

Influencer marketing

At-a-glance guide to regulation across Europe

November 2017



Belgium

What does Belgian law say?

Any advertising should be clearly identifiable as such, and related to an identifiable advertiser. Influencer marketing also risks infringing unfair market practices or negligence.

Who is accountable?

The influencer and the brand can each be accountable, depending on the infringement complained of.

When to label?

If the influencer receives any type of compensation, the content should be labelled as advertising.

How should posts be labelled?

If posts are not clearly identifiable as advertising, the wording "publicité" or "reclame" (advertising) should be used at the beginning of the post.

What are the potential sanctions?

Orders to cease-and-desist / take down content. Influencers or brands could face fines of up to €80,000.



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Belgian law does not specifically regulate Influencer Marketing as such. However, more general provisions are able to grasp this ever-developing practice. On the one hand, the Influencer may still be subject to the general rules on civil liability (negligence) if they exceed the limits of acceptable free speech. On the other hand, the advertiser may be held accountable under various provisions of the Belgian Code on Economic Law (BCEL).

Firstly, the general prohibition of unfair market practices under BCEL includes the provision of misleading information by mere omission. In addition, with respect to on-line services at large, BCEL requires that any advertising be clearly identifiable as such and related to an identifiable advertiser.

Further, specific provisions apply, for instance in the area of audiovisual services. It should be stressed that advertising is a broad notion, encompassing any types of communication aimed at promoting not only the sale of products or services, but also the reputation or image of the company.

Influencers often avoid mentioning the name of the company they are working for, which may lead to biased consumer opinions and bad commercial decisions. As such, this practice is likely to be regarded as misleading advertisement.



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Either the brand or the Influencer may be held liable. However, in the absence of financial relationship or compensation between the undertaking and the Influencer, it will be harder to establish the liability of the Influencer.



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When to label?

If the Influencer receives any type of compensation from the undertaking, they are considered to be bound by an economic link. This link should be translated / displayed accordingly and the content labelled as an advertisement, in the form that the message is received by the consumer.



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If posts are not clearly identifiable as being advertisements, the label "Publicité" or "Reclame" (advertisement) has to be mentioned at the beginning of the post. In addition, the brand for which the advertisement is made has to be clearly identifiable by the consumer.

If an undertaking fails or refuses to do so, its advertisement will be considered as hidden, which is condemnable.



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What are the potential sanctions?

Besides cease-and-desist orders, criminal sanctions for unfair market practices aimed at consumers may be ordered against the infringing parties. These may range from €208 to €80,000. In addition, the parties may be ordered to publish the judgment condemning their behaviour.



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What does French law say?

Influencer marketing can risk infringing the French law principle of "identification of advertising".

Who is accountable?

The influencer and the brand can each be accountable for deceptive commercial practices.

When to label?

Three factors to consider:

- Editorial control from the brand?
- Is the influencer promoting the brand;
- Influencer given compensation / free products?

Even if not advertising, any commercial relationship still needs to be clear.

How should posts be labelled?

Posts should be labelled at the beginning with French terms such as "publicité" (advertising), "sponsorisé par" (sponsored by), "en partenariat avec" (in partnership with).

What are the potential sanctions?

Orders to cease-and-desist / take down content.

Individuals:

- Fine up to €300,000;
- Imprisonment up to 2 years.

Companies:

- Fine up to €1.5m.



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Influencer Marketing risks blurring lines between editorial content and commercial content and can infringe the principle of "identification of the advertising" under the French digital economy law. Non-identification of such content can also be considered as a deceptive commercial practice and the influencer can be held accountable under French Consumer Law.



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Who is accountable?

The influencer can be liable under French Consumer Law for deceptive commercial practices. The brand that involved the influencer can also be held jointly liable.



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When to label?

France has changed its position about this issue and is now closer to the UK's approach. Before June 2016, the sole factor in determining whether the content constituted advertising was whether the influencer received compensation.

Nowadays, three cumulative criteria determine whether the influencer has to label its contents as advertising. They are as follows:

- there is an element of editorial control from the brand over the content;
- there is some form of promotional message by the influencer in the content; and
- compensation has been given to the influencer in relation to the content, whether that takes the form of payment or a free product.

However even when the content is not advertising because criteria 1 and/or 2 are not met, the influencer still has to let its audience know about the existence of any commercial relationship with the brand.



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How should posts be labelled?

For advertising content, it must be identified as such at the very beginning of the content. As French law requires the use of French language in advertising content, recommended practice is to use appropriate French words such as: "publicité" (advertising), "sponsorisé par" (sponsored by) or "en partenariat avec" (in partnership with).

For commercial content, the disclosure must be made clearly and instantly and can be done by any means (during the speech of the influencer, through text accompanying the video or via a mention included in the video).



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What are the potential sanctions?

Influencers as well as brands can be ordered to cease-and-desist and to remove infringing posts. Ultimately, brands and influencers can each be exposed to the following sanctions:

- For **individuals**: imprisonment up to 2 years, and a fine of up to 300,000;
- For **legal entities**: a fine up to €1.5m.

For each, the fine can be calculated proportionally on the annual sales revenues. Each also risks being forbidden to carry on a trade or business activity for up to 5 years. The court can also require companies to publish several rectified announcements and its ruling can be published in press and/or on the web.



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What does German law say?

Under German law, commercial and editorial content must be separated.

Who is accountable?

The influencer and the brand can each be accountable for covert advertising.

When to label?

If an influencer receives compensation, the content must be labelled accordingly.

How should posts be labelled?

Use the clear German terms "Werbung" or "Anzeige" (advertisement) at the beginning of the post "sponsored partnership" most likely not sufficient.

What are the potential sanctions?

The brand could face contractual damages and reputational damage.
The influencer could face damages and be ordered to cease-and-desist / take down content.



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Influencer Marketing often infringes the so-called 'principle of separation' (Trennungsgrundsatz), according to which commercial and editorial content must be separated. If content qualifies as advertising it must be labelled as such in order not to be considered 'covert advertising' (Schleichwerbung).



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The influencer itself can be held accountable for covert advertising under German Unfair Competition law (UWG) as well as under the Telemedia Act (TMG) and the Broadcasting Treaty (RStV). In addition, the company that involved the Influencer can itself be held vicariously liable for 'interference liability' (Störerhaftung) under principles of Unfair Competition law.



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When to label?

In general, if an Influencer receives compensation for their post, provided such compensation has an 'economic impact', the content must be labelled accordingly. Compensation in this sense includes not only payments, but also being provided with the product at a discount or free of charge.



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How should posts be labelled?

The safest way to label social media posts in Germany is to use the clear German terms "Werbung" or "Anzeige" (advertisement) at the beginning of the post. There has been no general decision to date on whether equivalent English terms such as "advertisement", "sponsored" or "ad" would be considered sufficient identification of such posts in social media by German courts. In one case, however, the Higher Regional Court of Celle found that labelling an Instagram post with "#ad" as one of many hashtags was not sufficient notification on the facts of that case (see below).



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Brands can be ordered to cease-and-desist and to remove infringing posts. Such cease-and-desist orders usually include provision for contractual penalties for further violation. Brands also risk reputational damage: the credibility of the brand's message can be damaged from discovery that the company has encouraged covert advertising and thus engaged in consumer deception.

Influencers themselves can also be held liable for damages as well as subjected to orders to cease-and-desist and to remove inadequately labelled posts.



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Italy

What does Italian law say?

All advertising and marketing communications must be transparent.

Who is accountable?

The influencer and the brand can each be accountable for covert advertising if content is not transparent.

When to label?

If an influencer receives compensation or free / discounted products for their post, the content must be labelled accordingly.

How should posts be labelled?

Wording such as: “pubblicità”, “promosso da...” (promoted by ...), at the start of the post.
Hashtags such as: “#pubblicità”, “#sponsorizzato” (or “advertising”), followed by the name of the brand.

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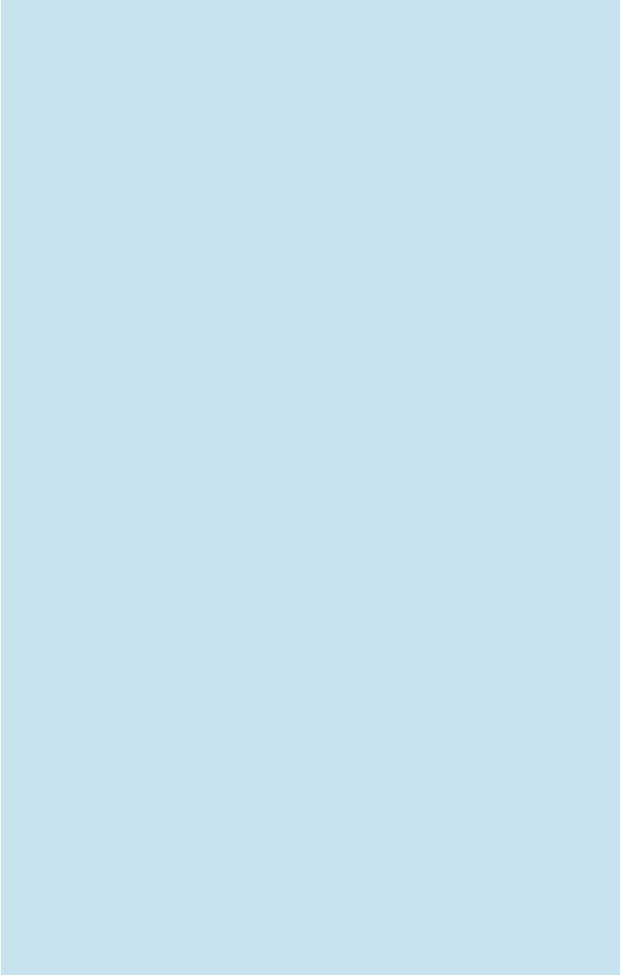
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This is on the basis that such communication may amount to 'covert advertising'. 'Covert advertising' can also trigger the liability of the social network / platform on which the Influencer marketing communication is published, under the European Directive on e-commerce (as implemented at under national law).

Influencer Marketing is also addressed within the self-regulatory framework developed by the non-profit organisation Istituto dell'Autodisciplina Pubblicitaria (IAP). The IAP's framework, albeit voluntary in nature, is widely recognised (including by the Italian Supreme Court) as an authoritative source for 'best practice' in the marketing and advertising sector Italy. IAP framework signatories cover approximately 80-90% of the turnover generated by the marketing and advertising sector in Italy.



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Legislative framework

The key provisions are the following:

- The Consumer Code (Codice del Consumo), according to which all advertising and marketing communications must be transparent so as to allow the average consumer to take a conscious decision before making any purchase of goods / services. An advertisement / marketing communication that is not transparent can be categorised as ‘covert advertising’ (which is an illegal practice);
- The Italian Civil Code, according to which ‘covert advertising’ can be categorised an act of ‘unfair competition’ (which is an illegal practice) if it does not comply with the principles of fair commercial conduct and is likely to damage a competitor’s business.



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Self-regulatory framework

- The IAP's Code of conduct for the marketing and advertising industry (Codice di Autodisciplina Pubblicitaria) (IAP's Code of Conduct) states that where the commercial purpose of an Influencer's opinion or comment cannot be clearly recognisable as such based on the factual context, then such purpose is to be disclosed through 'adequate means';
- The IAP's "Digital Chart" provides guidance on what specific labelling may constitute 'adequate means' for the purposes of the disclosure required by article 7 of the IAP's Code of Conduct.



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Who is accountable?

The brand owner and the Influencer itself can each be held accountable if the Influencer Marketing communication fails to adequately disclose to consumers the commercial purpose of the Influencer's post or other non-editorial material.



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Italy

What does Italian law say?

All advertising and marketing communications must be transparent.

Who is accountable?

The influencer and the brand can each be accountable for covert advertising if content is not transparent.

When to label?

If an influencer receives compensation or free / discounted products for their post, the content must be labelled accordingly.

How should posts be labelled?

Wording such as: "pubblicità", "promosso da..." (promoted by ...), at the start of the post.

Hashtags such as: "#pubblicità", "#sponsorizzato" (or "advertising"), followed by the name of the brand.

What are the potential sanctions?

Orders to cease-and-desist / take down content.

Influencers or brands could face fines of up to €5m.

When to label?

In general, if an Influencer receives compensation (i.e. an economic advantage) from the brand / advertiser for their post, then the content must be labelled accordingly. Compensation in this sense includes not only payments, but also being provided with the product at a discount or free of charge, but the type of label required depends on the form of compensation received.



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How should posts be labelled?

The Italian Competition Authority (L'autorità garante della Concorrenza e del Mercato) (AGCM) has identified general rules of conduct and has required the addressees to make apparent the possible advertising nature of the content delivered through social media, through the use of warnings, such as #sponsored, #advertising, #paidad, or, in the case of products given for free to the influencer, #productsuppliedby. In each case, these wordings should be followed by the name of the specific brand being advertised.

The IAP's Digital Chart has also provided similar guidance, albeit in a more granular fashion than the AGCM's one. According to the IAP, the possible advertising nature of the influencer's content should be clearly identified by including:

- In the initial part of the post, warnings such as (i) pubblicità / advertising, (ii) promosso da... [name of brand] / promoted by... [name of brand], (iii) sponsorizzato da... [name of brand] / sponsored by... [name of brand], or (iv) in collaborazione con... [name of brand] / in partnership with... [name of brand]; and/or
- Within the first three hashtags, one of the following labels: (i) "#Pubblicità / # Advertising"; (ii) "#Sponsorizzato da... [name of brand] / #Sponsored by... [name of brand]"; or (iii) "#ad", together with "[name of brand]".



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Hashtags such as: “#pubblicità”, “#sponsorizzato” (or “advertising”), followed by the name of the brand.

What are the potential sanctions?

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How should posts be labelled? (continued)

In the case of products given for free or at a discount to the Influencer, (only) the clearly legible warning “prodotto inviato da... .. [name of brand] / #product supplied by... [name of brand]” should be included in the post.



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Orders to cease-and-desist / take down content.
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What are the potential sanctions?

In the case of misleading conduct carried out by the Influencer and/or brand, the Italian regulator (AGCM) can request the immediate cessation of such conduct and can also apply administrative fines ranging from a minimum of €5,000 up to a maximum of €5,000,000. The AGCM can also order the publication of its decision (which is likely to have serious adverse effects on the reputation of the infringer).

Where the misleading conduct constitutes a violation of the unfair competition provisions of the Civil Code, the competent national court could also establish the infringer's liability for the damages suffered by competitors.

In the event of an ISP's liability under the E-commerce Directive, a court could issue an order requesting the cessation of any infringing activities and the removal of the infringing posts, as well as an order for the compensation of damages suffered by the claimant.



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Netherlands

What does Dutch law say?

Influencer marketing must be clearly labelled as an advertisement.

Who is accountable?

The influencer and the brand can each be accountable.

When to label?

If the influencer receives compensation, the content must be labelled accordingly.

How should posts be labelled?

Depending on the nature of the content, a statement that the post is sponsored may be included at the beginning, or hashtags such as #spon, #paid, #adv or #prom may be used.

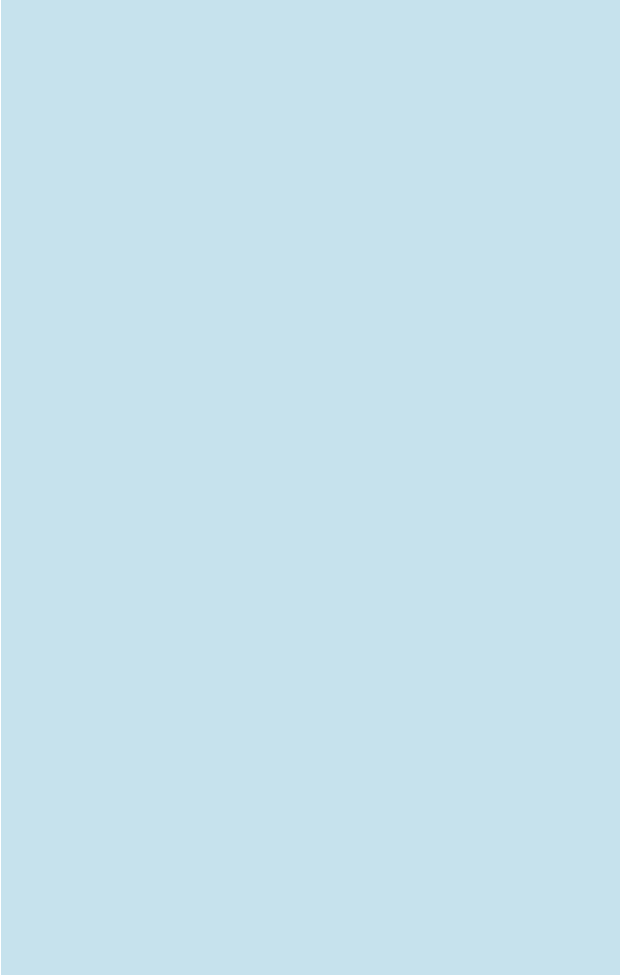
What are the potential sanctions?

Orders to cease-and-desist / take down content.
In theory, influencers or brands could face fines up to €450,000.
In practice, it is more likely to only receiving a warning.



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Netherlands

What does Dutch law say?

Influencer marketing must be clearly labelled as an advertisement.

Who is accountable?

The influencer and the brand can each be accountable.

When to label?

If the influencer receives compensation, the content must be labelled accordingly.

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What does Dutch law say?

As a general rule, Influencer Marketing must be clearly labelled as an advertisement. Failing to do so may qualify as misleading advertising under the Dutch Civil Code (DCC) and/or result in a breach of the Dutch Advertising Code on Social Media (Code).



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Influencer marketing must be clearly labelled as an advertisement.

Who is accountable?

The influencer and the brand can each be accountable.

When to label?

If the influencer receives compensation, the content must be labelled accordingly.

How should posts be labelled?

Depending on the nature of the content, a statement that the post is sponsored may be included at the beginning, or hashtags such as #spon, #paid, #adv or #prom may be used.

What are the potential sanctions?

Orders to cease-and-desist / take down content.
In theory, influencers or brands could face fines up to €450,000.
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Who is accountable?

Either the brand or the Influencer can be held accountable for failing to inform consumers of the sponsored nature of the content.



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In theory, influencers or brands could face fines up to €450,000.
In practice, it is more likely to only receiving a warning.

How should posts be labelled?

Depending on the nature of the post, the influencer may include a statement notifying consumers the post is sponsored at the beginning of its blog / vlog and/or apply hashtags to the post. Commonly used hashtags are #spon (sponsored), #paid, #sample, #adv (advertisement) or #prom (promoted).



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What are the potential sanctions?

Most complaints regarding influencer marketing are handled by the Dutch Advertising Code Committee (a self-regulatory body). Although not legally binding, the vast majority of the cases handled by the Committee are respected by advertisers.

The Dutch Authority for Consumers & Markets (ACM) may also enforce laws regarding unfair trade practices and misleading advertisements and impose fines, request deletion of the content etc. In theory, the ACM may impose fines up to a maximum of €450,000, depending on the nature of the violation. In practice, the ACM is more likely to first issue a warning prior to imposing a penalty.



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Spain

What does Spanish law say?

It must be clear to consumers where content is marketing content. Influencer marketing also risks infringing unfair competition.

Who is accountable?

The influencer and the brand can each be accountable, depending on who had editorial control and the type of infringement complained of.

When to label?

If the content amounts to marketing content, promoting products / services, it should be labelled accordingly.

How should posts be labelled?

Although no official labels, appropriate labels may be “Publi” or “Anuncio” – “Ad” or “Advertisement Commercial”.

What are the potential sanctions?

Influencers or brands could be challenged with a range of civil actions, which include cease-and-desist and take-down orders. Influencers or brands could face administrative fines of up to €601,012.10 or five times the value of the products/ services involved.



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What does Spanish law say?

Influencer Marketing can risk infringing Spanish Unfair Competition laws, under which civil actions could be taken against any person ordering/ carrying out/cooperating with the practice conducted. Unfair enrichment actions, by contrast, may be only pursued against the actual beneficiary.

Whichever model is taken, either the brand or the Influencer could potentially be liable under the following Spanish laws:

- Unfair Competition Act, which would be considering those acts as against competitors and consumers;
- General Advertising Act, which would scrutinise the lawfulness of the advertising and the minimum legal requirements to each advertising/ sponsorship contract;
- Intellectual Property laws: Copyright Act; and Trademarks Act, which would govern any unlawful use of, for instance, articles, designs or brands;
- Spanish Consumers laws, which require that every piece of marketing content is seen as such by consumers, so they are not deceived or mislead into modifying their economic behaviour in an unnoticed way. Otherwise, it may be found that misleading advertising is being directed to Spanish consumers, which can lead to civil actions and penalties under Spanish law.



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Who is accountable?

Liability for the content (e.g. fraudulent use of brands, inappropriate content being posted on social media) will normally be with the party with editorial control over the content. While it normally would be determined by the Influencer, brands may also introduce restrictions or compulsory contents in the marketing post.



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When to label?

If the promotion of products or services involved in the Influencer Marketing can be considered as marketing content, it should be labelled accordingly. In this sense, an incorrect or absent labelling may lead to the finding that the advertising is unfair to consumers for being misleading, which may be pursued by consumers. Additionally, subject to the applicability of the Spanish E-Commerce laws – social media platforms have been considered as comparable to email for the sending of marketing communications by the Spanish Data Protection Agency in some resolutions, it may be necessary that the marketing posts are clear about their commercial nature and the identity of the trader behind the marketing communication.



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How should posts be labelled?

Posts should be labelled as any other marketing content on social media. Therefore, captions such as “Publi” or “Anuncio” (“Ad” or “Advertisement”) may be considered as a suitable option.



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What are the potential sanctions?

Both administrative sanctions and civil actions may be decided/initiated against influencers, brands and/or the social media involved in the Influencer Marketing campaign. Administrative sanctions (up to € 601,012.10 or five times the value of the product) would be coming from claims filed by consumers for misleading commercial information, provided that the post entails a commercial offer – it can be difficult to qualify sometimes.

Influencers would be less likely to be fined than brands as the latter would be the ones more directly benefiting from a commercial offer included in the post, but this will depend on the circumstances. Cease-and-desist and take-down orders may be adopted by courts rather than by public administrations, as it can amount to a relevant limitation of rights.



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UK

What does UK law say?

Advertising or marketing communications should be clearly identifiable as such.

Who is accountable?

The influencer and the brand can each be accountable; it is seen as a shared responsibility.

When to label?

Whenever there is a payment or similar arrangement, that commercial relationship must be made clear.

How should posts be labelled?

The correct label will depend on the extent of editorial control by the brand.

If the brand does not have editorial control, it will be "sponsored content".

If the brand does have editorial control, it will be an advertisement.

What are the potential sanctions?

Regulators may make adverse public findings and require undertakings as to future conduct.

For the most serious cases, influencers or brands could face unlimited fines or imprisonment.



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What does UK law say?

The regulation of Influencer Marketing in the UK is mainly dealt with by the Advertising Standards Authority and the Competition and Markets Authority, although the body involved will vary depending on the circumstances, mainly concerning the degree of control that the brand has over the content itself.

Generally, content should be clearly identifiable as an ad or a marketing communication. This requirement is set out in the Consumer Protection from Unfair Trading Regulations 2008, which broadly criminalise misleading advertising and prohibit unfair commercial practices, including 'misleading omissions' and failing to make paid-for content clearly identifiable. The requirements of the CPRs are reflected in the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, which is enforced by the ASA.



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Who is accountable?

The influencer and the brand being advertised can each be held accountable for breaching Influencer Marketing rules in the UK, and the ASA and CMA have contacted and carried out investigations against both types of party. It is therefore generally seen as a shared responsibility to ensure that content is clearly labelled and any commercial relationship that exists between such parties is made clear to consumers.



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When to label?

Wherever there is a payment or any other reciprocal arrangement between an influencer and a brand, that commercial relationship must be made clear. Money does not always need to change hands and the payment need not be financial – all that matters is that there is a commercial relationship between the parties.

Different labels may be required depending on the extent of editorial control that the brand has over the content (if any), as discussed below. However, there is no need to label content which is located on a brand's own website and which is clearly controlled by the brand (even if developed by a third party publisher/influencer), as it will be obvious to the consumer that this is promotional content.

The content should be clearly labelled or identifiable as paid-for content and therefore labels or identifiers should be placed in a prominent position where readers will see them before they choose to engage with the content. Regardless of how consumers arrive at the content, the labels must be placed on the content page itself - disclosures on other pages cannot be relied upon.



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What are the potential sanctions?

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For the most serious cases, influencers or brands could face unlimited fines or imprisonment.

How should posts be labelled?

The correct label to use will depend on the extent of editorial control that a brand has over the content, which in turn will dictate whether content can be regarded as a marketing communication or not. If the influencer does not have editorial control over the content then it is likely to be considered sponsored content, which falls outside of the ASA's remit but will still need to be labelled so that consumers are aware of the commercial relationship between the brand and influencer. In those instances, the CMA recommends that labels such as "ad" or "advertisement feature" are used. In contrast, where the brand or provider of a product retains some editorial control over the content then the content is likely to be considered a marketing communication.

In addition to labelling the content correctly and clearly, influencers can also use visual and contextual identifiers (such as brand logos or even holding up a sign in the middle of a vlog) to call out their commercial relationship with the relevant brand and draw attention to this, as well as tagging the brand's handle in any social media posts.



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Regulators may make adverse public findings and require undertakings as to future conduct.

For the most serious cases, influencers or brands could face unlimited fines or imprisonment.

What are the potential sanctions?

Both the ASA and the CMA are currently very interested in transparency and ad-labelling issues and work together closely to tackle issues in this area. As noted above, the CPRs criminalise misleading advertising and prohibit unfair commercial practices, including 'misleading omissions' and failing to make paid-for content clearly identifiable. Breaches in respect of marketing communications can lead to criminal prosecutions, unlimited fines and in very serious cases terms of imprisonment of up to two years for implicated directors or senior managers.

However the requirements under the CPRs are mirrored in the CAP Code and so the ASA will often deal with breaches in the first instance upon receiving a complaint from a member of the public or a competitor. If the ASA does investigate then it is possible that the influencer and the brand can be named as a party against which a "complaint upheld" finding is reached. Such rulings are published online and, as such, the parties involved may face negative PR. Whilst the ASA cannot impose a fine or order payment of damages, serial offenders may be required to pre-clear all advertising.



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What does UK law say?

Advertising or marketing communications should be clearly identifiable as such.

Who is accountable?

The influencer and the brand can each be accountable; it is seen as a shared responsibility.

When to label?

Whenever there is a payment or similar arrangement, that commercial relationship must be made clear.

How should posts be labelled?

The correct label will depend on the extent of editorial control by the brand.

If the brand does not have editorial control, it will be "sponsored content".

If the brand does have editorial control, it will be an advertisement.

What are the potential sanctions?

Regulators may make adverse public findings and require undertakings as to future conduct.

For the most serious cases, influencers or brands could face unlimited fines or imprisonment.

What are the potential sanctions?

If the CMA does become aware of such a breach (and this does not depend upon any complaints being received), it will write to advertisers in the first instance to warn them. If, following this, the CMA does decide to investigate then it will ask that the advertiser and influencer provide undertakings to ensure that such content is clearly labelled in the future. Providing such undertakings will usually be sufficient to ensure no further action is taken.



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