




One Hashtag to rule them all?

Mandated Disclosures in Influencer Marketing Practices

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Agenda

1. The phenomenon of social media influencer marketing
2. The applicable legal framework concerning the information duties of influencers
 - WHEN there is a duty to disclose
 - HOW to disclose
 - WHO is the vulnerable consumer
-  3. Open challenges

The phenomenon of social media influencer marketing...



*...relates to post, pictures and content spread on social media (like Facebook or Instagram) by **influencers**, i.e. reference persons in the online world with a **high number of followers** and, as a consequence, able to influence the tastes of the public. They do it by showing **support and approval** for certain brands and thus generating an **advertising effect**, but without clearly and unequivocally revealing to consumers the advertising purpose of the communication”*

Advertisement in disguise



Is the current European legal framework applicable to such phenomenon?

The applicable legal framework

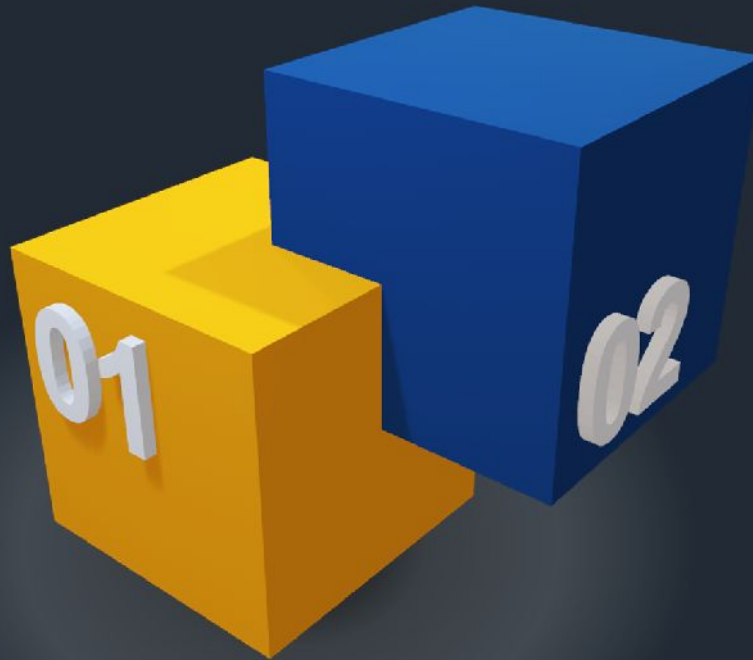
Duty to disclose the commercial intent

Unfair Commercial
Practices Directive
(UCPD)

Art. 5

Art. 7

Annex I, point 22



E-commerce
Directive

Art. 6

When the commercial intent is NOT apparent from the context...




- AGCM: two actions of moral suasion (2017 and 2018)
- AGCM: decision no. 27787/2019
 - Duty to disclose the commercial nature of the communication derived from paid partnership or free supply of products
- Advertising self-regulatory Jury, decision no. 45/2018 (liability of the brand)



- LG Hagen, Urt. v. 13.09.2017

- LG München I, 29.04.2019



- The commercial intent was evident from the context
- Public profile on the social media
- High number of followers
- Blue check mark 
- Consumers are generally aware that public profiles are used for commercial purposes, **especially millennials**

When the commercial intent is NOT apparent from the context?



Advertising self-regulatory Jury,
decision no. 45/2018 (Instagram
Stories)


The endorsement was “not immediately recognisable to the average consumer and, *a fortiori*, to the **more vulnerable consumer-follower**. Indeed, the average consumer neither knows nor has to know about the existence of a material connection between the endorser and the advertiser”



- LG Hagen, Urt. v. 13.09.2017
(target: adolescents)

• LG München I, 29.04.2019



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The form of disclosure



- AGCM → **use the tools available on the social media**

- #advertising #pubblicità #prodottofornitoda
- Advertising Self-regulation Jury, decision no. 45/2018
 - **Digital Chart**
 - Disclose prominently the material connection
 - **Hashtag/text**
 - “Pubblicità”/“Prodotto inviato da...”

- OLG Celle, Urt. v. 08.06.2017

- The #advertising has to be written at the beginning



Open challenges about the disclosure: one hashtag to rule all influencers?



- **Are hashtags the best we can do?** We are modifying the purpose of hashtags → from tools to create links to instruments to convey information (about the commercial intent)
- Role of guidance and recommendations
 - Need for **empirical experimentation**
- Tools for raising the **awareness of influencers**
- The **role of the platform**
 - Design duty



Bibliography #selfcitation



THE REGULATION OF SOCIAL MEDIA INFLUENCERS

11 JANUARY 2019, FACULTY OF LAW (MAASTRICHT UNIVERSITY)

A book workshop with the contributors of an upcoming volume by **Sofia Ranchordás** and **Catalina Goanta** (eds.) in the Elgar Law, Technology and Society series

With a keynote by

MADELEINE DE COCK BUNING (CvDM, Dutch Media Authority)

And a discussion table with **Egelynn Braun** (European Commission), **Fiona Vening** (Stichting Reclame Code) and **Justina Raižytė** (European Advertising Standards Alliance)

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- Boerman, Sophie C, and others, “Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say.” *J Intell Prop Info Tech & Elec Com L* 9 (2018): 146
- Ducato, Rossana, One Hashtag to Rule Them All? Mandated Disclosures and Design Duties in Influencer Marketing Practices (May 21,(2019). Ranchordás, S. (ed.) & Goanta, C. (Eds), *The Regulation of Social Media Influencers*, Edward Elgar Publishing, Forthcoming . Available at SSRN: <https://ssrn.com/abstract=3415598>
- Gfk Consortium, Behavioural Study on Advertising and Marketing Practices in Online Social Media. Annex 1.5 Legal Assessment of Problematic Practices , 2018
- Riefa, Christine, and Laura Clausen. "Towards Fairness in Digital Influencers' Marketing Practices." *Journal of European Consumer and Market Law* 8.2 (2019): 64-74.
- Trzaskowski, Jan, “Identifying the Commercial Nature of “Influencer Marketing” on the Internet.” *Scandinavian Studies in Law* 81(2018): 65

Thanks for your attention!

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