

Insights

UNDERSTANDING CONSUMER LAW WHEN CONDUCTING INFLUENCER MARKETING CAMPAIGNS IN THE EU AND UK

ARE YOU SURE YOU HAVE DISCLOSED THAT AD?

DIGITAL SPEAKS SERIES

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THE RISE OF THE INFLUENCER

Long gone are the days where brands could rely simply on purchasing advertising space in newspapers or investing in eye-catching brochures to display their products. Now, the world is their oyster with the advance of the internet and the smartphone. Social media is a key player in this digital change for brands, as they can easily cost effectively advertise their products to particular market segments using social media channels, and endorsements from social media influencers. With as many as 17% of people having made a purchase from a brand after seeing someone endorsing a product on a social media, influencer marketing is big business. But why is this? Social influencers have built up trust with their followers over time. They are seen as trustworthy and credible people, meaning when they talk positively about a product, their followers have trust in what they are saying. With the influencer endorsement market being worth an estimated \$16.4 billion in 2022 (and forecast to grow to \$143 billion by 2030) influencers and celebrities can be a smart investment for brands.

WHAT ARE THE REGULATORY IMPLICATIONS OF INFLUENCER MARKETING?

However, with great power comes even greater responsibility, as well as looming regulatory scrutiny. Both the EU and the UK have been taking steps to ensure consumers understand when they are seeing influencer marketing to ensure it is presented in a transparent way. The European Commission, together with the national authorities of the Consumer Protection Cooperation Network, recently released the results after investigating influencer marketing practices. Influencers, who are involved in regular commercial activity (such as brand deals), are considered 'traders' under EU consumer law. This means influencers must clearly disclose any advertisements they make in a transparent manner. To check compliance with relevant EU consumer protection legislation, the Consumer Protection Cooperation Network conducted a screening of online posts to identify testimonials and endorsements that may mislead consumers. The sweep found that nearly all (97%) of influencers investigated posted commercial content but only one in five (20%)

systematically indicated that their content was advertising. As a result of the sweep, 358 influencers were earmarked for further investigation. National authorities will now contact them to request that they follow the rules in place. Note that the EU's new consumer protection rules implement more stringent sanctions for non-compliance. For example, turnover-based fines, giving regulators increasingly more levers to use to drive compliant marketing and advertising practices.

In order to provide guidance on the European consumer law and influencer marketing, the European Commission has launched an [Influencer Legal Hub](#). This is a one-stop guide, providing information on EU legislation that applies to influencers in the EU. The Hub provides video training, written legal briefs, overviews and important EU law and cases and has been developed in collaboration with academic experts. Influencers can even learn about their legal obligations to understand when, where and how they should disclose their advertising activities on social media, given that influencers are categorised as traders under European law. The Influencer Legal Hub is now available to influencers, agencies and brands (along with consumers), to provide education on the relevant consumer protection rules applying to social media advertising. National EU member states are also tackling the issue of influencer marketing, so country-specific legal advice should always be sought ahead of any influencer-led campaign to ensure the marketing message can be delivered in a compliant manner.

In the UK, the new [Digital Markets, Competition and Consumers Act \(DMCCA\)](#) will, once the relevant implementing measures are brought into force (, autumn 2024) prohibit the commission and publication of fake consumer reviews (with sanctions for non-compliance to include turnover-based fines). This last prohibition means businesses will not be able to cherry pick more favourable reviews or hide less complimentary reviews when presenting consumer reviews of products or services offered. Businesses will also be required to undertake an additional layer of diligence to make sure they avoid publishing fake or misleading reviews, or reviews which conceal the fact the reviewer has been incentivised to produce the review (i.e. by being supplied with free goods/services).

This development must be seen in tandem with the Advertising Standards Authority's (**ASA**) ability to investigate online advertisements and promotions and its decision to uphold a series of complaints made about a range of influencer marketing campaigns which did not adequately disclose that the content was sponsored. We have also seen very recent regulatory enforcement action by the Financial Conduct Authority concerning social media influencers accused of promoting a foreign exchange trading scheme on a social media platform.

WHAT ABOUT PODCASTS?

Another similar digital marketing technique used amongst brands in agreement with influencers are podcasts. These digital audio files have proven to accelerate in growth and popularity within recent years. With a hugely diverse range of topics and niche interests, it is a great opportunity for advertisers to address keenly targeted groups of consumers. However, given the intimacy of the

format and the perceived authenticity of trusted hosts, regulators in the UK, such as the ASA have raised their concerns over the regulation and genuineness of ads featured on podcasts. In June 2023, the ASA set out an investigation into the clarity and identifiability of commercial content with regards to host-read ads in podcasts, to help establish appropriate guidance in this area. Its consumer research found participants had concerns over the hosts' authenticity when it came to making claims about a product to influence listeners' purchasing decisions. Podcast listeners also valued a clear, up-front label at the start of ads. This includes using a variation of terms such as 'paid-for advertisement' and 'sponsored', within the ad. Furthermore, consumers also found it easier to recognise ads when labels were coupled with the use of music or sound effects, to mark out the ad from the surrounding content. This is more likely to be effective where the same sound is consistently used to mark the beginning and end of ad breaks and is not overly long.

Read the [ASA's guidance](#), which came into effect in August 2024, on how to label ads when used in podcasts.

GET IN TOUCH!

For businesses using digital marketing, these are the types of issues for which it should have up-to-date internal practices and procedures in place. Appropriate contractual protection is also essential when using third parties, such as influencers, for digital marketing campaigns to ensure a brand is well-armed in the event of any non-compliance. If you would like to discuss this further, please do get in touch.

With grateful thanks to Emily Holdsworth in the preparation of this article.

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