under the Code, the Code is only recommended.

The Code sets out a number of responsibilities relating to content creation, in particular the way in which advertising



content is labeled, the language of the advertising itself, as well as rules on misleading advertising or promotion of specific products.

The Code establishes a set of measures consisting, in particular, of written warnings to Signatories for non-compliance with the Code, that may result in the non-compliant signatory's removal from the list if the violation(s) for which the warning was issued are not remedied. However, the Code also contains penalties for influencers who have not signed the Code, including a call for compliance and, in extreme cases, the possibility of recommending that signatories refrain from working with influencers who breach the Code's ethical rules.

The list of signatories (and the Code itself) are publicly available.



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Introduction

The rise of social networks, where individuals share snippets of their lives with their followers and influence them by building trust and familiarity through their opinions and behavior, has resulted in the rise of online influencers, and thus of a new way of advertising: influencer marketing.

Yet, despite the constant growth of influencer marketing, the term online influencer is not explicitly defined nor are influencers as such directly addressed by Slovenian legislation. However, influencers remain subject to the same requirements as other professionals. Therefore, online influencers must comply with existing media and advertising laws to protect consumers when advertising or selling on social networks.

Legal framework

In Slovenia the legal framework applicable to media and advertising consists of the Mass Media Act, the Audiovisual Media Services Act and the Consumer Protection Act. All of them regulate two aspects of advertising, namely the content that can be advertised and the protection of consumers against misleading advertising or unfair commercial practices.

In 2021, the scope of the Audiovisual Media Services Act was extended to include individuals and legal entities engaged in the business of offering services through video-sharing **platforms**². The rationale for extending the scope of application of the Act to influencer marketing was, undoubtedly, the need to accommodate the changing market for audiovisual media services and the emergence of new types of content created by users of digital platforms and social media, by subjecting advertising services to the advertising rules established for traditional media, including television, radio, and print.

Under the Audiovisual Media Services Act (Articles 19-23), video-sharing platform services must ensure that audiovisual commercial **messages**³ are clearly identifiable. Hidden messages as well as audiovisual commercial communications for healthcare activities and services are prohibited.

² According to Article 3(1)(3) of the Audiovisual Media Services Act, a video-sharing platform service is defined as a service where the primary purpose of the service, or the purpose of a distinguishable part of the service, or an essential function of the service, is to provide user-generated program content or videos, over which the platform provider has no editorial responsibility, to the general public for information, entertainment or educational purposes over electronic communications networks within the meaning of the law applicable to electronic communications networks.

³ Article 3(1)(13) defines audiovisual commercial communication as any visual image, with or without sound, designed to promote, directly or indirectly, the goods, services or logo of a natural or legal person engaged in an economic activity, accompanying or featured in user-generated programme content or videos, whether in return for money or similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, but are not limited to, television advertising, sponsorship, teleshopping and product placement.

In addition, sector-specific laws impose a ban on the advertising of tobacco and tobacco products, electronic cigarettes and electronic cigarette refills, whilst restricting the advertising of alcoholic beverages and spirits to those with an alcohol content of 15% by volume or less. The advertising of drugs is limited to over-the-counter medicines.

According to Articles 36-40 of the Consumer Protection Act, advertising must not be misleading, offensive, indecent or likely to cause physical, mental or other harm to children by exploiting their inexperience and vulnerability. Deceptive, unfair and aggressive commercial practices are also prohibited.

Influencer content in Slovenia is also regulated by independent professional organizations. For example, the Slovenian Chamber of Advertising has adopted the Advertising Code, which contains provisions that define the framework for and prohibitions related to advertising.

The Advertising Code sets out a number of basic advertising principles, including the principle of legality, decency, fairness, truthfulness and identifiability of content. In addition, all sponsored content must be clearly identified as such.

Although there are no court precedents on influencer advertising, the Slovenian Advertising Council, which operates under the Slovenian Advertising Chamber and evaluates advertising to ensure it complies with the Advertising Code, has recently examined a few individual cases of influencer advertising on social media. In two instances where advertising in an influencer's social media post was not clearly labeled as such, the Slovenian Advertising Council ruled that the post must be clearly identifiable as sponsored, for example by including #ad,

sponsored content, etc., and stating the name of the company paying for the ad.

The decisions on influencer advertising by the Slovenian Advertising Council sent a clear message to influencers that although there are no specific provisions in current Slovenian legislation explicitly regulating online content creators, the content of advertising must comply with the laws and autonomous legal sources relating to advertising.

Conclusion

Influencer marketing is becoming an increasingly important method of advertising products or services, significantly influencing consumers and their purchasing habits. It is therefore important that influencers comply with applicable laws and regulations, especially as their content becomes more accessible to consumers.



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| Spain

Spanish audiovisual regulation of influencers

Influencers who provide content on social media (e.g., Instagram or Tik Tok) and video-sharing platforms (e.g., YouTube or Twitch) are a common feature of today's society. Their influence on our behavior and decision-making, especially and most importantly among young audiences, is unquestionable. Some of them have millions of followers and have become economic drivers of the digital economy in their own right.

This is the case, for example, of Chiara Ferragni on Instagram, with 36 million followers - although her reign is currently being questioned - or MrBeast on YouTube, with 312 million subscribers. As a result of their great impact on the public, these new players in audiovisual and digital media have become a major target for all types of national and international brands, which are increasingly hiring them to run their advertising campaigns on digital platforms, social networks and beyond.

This enormous potential of influencers - particularly those who use video to communicate through video-sharing platforms (i.e. vloggers) - has obviously captured the attention of European audiovisual regulators. Via the European Regulators Group for Audiovisual Media Services ("**ERGA**"), these regulators have addressed this new phenomenon from the perspective of audiovisual regulation. In its regular publications on the state of audiovisual regulation, and in particular in the report published in 2022 and entitled



Activity Report on the ERGA Workshop "Regulation of Vloggers on Video-Sharing Platforms" 2020, ERGA examined this issue and emphasized the importance of regulating vloggers, as their channels and content should be subject to specific audiovisual regulation across the European Union (EU). This is not only because of their impact on the public, but also because they have started to compete with other content providers in the audiovisual market, such as TV networks and on-demand platforms.

Notwithstanding ERGA's concerns, Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the "**Audiovisual Media Services Directive**") in view of changing market realities (Directive 2018/1808) does not address the activities of these influential users of video sharing platforms who provide audiovisual content through them.

By implementing such a regulation, national legislators in different EU Member States have taken the initiative, following ERGA's recommendations, to regulate the activity of influencers who use video to communicate, i.e. vloggers.

In Spain, the General Audiovisual Communication Act of July 2022 (*Ley 13/2022 de 7 de julio, General de Comunicación Audiovisual*) ("**Law 13/2022**") , which repeals the previous legal framework on the matter, establishes a minimum regulatory framework for these audiovisual influencers, provided that they have an impact on the market in which they operate.

However, Law 13/2022 refers the definition of some of the key terms to a subsequent regulatory development, in particular, those related to the definition of users subject to the new rules. Such regulation has taken the form of Royal Decree 444/2024, dated April 30, which specifically sets out the requirements to be considered a user of special relevance, pursuant to Article 94 of Law 13/2022 ("**Royal Decree**").

Definition of Users of Special Relevance ("USRs")

The terms often used to define these creators and content providers are "influencers", as a general term that can refer to any type of content and media. The term "vloggers" has also been used specifically, including ERGA itself, to refer to providers of audiovisual content through video-sharing platforms.

Disregarding this classification, in Article 94.2 of Law 13/2022, the Spanish legislator uses the term Users of Special Relevance ("**USRs**") to describe users of video-sharing platforms, as defined in Article 2.13 of Law

13/2022 (it remains to be clarified whether certain social media, such as Tik Tok, should also be considered as video-sharing platforms), who:

(a) provide audiovisual content through these platforms as a business activity, generating significant income; (b) have editorial responsibility for the audiovisual content made available to the public; (c) target their content to a significant part of the public in general and may have a clear impact on it; (d) seek to inform, entertain or educate the public through their service, mainly by distributing audiovisual content; (e) provide their service through electronic communication networks; and (f) are established in Spain in accordance with the rules set out in Art. 2 of Law 13/2022.

As mentioned above, Law 13/2022 leaves some terms applicable to the definition of USR undefined so that they can be clarified in future regulatory developments.

In this respect, the Royal Decree states that it does not apply to television audiovisual service providers or radio/audio service providers that offer their content through video-sharing platforms, assuming, as we understand it, that these providers are subject to the general regulations of Law 13/2022, which are expressly applicable to them.

As to the undefined terms related to USRs, the new regulation provides that:

- **Significant income** shall mean, as per article 3, the gross income obtained in the previous natural year equal or beyond 300,000 euros deriving exclusively from the activity of the user at stake in video-sharing platforms that he/she uses.

The following income shall be taken into account: (a) income obtained from the commercialization, sale or organization of audiovisual commercial communications accompanying or inserted in the audiovisual content provided by the user; (b) payments made to the user by the video-sharing platforms in exchange for its activity in such services; (c) income obtained by the users from fees or subscriptions paid by the influencer's audience; (d) income received as economic benefits granted by the Administration and any public entities and related to the activity of the user in the video-sharing platform, and (e) other income obtained by the user for its activity in the platforms, excluding those which are not related to the activity of the user in the video-sharing platform service.

- **Having significant audience with a potential clear impact in the public.** Under 4 of the Royal Decree, this will be the case where: (a) the user has followers in an amount equal or beyond 1,000,000 during the previous natural year in a single video-sharing platform where the user develops its activity, or she/he has an aggregate amount of followers equal or beyond 2,000,000 in all of the services where the user operates, and (b) the service contains at least 24 videos of any duration in the prior natural year.

Regulations applicable to USRs under Law 13/2022

Users of a video-sharing platform that fulfil the above requirements will be considered USRs. Therefore, they need to register with the national Registry of Audiovisual Communications Service Providers, as set forth by article 39 the new Law and Royal Decree 1138/2023, of 19 December.

Also, such USRs shall be considered audiovisual service providers for the purposes of complying with certain rules and obligations set forth in article 94 of Law 13/2022, which include:

- Pursuant to Article 86 of principles, Law 13/2002, complying with the principles of Title I in similar terms as video-sharing platform service providers. These principles essentially relate to the protection of human dignity, pluralism, gender equality and accessibility, among others, by avoiding the provision of content that may incite violence, hatred, discrimination or terrorism.
- Taking measures to protect minors from content that may harm their physical, moral or mental development, in accordance with paragraphs 1 and 4 of Article 99, which set out these obligations as they apply to video-sharing platforms. In particular, paragraph 1 requires audiovisual service providers to provide users with sufficient and clear information about such potentially harmful content by visual, acoustic or other available means. In addition, paragraph 4 focuses on requiring on-demand service providers to separate potentially harmful content in different catalogs, to participate in co-regulation and to implement parental control mechanisms or digital coding systems.
- Comply with the rules on audiovisual commercial communications laid down in Title VI, Chapter IV, Sections 1 and 2, with regard to the commercial communications that these users

sell, commercialize or organize to accompany or be inserted in the audiovisual content that they make available to the public on the video-sharing platforms. Among other things, they must avoid surreptitious advertising and comply with the rules on product placement and sponsorship.

USRs must take reasonable measures to comply with the above obligations and use the mechanisms provided by the video-sharing platform providers for this purpose, in particular tools to assess potentially harmful content and mechanisms to identify commercial communications contained in their respective content.

USRs are also encouraged to adopt, themselves or through their representative bodies, codes of conduct for self-regulation and co-regulation.

Finally, USRs that fail to comply with these obligations will be subject to the penalties established in Title X of Law 13/2022, which vary significantly depending on the revenue generated and the seriousness of the violation, ranging from €150,000 to €1,500,000.

Even though Law 13/2002 was enacted in 2022 this legal regime is only applicable since the entering into force of the Royal Decree, which additionally grants users a two-month period to register at the Registry of Audiovisual Communications Service Providers.

In addition, there are certain entities that cannot be subject to the above regime, pursuant to Article 94.3 of Law 13/2022, even though they may qualify as USRs according to the criteria set forth in paragraph 2 of the same provision. Excluded users are (i) educational and scientific institutions, if their activity on a platform is part of their purpose or is of an educational nature; (ii) museums, theaters or other cultural institutions that use a platform to showcase their activities; (iii) public administrations or political parties that use a platform for informational purposes and to present their functions; (iv) companies and workers to promote their activities or services; and (v) associations and NGOs that use platforms for self-promotional purposes and to present their activities.

Other applicable rules

Since USRs, like other influencers, have become an important asset in new forms of advertising in social networks and other digital media, the Spanish Association of Advertisers (AEA) and the Association for the Autoregulation of Commercial Communications (Autocontrol) have jointly issued a Code of Conduct for the Use of Influencers in Advertising. This code applies to advertisers and agencies, as well as to the influencers who choose to comply with it.

The Code defines "influencers" as "individuals who are perceived to have a significant influence on the public by virtue of their large number of followers on social media and/or digital media, and who interact through tweets, videos and posts, blogs or other means" - a category in which USR would in principle fit, although the Code is silent on what

constitutes a significant influence and a large number of followers. The Code also sets out certain rules for advertising with and/or by influencers, including what constitutes advertising, how it should be identified, and what should be considered remuneration for such activity.

In any case, any form of advertising in Spain using influencers will be subject to the Spanish legislation applicable to advertising, namely the Spanish General Law on Advertising (*Ley 34/1988, de 11 de noviembre, General de Publicidad*) and the Spanish Law on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*). Whether these regulations can be applied to influencers - and in particular to USRs - will depend on the degree of involvement of these individuals in the development of the advertising content generated for a relevant campaign.

In addition, some of the provisions of the Digital Services Act (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC) on online advertising will have a significant impact on the advertising activities of influencers. In fact, as of February 17, 2024 - the date on which the law became fully applicable - all online platforms, regardless of their size, will have to take measures to, among other things, inform consumers about the presence of advertising in their content, which these platforms will have to extend to those of their users, including influencers who provide advertising content.

Conclusions

For the first time in Spain, Law 13/2022 has established a set of minimum rules applicable to influencers who use video to communicate, i.e. vloggers -which it defines as users of special relevance- with regard to respecting the basic principles of audiovisual communication, the protection of minors and the regulation of advertising. It even requires these new players in the digital market to register in order to operate.

As providers of advertising, these USRs may also be subject to other Spanish regulations, namely those related to advertising and unfair competition, and in any case they will be subject to the new code of conduct established by the advertising sector, provided that they adhere to it.

It is expected that other regulations will follow, as the role and impact of influencers in today's society continues to grow, not only in the audiovisual sector, but also in many other areas of digital society.



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