

# Influencer Marketing Guide

# Introduction

Welcome to the second edition of DLA Piper's Influencer Marketing Guide. The importance of influencer marketing is constantly increasing and it is already a major component of many marketing campaigns. There are numerous legal challenges for influencers and the companies they cooperate with. The legal framework is still in flux in most jurisdictions, which makes it particularly difficult to carry out cross-border influencer marketing campaigns in a legally compliant manner. This guide is designed to give an overview of the legal framework for influencer marketing in 28 jurisdictions around the world.

People are spending more time than ever on social media, so it is crucial for companies to be visible on these platforms to promote their products or services. In addition to publishing posts through corporate channels and placing banner advertisements, endorsements and product placements by influencers are playing an ever-increasing role in marketing strategies. One of the main advantages of collaboration with influencers is that their followers trust them, which results in their strong influence on purchasing decisions.

Since influencers often share personal experiences, the question arises about when a post mentioning or showing a product is considered an advertisement. In addition, it needs to be determined to what extent labelling requirements apply and how such a label has to be provided. The consequences influencers and companies may face if these legal requirements are not met also have to be addressed.

This interactive document will help you quickly find answers to these questions and others. The chapter for each jurisdiction can be accessed by clicking on the respective countries on the world map on page 3. You can also click on the buttons containing keywords to see additional information. Interactive elements are indicated wherever you see this icon \*.

This guide is not a substitute for legal advice, nor is it intended to be an exhaustive guide to all rules and regulations relating to influencer marketing in the jurisdictions covered, or to cover all aspects of the legal regimes surveyed, such as specific sectoral requirements. Rather, it aims to simplify what are often complex provisions into a more manageable summary and to highlight areas of potential concern.

\*This guide is designed to be viewed on a desktop in order to access all interactive elements.

## Editors

# Contents

Click on the map to navigate through the jurisdictions.



**Risk and enforcement key:**



Limited



Moderate



Robust



Heavy



# Australia

Risk and enforcement level: Robust

# Australia

## What qualifies as advertising under Australian law?

### REGULATED CONDUCT

The Australian Consumer Law (**ACL**) is the primary law in Australia governing all forms of advertising and marketing practices relevant to Australian consumers. Interestingly, “advertising” is not expressly defined in the ACL. Instead, the focus is on conduct and representations made to Australian consumers in any form that are commercial in nature. In particular, the two fundamental rules relating to advertising are that:



These laws apply to social media (including influencers) in the same way they apply to other media channels.

The concept of “conduct” is intentionally broad to capture action as well as inaction (i.e. refusing to do something or silence) and can apply to verbal representations made by a person or corporation. Further, the conduct only needs to be *likely* to mislead or deceive. It does not matter whether the conduct *actually* misled anyone, or whether there is an intention to mislead.

Whether a representation is made in trade or commerce, which is a threshold requirement, depends on whether the activity in question has a trading or commercial character. Promotional activities are considered to have such a

character. Given this, social media activities by influencers which have the effect of promoting a product or service are captured by the ACL.

In addition to the ACL, Australia has in place a system of advertising self-regulation, established by the Australian Association of National Advertisers (**AANA**). A definition of “advertising and marketing communication” is contained in the AANA Code of Ethics which encapsulates any material which is published or broadcast using any medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and:

- over which the advertiser or marketer has a reasonable degree of control; and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.

Both factors are required to be present for the material to be classified as advertising. The AANA has confirmed that contextually targeted branded content, integrated content and native advertising all fall within the definition of advertising and marketing communication, particularly where a brand has a reasonable degree of control over the material. Overall, the focus is on making sure that advertising content is clearly distinguishable as such.

### UN-REGULATED CONDUCT

Generally, where an influencer decides to positively post about a particular product or service and this is done *without* commercial benefit to the influencer or pursuant to a direction or arrangement with the business that offers that product or service, the post is unlikely to be subject to the ACL.

## What are typical influencer practices in Australia and in which cases are they considered advertising?

As indicated in Question 1, the types of posts which would be considered “advertising” for the purposes of the ACL will be very broad. Regarding practices which would fall within the ambit of the AANA Code of Ethics (compliance of which is not mandatory), the main issues to consider will be whether the *advertiser or marketer* has a reasonable degree of control over the material and whether the material is calculated to promote a product or service.

By way of example only, the following are common influencer practices which may be captured by the ACL:

Posts\* mentioning or featuring third party products or services;

Posts mentioning or featuring the influencer’s own products or services;

Offering or directing followers to access discount codes or enter competitions for promoted products or services; and

Using or failing to use certain hashtags or in-image tags that result in a misleading impression about the particular products or services featured or referred to.

\*The term ‘post’ is used widely given the range of influencer marketing activities across platforms, e.g. written blog posts, pictures, video, and commentary posted on Instagram or Snapchat, and content posted on YouTube and TikTok.

## Which legal obligations apply?

### AUSTRALIAN CONSUMER LAW

The key ACL provisions referred to at Question 1 require regulated content to be truthful and accurate, and if necessary to have appropriate substantiating materials which support the claims made.

Influencer marketing may be misleading or deceptive where there is a failure to disclose that a post is advertising a business, product or service, or is otherwise sponsored. As such, it is an implied requirement of compliance with the ACL that influencers disclose these arrangements in the particular post, e.g. through use of appropriate hashtags (see Question 4, below).

### INDUSTRY SELF-REGULATION

As mentioned, industry self-regulation of influencer marketing in Australia is growing as part of a move to legitimise the practice. Various self-regulatory bodies have established codes of practice for their members as well as voluntary guidelines which set the baseline of accepted practices for influencer marketing. While not binding on non-members, these codes are generally considered best practice and reflective of Australian community standards.

The following industry codes and guidelines are particularly relevant to influencer marketing (in addition to the AANA Code of Ethics as mentioned in Question 1):





**PLATFORMS**

Influencers and those brands engaging them must also make sure to familiarise themselves and comply with advertising disclosure requirements (if any) particular to the social media platform on which the advertising content will appear. The declarations required by influencers in order to ensure compliance with the ACL and relevant codes/guidelines may vary across platforms.

**What labelling requirements do you need to be aware of?**

The law does not mandate specific labelling for influencer marketing. However the AiMCO Code of Practice sets out **examples** of best practice minimum disclosure:

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#Ad	#sp
#Sponsored	#spon
	#gift

The AiMCO Code of Practice suggests that the following terms can be used **in addition** to the minimum disclosure tags:

- #Ambassador
- #Collab
- #PaidPartner

As noted above at Question 1, where an influencer decides to positively post about a particular product or service and this is done in the absence of a commercial relationship between the influencer and the brand then the post will not require disclosures - (AiMCO uses the example of a friend or family member providing the product to the influencer). However, recent decisions by the Ad Standards Community Panel (the industry body which hears complaints relating to non-compliance with the AANA Code of Ethics) have found that providing gifts or freebies to persons that are known influencers does establish a sufficient degree of control by the brand over the influencer to fall within the Code of Ethics definition of “advertising” and therefore warrant the need for disclosure through labelling, verbal disclosures or as otherwise appropriate for the format of the post. Additional advice about disclosures on gifting can be found in the 2021 AiMCO Guide to Gifting and Ad Disclosure.

**Describe specific laws, regulations or guidance aimed at influencers in Australia**

As outlined above, Australia does not have specific legislation addressing influencer marketing activities. The key obligation on influencers and those brands that engage them as part of their marketing strategies, is to comply with the misleading and deceptive conduct provisions in the ACL.

The Australian Competition and Consumer Commission (**ACCC**) is the regulator that monitors and enforces compliance with the ACL. It is a very active regulator. While no Australian influencer or business associated with influencer marketing has been sanctioned or faced a penalty from the ACCC, the ACCC recently (August 2020) reminded influencers and commissioning brands of their obligations to comply with the ACL, particularly with respect to disclosure to their audience of sponsored posts.

## What are the consequences for influencers if advertising content is not clearly labelled?

The ACCC has a range of enforcement tools at its disposal to address contraventions of the ACL, including issuing infringement notices (fines), or requiring parties to enter into court enforceable undertakings. Individuals and corporations can also have federal court proceedings brought against them by the ACCC or private parties aggrieved by the misconduct.

Maximum penalties for individuals found to be in breach of the ACL are AUD500,000 (approximately USD357,000) per breach. For a corporation, the maximum penalty is AUD10 million (approximately USD7 million), or if the value of the benefit can be ascertained, then three times the value of the benefit, or if the value of the benefit cannot be obtained, 10% of annual turnover of the corporation.

To date, the ACCC has not taken action against influencers for breaches of the ACL. While this is not indicative of the stance the regulator may take in future, it does suggest that the current risk for influencers is potentially lower than other groups. Regardless, influencers directing posts or other promotional content at Australian consumers **must** comply with the ACL, and should also aim to comply with industry best practice including the AANA Code of Ethics and other guidance materials issued by both the AANA and AIMCO.

Indeed, in addition to legal risks, industry self-regulation also imposes consequences for influencers and brands that do not clearly label their sponsored content in compliance with codes and guidelines that seek to give effect to the law.

In the first half of 2021 the Ad Standards Community Panel was particularly active in responding to and investigating complaints regarding alleged failures to comply with disclosure obligations. For example:

- In one case (no. 0055-21), the use of “#brandname” was found to not be sufficiently clear enough to convey to audiences that a commercial relationship existed between the poster and the brand in question (a clothing fashion label); and
- In another case (no. 0063-21), gifting of perfume by a brand to a known influencer was found to require disclosure, with the Community Panel interpreting the motivation for the act of gifting to be in-kind promotion and finding that the brand had a “reasonable degree of control” to constitute advertising within the meaning of the AANA Code definition of “Advertising”.

The recent activity of the Community Panel shows that industry practices are under increasing scrutiny, and these developments have likewise attracted significant media attention.

## What legal risks apply when cooperating with influencers in Australia?

The primary legal risk for companies engaging influencers to conduct marketing activities at their direction is breach of the ACL from failure to make disclosures, or otherwise misleading or deceiving consumers about the promoted product or service.

Non-compliance with the ACL may also carry reputational risks for the company and the influencer. For example, the ACCC regularly publicises its enforcement activities and these are widely reported in Australian media.

The ACCC is unlikely to take a favourable view of businesses that direct or commission influencer marketing content that breaches the ACL. Businesses **must** comply with the ACL and should ensure that their arrangements with influencers are documented via way of contract (including appropriate warranties and indemnities, as well as provisions regarding IP ownership).



## Key contacts



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# Austria

Risk and enforcement level: Robust

# Austria

## What qualifies as advertising under Austrian law?



A post by an influencer only qualifies as “advertising” if it directly or indirectly promotes the sale of goods or services. Whether, in turn, a post is considered to promote the sale of goods or services depends on several indicators:



## What are typical influencer practices in Austria and in which cases are they considered advertising?

There are various influencer practices which can be classified as advertising:



## Which legal obligations apply?

### RECOGNISABILITY AS ADVERTISING

The basic rule is that advertising must always be recognisable as such by the targeted audience.

Whether a post is clearly recognisable as advertising depends on numerous factors, particularly:

- the influencer's appearance;
- the influencer's audience;
- the presentation of the products and services.

### LABELLING REQUIREMENT

If an advertisement is not directly apparent from the circumstances, its commercial nature must be made clear by labelling it as advertising. Usually it is also necessary to disclose the client who instructed the influencer, e.g. by placing a link to their website.

### SEPARATION OF ADVERTISING AND EDITORIAL CONTENT

If advertising takes place in the context of editorial content, e.g. on a fashion blog, such promotional content needs to be clearly separated from the editorial content (so-called separation rule).

Further specific rules apply to on-demand audiovisual media services, e.g. content for information, entertainment or educational purposes posted on YouTube, namely:

- the ban of surreptitious advertising;
- the obligation to disclose sponsorships;
- the obligation to clearly indicate product placements; and
- In cases of influencers seated in Austria, the obligation to notify Austrian authorities prior to the start of their activities.



## What labelling requirements do you need to be aware of?

### GENERAL RULE

The labelling must be so apparent that, from the point of view of an average member of the relevant public, there is no doubt about the commercial purpose of the post. That means that the labelling has to be adjusted to the specific circumstances of an advertisement. The German terms mentioned in the table below – “Anzeige”, “entgeltliche Einschaltung” and “Werbung” are considered to be sufficient in general.

Examples from German case law which will also apply under Austrian law:

- “#ad” as one of several hashtags under a post was considered insufficient and
- “#sponsoredby” was held to be insufficient.

Instead, it is required to use the German terms for advertisement, i.e. “Werbung” or “Anzeige”.

### PLACEMENT OF LABELLING

The labelling must be visible at first glance. Thus, if it is necessary to click on certain buttons or to scroll down in order to become aware of further information, the labelling will be considered insufficient. The note should therefore be inserted at the beginning of the post. If a video focusses on a certain product throughout, it can even be advisable to use a permanent insertion. Information on product placements must be inserted at the beginning of the video.

### LABELLING REQUIREMENTS FOR AFFILIATE LINKS

It is mandatory to provide information about how the affiliate link works and that the influencer receives a commission.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Werbung” <i>(“Advertisement”)</i>	“Promotion” <i>(“Promotion”)</i>
“Entgeltliche Einschaltung” <i>(“Paid notification”)</i>	#ad
“Anzeige” <i>(“Advertisement”)</i>	#sponsoredby
“Bezahlte Kooperation” <i>(“Funded cooperation”)</i>	
“Bezahlter Inhalt” <i>(“Paid content”)</i>	

### Describe specific laws, regulations or guidance aimed at influencers in Austria

There are not any specific laws, regulations or guidelines that apply exclusively or specific to influencers. However, the Austrian Press Ethics Council have issued a guideline concerning “Ethics in Digital Communication” which states certain principles (i.e. labelling, standards of journalism) its members have to follow. Those are not legally binding.



## What are the consequences for influencers if advertising content is not clearly labelled?

If influencers violate these labelling obligations, they may face legal proceedings brought by competitors or certain business or consumer associations. In some instances, such violations can also be sanctioned by regulatory authorities:

### COMPETITORS/BUSINESS OR CONSUMER ASSOCIATIONS

If an advertisement is not sufficiently labelled, this constitutes an unfair commercial act. In this case, competitors have a claim to cease and desist. They can therefore send a warning notice and assert the claim in court. Furthermore, such claims can also be raised by certain consumer protection or business associations. In addition, such associations or competitors may be entitled to damages, e.g. reimbursement of their costs for the warning notice.

### REGULATORY AUTHORITIES

Moreover, there is a risk of sanctions imposed by the supervisory authorities. Administrative fines of up to EUR20,000 (approximately USD22,500) may be imposed if posts are not sufficiently labelled. In cases of on-demand audiovisual media services (e.g. certain content on YouTube) fines of up to EUR40,000 (approximately USD45,000) may be imposed. Apart from monetary fines authorities may also prohibit or block posts if they violate the above mentioned requirements.

## What legal risks apply when cooperating with influencers in Austria?

If an influencer violates these labelling requirements, the company that mandated him or her may also be liable. In particular, a company would be liable if it exerted control over the composition of the respective post. Such an exertion of control would be assumed, for example, if a company had instructed the influencer not to insert the necessary labelling.

Yet even without knowledge of such violation, the company may be held liable under certain circumstances, i.e. if:

- the influencer is integrated into the sales organization;
- the success of his or her actions benefits the company; and
- the company had the possibility of exerting influence on the behavior of the influencer in the area in which the violation occurred.

Such claims based on labelling infringements can be brought either against the influencer, the company or both.

In addition, companies may be liable for other legal infringements by the influencer, e.g. of third party copyrights. Such liability may arise if the company instigated the influencer to infringe certain rights or had to expect such an infringement and did not intervene.

Thus, before the start of a campaign, a company should stipulate in its contract with the influencer how posts are to be designed and labelled. Additionally, compliance with these provisions should be monitored throughout the campaign.



## Key contacts





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# Belgium

**Risk and enforcement level: Moderate**

# Belgium

## What qualifies as advertising under Belgian law?

### HARD LAW

The Belgian Code of Economic Law (“**BCEL**”) includes two broad definitions for advertising. The first applies to advertising in the field of commercial practices and consumer protection in general, whilst the second applies more specifically to digital advertising (the so-called “**electronic economy**”).

1. Article I.8, 13° BCEL (applicable to “*Commercial practices and consumer protection*” in general (Book VI BCEL)) defines advertising as:
 

*“any communication with the direct or indirect aim of promoting the sale of products, irrespective of the place or means of communication used.”*

2. Article I.18, 6° BCEL (applicable to “*Law of the electronic economy*” more specifically (Book XII BCEL)) defines advertising as:
 

*“any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.*

*For the purposes of Book XII, the following does not in itself constitute advertising:*

- a. Information giving direct access to the activity of a company, organisation or person, in particular a domain name or an electronic mail address;*
- b. communications compiled independently and in particular without any financial compensation”.*

Further, the Belgian Media Laws also provide a definition of “advertising”. The Belgian Media Laws consist of four pieces of legislation (three at community level and one at federal level) and have all implemented Directive 2018/1808/EU, amending Directive 2010/13/EU (“**Audiovisual Media Services Directive**”, “**AVMSD**”): (i) the federal Act of 5 May 2017 on audiovisual media services in the bilingual region of Brussels-Capital, as amended by the Act of 21 July 2021 transposing the AVMSD (“**Federal Act**”); (ii) the Decree of the Flemish Community of 27 March 2009 on radio and television broadcasting, as amended by the Decree of 19 March 2021 transposing the AVMSD (“**Flemish Decree**”); (iii) the Decree of the French Community of 4 February 2021 on audiovisual media services and video platform services (“**Decree of the French Community**”); and (iv) the Decree of the German-speaking Community of 1 March 2021 on media services and cinema screenings (“**Decree of the German-speaking Community**”).

The Belgian Media Laws contain the following definitions:

1. Article 2, 17° Federal Act, Article 5.1-1, 7° Decree of the French Community and Article 4, 23° Decree of the German-speaking Community define advertising as:

*“The communication - in whatever form - transmitted by a public or private company or natural person, in return for payment or for similar consideration or for the purpose of self-promotion, in connection with the exercise of a commercial, industrial, craft or professional activity, in order to promote the supply for payment of goods or services, including immovable property, rights and obligations.”*

2. Article 2, 35° Flemish Decree defines advertising as:

*“The audiovisual or auditory communication of a public or private company or natural person - in any form - on the exercise of a commercial, industrial, craft or professional activity, in order to promote the supply against payment of goods or services, including immovable property, rights and obligations, which is broadcast for payment or similar consideration or for self-promotion in a linear broadcast service.”*

This definition thus strictly limits the scope of “advertising” to linear broadcast services, as a result of which the Flemish audiovisual media provisions regulating advertising will only apply to influencers in particular circumstances, yet without prejudice to the provisions regulating (the broader concept of) commercial communication (which is defined as *“Images, whether or not accompanied by sound, or sounds which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity. Such images or sounds accompany or form part of a programme or user-generated content, in return for payment or for similar consideration or for self-promotional purposes. Forms of commercial communications include advertising, sponsorship, teleshopping and product placement.”* (Article 2, 5° Flemish Decree), cf. infra).

#### SOFT LAW

Due to the specifics of influencer marketing, the Belgian Advertising Council (since 25 May 2020 revamped as the “Communication Center”) has published **guidelines for online influencers** on 8 October 2018 (the “**Guidelines**”, available in [French](#) and [Dutch](#)), i.e. self-regulation by the advertising sector.

These Guidelines define influencer marketing as *“a form of marketing through which companies activate online influence and relevant sectoral knowledge of individuals or “influencers”. The influencers are influential people who have built a large online community on social networks, websites, forums (...).”*

The Guidelines apply provided that the following **two cumulative conditions** are met:

- a. The influencer receives **remuneration** in cash or in kind:
  - the advertiser, or the agency acting at the advertiser’s request, gives the influencer compensation in order to communicate about its brand, product, service or organisation. Allowing the free use of a product for a specified period of time or offering a product can be considered payment in kind; and
- b. The advertiser has significant **control** over the communication:
  - the advertiser agrees on guidelines with the influencer.

If these conditions are not met, the published content will (according to the Communication Center) not be considered as advertising but as the mere expression of the influencer’s opinion (see also the definition above: Article I.18, 6°, b) BCEL.

The supervising authority in charge of securing the correct implementation of the guidelines is the Jury for Ethical Practices (“**JEP**”).



Further, on 14 December 2021, the Flemish Media Regulator ("*Vlaamse Regulator voor de Media*"), which is authorized to supervise the compliance by audiovisual media services providers falling under its jurisdiction with the provisions of the Flemish Decree, published the new [Content Creator Protocol](#) ("**CCP**").

The CCP provides guidance to content creators, influencers and vloggers who produce and publish audiovisual content and are established in the Flemish Community or in the bilingual region of Brussels-Capital (if their activities may be considered to belong exclusively to the Flemish Community). **It covers three themes:** commercial communication on social media, commercial communication towards minors and hate speech.

Content may be regarded as **commercial communication** provided that two conditions are met:

- a. It *mentions* (visually and/or aurally) a brand, company, product or service,
- b. in return for a *benefit* from the company behind this brand, product or service.

Such benefit may constitute by way of example a payment, beauty products, jewelry, clothing, mobile phone, food or drinks, games, trips, hotel accommodation, events, car usage, unique experiences or gift cards.

It is to be noted that the CCP only applies (i) to content creators, influencers and vloggers and not to their external partners (i.e. the brands and companies sponsoring them) and (ii) to *audiovisual* content (such as Instagram and Facebook stories, TikTok movies, vlogs etc.) and not to merely stationary images. The Federal Public Service Economy ("*FPS Economy*") remains the competent authority to supervise compliance of other content (such as stationary images) with the federal media laws as well as compliance of any and all advertising content with federal advertising laws, including the unfair market practices law as contained in the BCEL (cf. *infra*).

Whilst the CCP does not constitute hard law, the Flemish Media Regulator did emphasize that it cannot be simply dismissed as non-binding. The Regulator has a team of (currently two full-time) social media watchers who monitor compliance with the CCP. Should a content creator continue to breach the CCP after a warning by the Flemish Media Regulator, the latter, on the basis of its authority to enforce the Flemish Decree, can impose sanctions.

At the date of this publication, the Audiovisual High Council of the French Community ("*Conseil Supérieur de l'Audiovisuel*"), the Media Council of the German-speaking Community ("*Medienrat*") and the Belgian Institute for Postal Services and Telecommunications ("*Belgisch Instituut voor Postdiensten en Telecommunicatie*"), which are competent to supervise the compliance by audiovisual media service providers falling under their jurisdiction with the provisions of their respective decrees and federal act, have not (yet) published a similar protocol for online content creators. However, a similar initiative is currently being prepared by the Audiovisual High Council of the French Community.

## What are typical influencer practices in Belgium and in which cases are they considered advertising?

According to the Communication Center, the following situations are **not** to be considered as “influencer practices” that fall under the scope of the Guidelines:

- A product is delivered for free, without the company expecting a review (*i.e.* the company has no control over the content);
- The “influencer” posts a spontaneous and honest opinion that is not imposed by the brand (e.g. the influencer offers a free product or service for a review and provides information about the product or service, but the message is not written by the brand, nor does it have the right to approve the message);
- An employee of a company communicates about the company on social media with his or her friends, acquaintances, etc. as a result of his/her loyalty to that company (the compensation (*i.e.* the wages) is not dependent on the employee communicating such messages).

Please note however, that for certain practices, it could still be argued that the general principles on commercial practices apply (see the above-cited definition).

The Communication Center provides the following examples of influencer practices that are “**in scope**” of the Guidelines:



According to the CCP, the following situations cannot be considered to constitute “commercial communications”:

- The content creator has purchased the product or service mentioned in its content entirely on its own, at the regular market price, without receiving any form of discount or benefits; or
- The content solely contains self-promotion. This will be the case if the content creator promotes her/his own products, merchandising, services or videos. Content will however not be regarded to be self-promotional when, for example, the content creator releases a clothing line together with a brand.

Conversely, the following examples remain **in scope** of the CCP:

- A content creator is compensated to advertise for a recognized charity;
- The financial compensation of a content creator is only EUR5; or
- A content creator organises a giveaway for a company, service or brand in exchange for a free or discounted product.

### Which legal obligations apply?

In general, Book VI BCEL (“*Commercial practices and consumer protection*”) stipulates that any kind of advertising (including influencer practices) that amounts to “*unfair, misleading or aggressive market practices*” (articles VI.92-VI.103 BCEL) is prohibited.

More specifically, Book XII BCEL (“*Law of the electronic economy*”) determines the general requirements to be followed when advertising online. For example, (i) the advertising character of the content must be clearly identifiable, and (ii) the identity of the company or individual being advertised must be clearly identifiable (Article XII.12).

In addition to the above, when advertising meets the conditions of influencer marketing (as explained above under Section 2), the Guidelines provide that every commercial communication must be:

a. **Clearly recognizable** - which can be achieved by:

- An explicit and textual statement;
- The context in which the online message is published;
- Brand or logo notification.

b. **Fair** - The message must not contain incorrect information or mislead the target group with false statements and the commercial communication should not directly encourage children to persuade their parents or other adults to buy products for them.

Further, the Belgian Media Laws also provide various legal obligations regarding commercial communication, which includes advertising, such as:

a. **Surreptitious** audiovisual commercial communication (i.e. the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature) is prohibited (Article 54 of the Flemish Decree, Article 5.2.2 §5 Decree of the French Community, Article 13, 1° Decree of the German-speaking Community and Article 14 §2 1° Federal Act).

b. All forms of commercial communications for cigarettes and other **tobacco** products, as well as for electronic cigarettes and refill containers are prohibited (Article 65 Flemish Decree, Article 5.1.2, 3° Decree of the French Community, Article 13, 4° Decree of the German-speaking Community and Article 14, 2° Federal Act).



- c. Commercial communication **cannot** (i) incite violence or hatred based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, (ii) publicly provoke to commit a terrorist offence, (iii) include or promote any form of discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, (iv) prejudice respect for human dignity, nor (v) encourage behavior prejudicial to health or safety or the protection of the environment (Article 38-39, 55, 62 Flemish Decree; Article 5.2-2, 2.3-1, 2.4-1 2° Decree of the French Community; Article 7 §2, 12 Decree of the German-speaking Community; Article 14, 17 Federal Act).

At the level of the French speaking Community, several additional safeguards have been implemented, particularly with regard to the protection of the rights of women. In this respect, the Decree of the French Community also expressly prohibits audiovisual commercial communication or programmes which (i) incite discrimination, hatred or violence based on other grounds such as pregnancy, motherhood, gender reassignment, gender expression, gender identity or (ii) contain incitement to violence against women and domestic violence (Article 2.4- 1, 1° Decree of the French Community).

- d. Commercial communication for **alcoholic beverages** cannot (i) be aimed specifically at minors or, in particular, depict minors consuming these beverages; (ii) link the consumption of alcohol to enhanced physical performance or to driving; (iii) create the impression that the consumption of alcohol contributes towards social or sexual success; (iv) claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts; (v) encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; or (vi) place emphasis on high alcoholic content as being a positive quality of the beverages (Article 68 Flemish Decree, Article 5.1-2 Decree of the French Community, Article 18 Decree of the German-speaking Community, Article 25 Federal Act).

- e. Commercial communication cannot directly exhort **minors** to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, unreasonably show minors in dangerous situations, or contain content of gratuitous violence and pornography (Article 72 Flemish Decree, Article 2.5-1 & 5.2-3 Decree of the French Community, Article 14 & 17 Decree of the German-speaking Community, Article 14 & 17/1 Federal Act).
- f. Product placement in **children's programmes** is prohibited (Article 50 Flemish Decree, Article 5.3-4. Decree of the French Community, Article 20 Decree of the German-speaking Community & Article 16 Federal Act).

Pursuant to the implementation of the revised AVMSD into the Belgian Media Laws, influencers may now also be regarded as providers of audiovisual media services. Consequently, they will also have to abide by the rules on commercial communication as mentioned above.

The Flemish Media Regulator also explicitly **confirms** the applicability of the Belgian Media Laws in the CCP. With regard to commercial communication on social media, the CCP provides additional guidance for content creators on the labelling requirements (cf. infra). With regard to the other two themes of commercial communication towards minors and hate speech, the CCP mainly **reiterates** the provisions of the Flemish Decree by pointing out the prohibition of product placement and of logos of sponsors in content aimed at children, and the prohibition to incite hatred or violence and to publicly invoke to commit a terrorist offence. In addition, the CCP states that a content description of potentially inappropriate elements for minors should be included in the videos of content creators and that videos containing pornographic images or images of gratuitous violence should be encrypted (whereas Article 42 of the Flemish Decree also allows for parental control as an alternative).

## What labelling requirements do you need to be aware of?

Given that influencers may also be regarded as providers of audiovisual media services, they are subject to the legal obligation of **sponsor identification**, which states that in the event of sponsoring of audiovisual media services, the existence of the sponsoring agreement must be clear for viewers (Article 15 Federal Act, Article 91, 1° Flemish Decree, Article 5.6-1, 2° Decree of the French Community, Article 19 Decree of the German-speaking Community).

The Commercial Center (now Commercial Center) provides the following guidance:

- a. The online influencers must make the commercial relationship clear in a visual or audible way. This can be done by mentioning the following words in the commercial communication: **“advertising”, “publicity”, “sponsorship”, “promotion”, “sponsored by”, “in collaboration with”** or **other types of similar entries** or **hashtags #ad, #spon or #prom**.
- b. It is necessary to adapt the above words in function of the **language** of the message or the target group because social media does not have any language boundaries.
- c. The words must be **mentioned** in the right way and placed such that the recipient immediately understands the commercial nature of the message.
- d. Finally, the words **cannot be hidden** in such a way that the average consumer does not notice them easily.

The Flemish Media Regulator, however, provides for **stricter guidelines** in the CCP. Content creators should indicate their commercial communication as follows:

1. The commercial communication should be labeled with the Dutch terms **“advertentie”, “reclame”** (“*advertising*”) or **“publiciteit”** (“*publicity*”) at the **beginning** of the description. If the audience mainly consists of non-native speakers, the English term “advertising” may also be used. Abbreviations such as “ad”, “spon” or “pub” are **not** sufficient.  
  
Further, if the content creator uses an **affiliate link**, then this affiliate link must be indicated with an asterisk (\*) and include the following message under the link: **“\*If you buy something through this link, I will receive a commission.”**
2. The content creator must tag her/his partner(s) (**@partner**).
3. The content creator must use the app ‘toggle’ and indicate **within the platform system** that her/his video contains commercial communication, unless this would be technically impossible.

The CCP provides several practical examples which may be consulted [here](#).



ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“advertentie”, “reclame” or “publiciteit” (“ <i>advertising</i> ”) at the beginning of the description	Abbreviations such as ad, prom, spon or pub.

### Describe specific laws, regulations or guidance aimed at influencers in Belgium

On 15 May 2018, the FPS Economy published guidelines for influencers on Twitter. After protest on social media, the FPS Economy withdrew its guidelines and stated that its announcement was “premature”, as the guidance was not yet “validated”.

It should be carefully monitored if and when new guidelines are published by the FPS Economy, as the guidelines published on 15 May 2018 were more restrictive (severe fines, specific guidelines for several social media platforms, etc.) than the Guidelines of the former Belgian Advertising Counsel (now Commercial Center), which were published after consultation with the sector.

Further, the Belgian Media Laws now also target influencers, as a result of which the latter are subject to the provisions regulating sponsoring, product placement, other commercial communication, the protection of minors, etc. (cf. above).

### What are the consequences for influencers if advertising content is not clearly labelled?

The Jury of Advertising Ethical Practices (“**JEP**”) is the body authorised to receive complaints regarding influencer marketing. In such circumstances, the JEP will handle them in accordance with its regulations (available at [jep.be](http://jep.be)). As a reminder, if the JEP decides to discontinue or modify a campaign, it expects voluntary compliance with its decisions by advertisers (influencers), their agencies and the media.

Additionally, when an influencer practice (that qualifies as advertising as defined above under Section 1) violates a BCEL rule (e.g. an unfair commercial practice), administrative fines and other sanctions (Book XV BCEL) may be imposed on the influencer by the FPS Economy.

Lastly, a violation of the Belgian Media Laws may, amongst other measures, result into:

- An order to cease the violation;
- administrative fines up to EUR125,000 (Flemish Community) (approximately USD140,000)/3% of the annual turnover before taxation (French Community)/EUR25,000 (German-speaking Community) (approximately USD28,000)
- criminal prosecution;
- civil prosecution.



## What legal risks apply when cooperating with influencers in Belgium?

The responsible person for abiding by the rules set forth by the Guidelines will be whoever places the post (*i.e.* the influencer). However, the following entities may also be held liable for such infringements: companies that request to place advertising posts, networks, agencies, platforms and other parties involved in social network marketing.

Furthermore, if an influencer practice (that qualifies as advertising as defined above under Section 1) violates a rule included in the BCEL (e.g. an unfair commercial practice), administrative fines and other sanctions may be imposed by the FPS Economy on companies working with (or instructing) the influencer.

Competitors/consumers can also file complaints and/or initiate legal proceedings (cease-and-desists, but also claims for damages suffered as a result of the unfair commercial practice) for alleged unfair commercial practices (e.g. unlawful comparative advertising).

In addition, companies may be liable for other legal infringements by the influencer, e.g. of third party copyrights. Such liability may arise if the company instructs the influencer to infringe certain rights or had to expect such an infringement and did not intervene.

Thus, before the start of a campaign, a company should stipulate in its contract with the influencer how posts are to be designed and labelled. Additionally, compliance with these provisions should be monitored throughout the campaign.

## Key contacts



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# Canada

Risk and enforcement level: Robust

# Canada

## What qualifies as advertising under Canadian law?

Advertising in Canada is any message where the content is controlled directly or indirectly by the advertiser and which is communicated in any medium to viewers with the intent to influence their choice, opinion, or behavior.

A post by an influencer qualifies as advertising if there is a material connection between the influencer and the company they are posting about. A material connection is any connection between an entity providing a product or service and an endorser, reviewer, influencer or person making a representation that may affect the weight or credibility of the representation, and includes: benefits and incentives, such as monetary or other compensation, free products with or without any conditions attached, discounts, gifts, contests and sweepstakes entries, and any employment relationship.

## What are typical influencer practices in Canada and in which cases are they considered advertising?

There are various influencer practices which can be classified as advertising:



### Which legal obligations apply?

If content is qualified under the law as advertising, the influencer must disclose the relationship between themselves and the advertiser. Any commercial relationship between an influencer and a advertiser that has the potential to affect how consumers evaluate the influencer’s independence or impartiality is a material connection and requires disclosure. This type of relationship can involve:



### What labelling requirements do you need to be aware of?

The disclosure should catch viewers’ attention and be placed where they are unlikely to miss it. A key consideration is how viewers see the screen when using a particular platform.

Influencers should state the nature of the material connection (i.e. free products, monetary compensation, exclusive invite to an event, etc.), name the brand, and list the specific products they are promoting. Blanket statements that are not product and brand-specific are not transparent for the viewers. If an influencer receives a product for free from a company, they are not necessarily required to use specific tags such as #ad or #sponsored, but they do need to disclose that they received the product for free. Here are some example of tagging options.

ACCEPTABLE TAGS	UNACCEPTABLE TAGS
#ad	#SP
#sponsored	#Spon
#XYZ-Partner	"Thank you company X"
#XYZ-Ambassador	Labels such as #Partner' or #Ambassador' without naming the company.



## SPECIFIC MEDIA CHANNEL DISCLOSURE

**Describe specific laws, regulations or guidance aimed at influencers in Canada**

There are no specific laws or regulations aimed at influencers, but regulators have made it clear that the laws governing advertising and marketing in Canada apply to influencer marketing just as they do to other forms of advertising.

In Canada, the Competition Bureau is the primary government body responsible for enforcing laws about misleading marketing practices. An arm of the federal government, the Competition Bureau oversees the Competition Act with the goal of preventing fraud and eliminating deceptive marketing practices. The Competition Bureau has issued the Deceptive Marketing Practice Digest with guidance for influencer marketing.

In addition, the Canadian advertising industry's self-regulatory body called "Ad Standards", administers The Canadian Code of Advertising Standards. Ad Standards has also published The Influencer Marketing Guidelines, which is specifically aimed at influencers.



### What are the consequences for influencers if advertising content is not clearly labelled?

Breaching the Competition Act can result in civil or criminal action by the Competition Bureau, though civil action is more common than criminal action.

Under Section 52 of the Competition Act a person who knowingly or recklessly make a representation to the public that is false or misleading in a material respect may be found guilty of an offence and liable:

- a. On conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or
- b. on summary conviction, to a fine not exceeding CAD200,000 (approximately USD150,000) or to imprisonment for a term not exceeding one year, or to both.

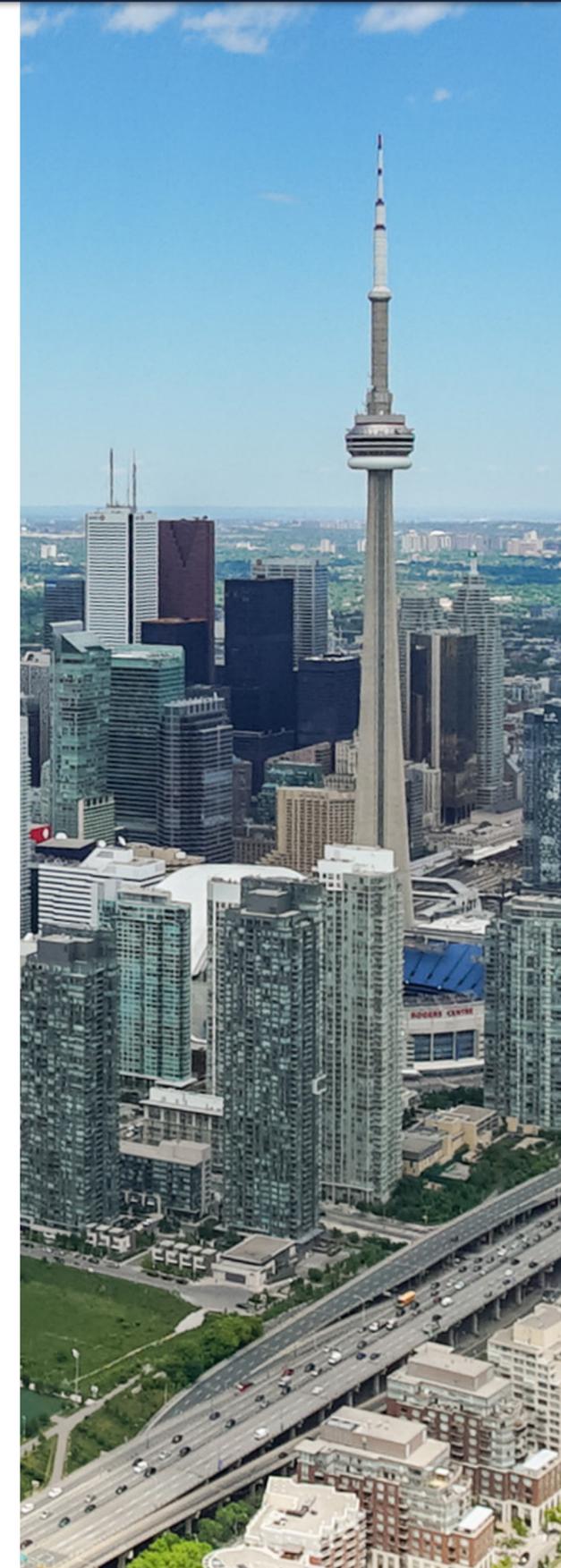
Under Section 74 of the Competition Act if a court determines that a person is engaging in or has engaged deceptive marketing practices the court may order the person to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding:

- i. In the case of an individual, CAD750,000 (approximately USD588,000) and, for each subsequent order, CAD1 million (approximately USD783,000), or
- ii. in the case of a corporation, CAD10 million (approximately USD7,831,000) and, for each subsequent order, CAD15,000,000 (approximately USD11,750,000).

### What legal risks apply when co-operating with influencers in Canada?

The Competition Bureau warns that compliance is a shared responsibility of the companies and their advertising agencies along with their influencers. Companies or their advertising agencies cannot rely on their lack of control over the format or content of the influencers' posts to avoid liability under the Competition Act.

Companies should therefore ensure that Influencers comply with the applicable provisions of the Competition Act. That includes ensuring that influencers clearly communicate any material connection that they have with the company and verifying that influencers aren't making performance claims about a product or service that haven't been adequately tested.



## Key contacts





# Chile

Risk and enforcement level: Moderate



## Chile

### What qualifies as advertising under Chilean law?

Advertising is mostly regulated in Law No. 19,496, which establishes rules for the protection of consumers' rights in Chile (hereinafter, the “**Consumer Protection Act**” or “**CPA**”). The CPA distinguishes between advertising and advertisers, which have a series of obligations regarding the information they provide to consumers.

Advertising is defined as the communication that the supplier directs to the public by any means suitable for that purpose, to inform and motivate them to acquire or contract a good or service (Article 1, No. 4 of the CPA). The objective conditions contained in the advertisement are assumed to be incorporated into the contract until the contract is concluded. Objective conditions are elements such as: price, components, guarantee conditions, and uses (Article 28 of the CPA).

The advertiser is the supplier of goods, service provider or entity that, through advertising, intends to illustrate to the public the nature, characteristics, properties or attributes of the goods or services whose production, intermediation or provision constitutes the object of its activity, or to promote the purchase of the goods or services (Article 1, No. 5 of the CPA). Therefore, suppliers that hire advertisements from third parties are advertisers.

The *Servicio Nacional del Consumidor* (National Consumer Service or “**SERNAC**”) is the administrative body in charge of investigating and initiating legal action on behalf of consumers, among other relevant consumer protection actions.

Advertising is also self-regulated by the advertising industry through the *Consejo de Autorregulación y Ética Publicitaria* (Council of Self-Regulation and Advertising Ethics or “**CONAR**”), which constitutes the lex artis or accepted good practice of advertising. The Chilean Code of Advertising Ethics defines advertising as any form of communication directed to the public or to a segment with the purpose of informing or influencing their opinions or conduct, through any channel, platform or means of communication, including promotions, sponsorships, and placements, as well as the direct and data-based marketing, and other activities or events carried out for commercial purposes and/or to compete with other alternatives.

The CONAR has an Ethics Tribunal, which resolves the disputes among members in commercial advertising matters related to Article 8 of the Chilean Code of Advertising Ethics on “Truthfulness, Deception, Exaggerated Pretension and Advertising Absolutes”.

### What are typical influencer practices in your jurisdiction and in which cases are they considered advertising?

According to the Online Advertising Study issued by SERNAC in 2018 (SERNAC, Online Advertising Study (2018), available [here](#)), an influencer is defined as a person who has a degree of credibility and a recognized image, especially on a certain topic, and who, as a result of their presence and influence, can spread knowledge of a brand in an audience or target audience, mainly in social networks (Ibidem, p. 20).



It is important to consider that there is no normative body or binding interpretation concerning whether influencer practices are considered as advertising. Nonetheless, as the definitions of advertising and advertiser provided by the CPA are broad, it is possible for any form of communication directed to the public with commercial purposes to be considered as advertising, including influencer practices. Moreover, Article 19 of the Chilean Code of Advertising Ethics has stated that when a person embracing a brand has any financial interest or personal connection with the advertiser, this circumstance must be expressly stated in the message. In the case of influencers, their contractual relationship or other relationship with the advertiser must be made known to the public.

Influencer practices are mainly carried out through social networks and are not defined in laws or guidelines, and therefore, can be classified in a similar way to those in other jurisdictions: 

### Which legal obligations apply?

Influencer practices have been considered as advertising by SERNAC, and therefore these practices are under the scope of the CPA and must comply with all laws and interpretations that are applicable to advertisements. In that regard, influencers must comply with the following principles of advertising, which are stated in various Articles of the CPA and in the Chilean Code of Advertising Ethics of CONAR:

- **Principle of Legality:** Advertisers must comply with the values and rights stated in the Constitution and other legal bodies.
- **Principle of Truthfulness:** It is related to the right of truthful and timely information, stated in Article 3 subsection 1 ° letter b) of the CPA, avoiding false or misleading advertising established in Article 28 letter a) to f) of the CPA. This principle requires that advertising must be truthful and timely, both in its form and its content.
- **Principle of Verifiability:** Advertisers must be able to verify claims that can be measured or quantified. This is related to the basic commercial information that suppliers must provide, as stated in Article 1, N° 3 of the CPA.
- **Principle of Advertising Integration:** The promises contained in an advertisement are understood to be incorporated in the respective contracts. Everything that the advertisement states must be respected by the company, which is an interpretation of the definition of advertisement in Article 1, N° 4 and Article 28 of the CPA.
- **Principle of Availability and Access to Information:** Information regarding the advertised goods or services must be available and easily accessible to consumers, in relation to Article 3 letter b) of the CPA.



- **Principle of Authenticity:** By virtue of this principle, advertising must be easily identifiable as such, clearly distinguishing itself from news or information reports. This is an interpretation of the right to truthful and timely information (Article 3 subsection 1 ° letter b) of the CPA), along with the definition of advertisement. In this regard, CONAR has established that the endowment of influencers must expressly state if there is any financial or personal interest involved. The contractual relationship, or the interests they may have with the advisor, must be made known to the public (Article 33 of the Chilean Code of Advertising Ethics of CONAR).
- **Principle of Respect for Competition:** The advertising activity must be respectful of the competition and its products or services, not incurring in the denigration or disparagement of a competitor. This principle responds to the obligations established in Law N° 20,169, the Unfair Competition Act.
- **Principle of Self-Sufficiency of Advertising Support:** Any supporting information must be self-sufficient, which means that each of the advertising messages must be sufficient in terms of its content, in such a way that they do not lack the information that by law Providers are required to provide to consumers. This is an interpretation of the right to truthful and timely information.

Influencers must provide truthful information of the products and services that they advertise, if not, they can be involved in giving out false or misleading information, as stated in Article 28 of the CPA. In this regard, the provided information must be truthful, specifically regarding:

- a. The components of the product and the percentage in which they concur.
- b. The suitability of the good or service for the purposes that it is intended to satisfy and that has been explicitly attributed by the advertiser.
- c. The relevant characteristics of the good or service highlighted by the advertiser or that must be provided in accordance with commercial information standards.
- d. The price of the good or the service fee, its payment method, and the cost of the credit, if applicable, in accordance with current regulations.
- e. The conditions under which the product or service guarantee operates.
- f. The effect of the good or service on the environment and quality of life, and whether the good or service is recyclable or reusable.

Specifically, relating to promotions or offers, influencers must provide information of the applicable terms, the duration of the offers and in the case of contests or sweepstakes, information on the number or volume of products and the term in which the prizes can be claimed, pursuant to Articles 35 and 36 of the CPA.

It is important to consider that influencer practices can be taxed, but if influencer practices are carried out by an individual, its services are classified as a second-category tax and are exempt from VAT. Therefore, to comply with tax obligations influencers must issue an invoice or receipt for professional fees in the Servicio de Impuestos Internos (Chilean Internal Revenue Service or "SII").

Finally, and according to the principle of legality, influencers in their role of advertisers must comply with all the applicable sectoral regulations, depending on the advertised product or service. This implies that influencers must not damage consumer health and safety, and respect the laws and regulations applicable, for example, provisions regarding alcoholic beverages, tobacco products, medical products and processed foods.



### What labelling requirements do you need to be aware of?

According to the authenticity principle, influencers must expressly state that they have a commercial or personal interest in promoting a product or service. Consumers must be able to recognize the advertising nature of the influencer’s practices in a clear way.

To comply with such obligation, influencers should use the accepted labels detailed below:

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#Publicidad (#Advertisement)	“Ad” (Shorthand term for “Advertisement” in English)
#Anuncio Contratado (#Hired advertisement)	“Socio” (“Partner”)
“Este video ha sido realizado en colaboración con [nombre del anunciante]” (“This video contains advertising for [name of the advertiser]”)	“Ad” (Shorthand term for “Advertisement”)
“Este video ha sido patrocinado por [nombre del anunciante]” (“This video has been sponsored by [name of the advertiser]”)	“Embajador” (“Ambassador”)
“Gracias [nombre del anunciante] por enviarme estos productos” (“Thank you [name of the advertiser] for your products”)	“[nombre del anunciante] publicidad” (“[name of the advertiser] advertisement”)

“Gracias [nombre del anunciante] por invitarme a este viaje/evento” (“Thank you [name of the advertiser] for your invitation to this event/trip”)	“[nombre del anunciante] publicidad” (“[name of the advertiser] advertisement”)
“[Nombre del anunciante] y yo venimos a sortear un [Descripción general del concurso y mención a las bases ante notario]” (“[Name of the advertiser] and I have come together to giveaway a [General description of the offer and mentioning the rules]”)	“[nombre del anunciante] publicidad” (“[name of the advertiser] advertisement”)



### Describe specific laws, regulations or guidance aimed at influencers in your jurisdiction

There are no laws nor regulations that apply exclusively or specifically to influencers. However, the following laws apply – in general – to advertising, and, consequently, they may apply to influencer practices consider as such:

- Law No. 19,496, which establishes rules for the protection of consumers' rights (Consumer Protection Act").
- Law No. 20,169, the Unfair Competition Act.
- Law No. 17,336, the Intellectual Property Act.
- Chilean Code of Advertising Ethics issued by CONAR.
- Interpretation on Advertising and Commercial Practices issued by SERNAC, Exempt resolution N° 0187, of March 21st, 2019.
- Interpretation of the tax treatment of influencer practices issued by the SII, Ord. No. 642 of March 9th, 2021.
- Sectoral regulations applicable to the provision of certain goods and services, for example: (i) alcoholic beverages; (ii) tobacco products; (iii) medical products; and (iv) processed foods.

### What are the consequences for influencers if advertising content is not clearly labelled?

Advertising content, including influencer practices, should be clearly labelled to allow consumers (or targeted audience) to recognize it as advertisement. Furthermore, influencers should only share truthful information, and comply with the general principles explained in section 3.

Article 24 of the CPA contemplates the sanctions for advertisers that infringe their obligations, which include:

- A general sanction for infringements of the obligations stated in the CPA, consisting of a fine of up to UTM300 (approximately CPL15 million or USD20,000).
- A sanction for providing false or misleading information, in relation to any of the elements stated in Article 28, consisting of a fine of up to UTM1,500 (approximately CPL77 million or USD100,000).
- If the advertising affects the health or safety of the population or the environment due to false or misleading information, it will cause the offending advertiser to incur a fine of up to UTM2,250 (approximately CPL116 million or USD160,000).
- Finally, Article 29 of the CPA states that anyone who is obliged to label the goods or services that they produce, sell, or provide, does not do so, or fails to truthfully label, conceals or alters the labels, will be sanctioned with a fine of UTM300.

Additionally, consumers and the SERNAC on behalf of individual consumers or as class actions can initiate legal actions for the compensation of damages caused by the advertisement.



## What legal risks apply when cooperating with influencers in your jurisdiction?

The responsibility that arises from the advertisement infringements will always apply to the advertiser. Therefore, whenever an advertiser cooperates with an influencer, and the influencer does not comply with the advertisement applicable laws, the advertiser will also be held responsible and may be subject to the applicable sanctions and corrective measures, particularly those related to false or misleading information.

It is also relevant to consider that the objective conditions contained in the advertisement – which include influencer practices – are understood to be incorporated into the contract between the supplier and the consumer when issued before conclusion of the contract. Objective conditions are elements such as: price, components, guarantee conditions, promotions, and common uses. Therefore, the objective conditions that the influencer communicates through any means are part of the contract and can be claimed by consumers.

Taking the latter in consideration it is advisable that the obligations of the influencer are clearly established through writing. The influencer must be informed by the advertiser of the labelling requirements and the relevant information that must be communicated, to avoid possible infringements.

## Key contacts



## Colombia

Risk and enforcement level: Moderate

# Colombia

## What qualifies as advertising under Colombian law?

Pursuant to Law 1480, 2011 (the “**Consumer Protection Statute**”), advertising is defined as any form of content intended to influence consumers’ decisions.

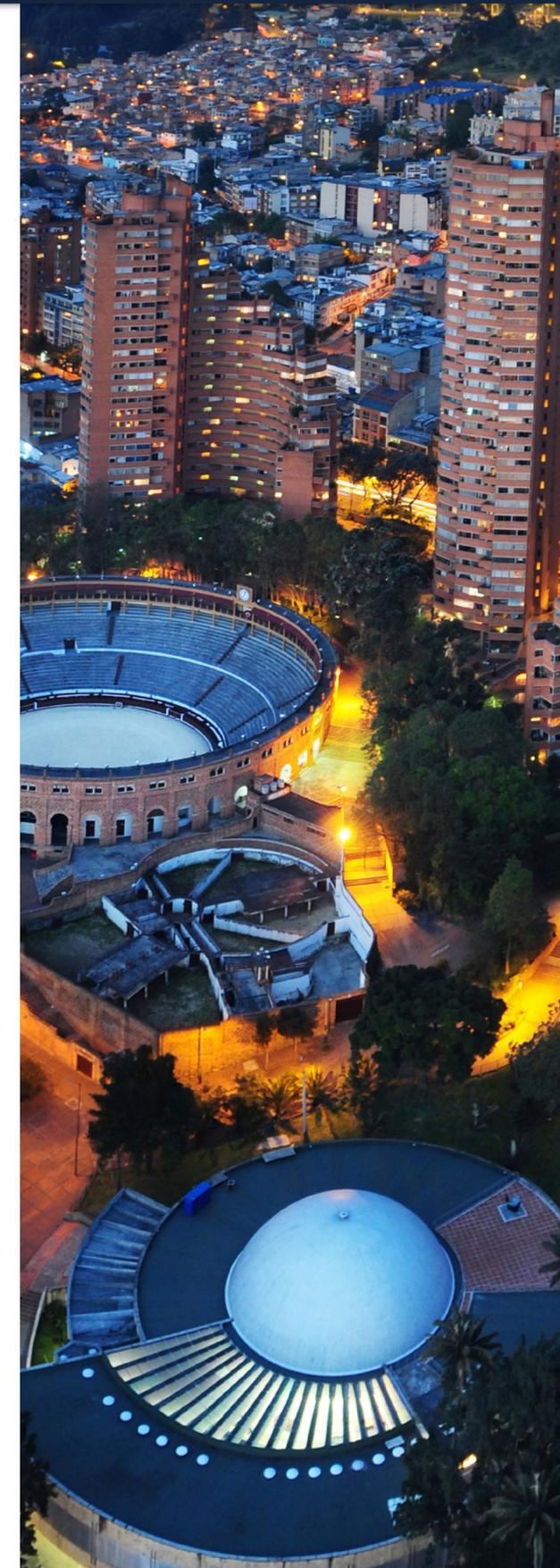
## What are typical influencer practices in Colombia and in which cases are they considered advertising?

According to the “Influencer Advertising Good Practices Guide” (available [here](#)), issued by the Superintendency of Industry and Trade (“**SIC**”), an Influencer is a person who shares their personal life, interests and experiences with an online community through social networks and/or interactive digital platforms, and who, as a result of the latter, has managed to build credibility, trust and a recognizable image with the online community, that allows him/her to influence, affect or motivate consumer behavior.

For the influencer’s practices to be considered as advertising, there must be a commercial relationship between the advertiser and the influencer, which exists when: (i) the influencer promotes the advertiser’s products or services under the instructions of the advertiser; (ii) the advertiser offers some type of payment or compensation to the influencer and (iii) the influencer’s message is made to influence the consumption decisions of the audience.

Conversely, if the influencer is giving his/her personal opinion about the product or providing a statement based on his/her previous experiences, it is not considered as advertising as long as they clarify this situation to his/her audience.

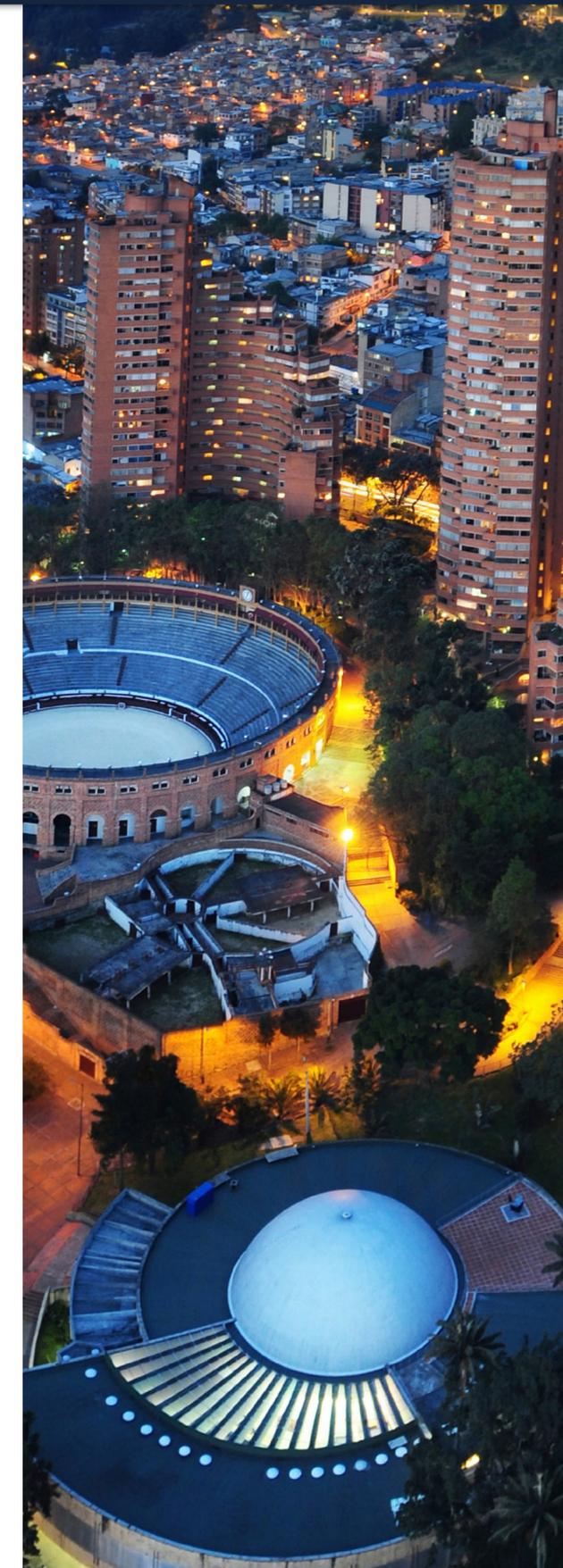
Influencer practices are mainly carried out through social networks and are not defined on laws or guidelines, and therefore, can be classified in a similar way to those in other jurisdictions:



## Which legal obligations apply?

Insofar as influencer practices may be considered as advertising, they must comply with all laws and interpretations that are applicable to advertisements. As a result, influencers shall:

- Indicate to the audience that they have a commercial relationship with the advertiser.
- Clearly indicate that the message is an advertising piece and that it is not based on their own experience or opinion. For these purposes, they may include a tag, preceded by the hash sign “#” with expressions such as “advertising”; “advertisement” or “promoted by”.
- Provide complete, truthful, verifiable, and understandable information.
- Based on the type of product, additional information must be provided. The most important cases are the following:
  - **Alcoholic drinks:** Advertising for these products shall include the caption “excessive alcohol consumption is detrimental to health.”
  - **Energizing drinks** shall include captions such as “high caffeine content”; “it does not prevent the effects generated by the consumption of alcoholic drinks”; “it is not advisable to mix this beverage with alcoholic drinks”; “this product may only be marketed, aimed and sold to people over 14 years old” and “this product is not recommended for people who are sensitive to caffeine.”
  - **Medicines:** to broadcast an advertising piece for this type of products, the prior authorization from the National Food and Drug Surveillance Institute (INVIMA) is required.
  - **Advertisements of products that by their nature or components are harmful to health** shall include information on their harmfulness, as well as the necessary indications for their correct use and the contraindications, which are to be considered by the consumer.
- In case the influencer provides information about products other than the advertiser’s, the information must be truthful and verifiable, to prevent unfair competition practices.
- The following shall be noted for advertisements aimed at children and adolescents who are under 18:
  - It shall not contain any form of violence, discrimination, harassment and, in general, any conduct that may affect the life or physical integrity of the individual.
  - It shall not contain images or information of sexual, violent, or discriminatory content that promotes conduct contrary to the values of society.
  - It shall not contain images or information related to the consumption of narcotics and/or alcoholic drinks unless it is used for prevention campaigns.
  - It shall not include information suggesting to the child and/or adolescent that not acquiring or using a product may generate effects such as social rejection or lack of acceptance by a group.
  - It shall not state or imply that the consumption of a food or beverage replaces any of the three main meals of the day (breakfast, lunch, and dinner).
- Comply with data protection regulation which includes, among other obligations, not to disclose information about its followers without their consent.
- Comply with intellectual property and copyright law.



### What labelling requirements do you need to be aware of?

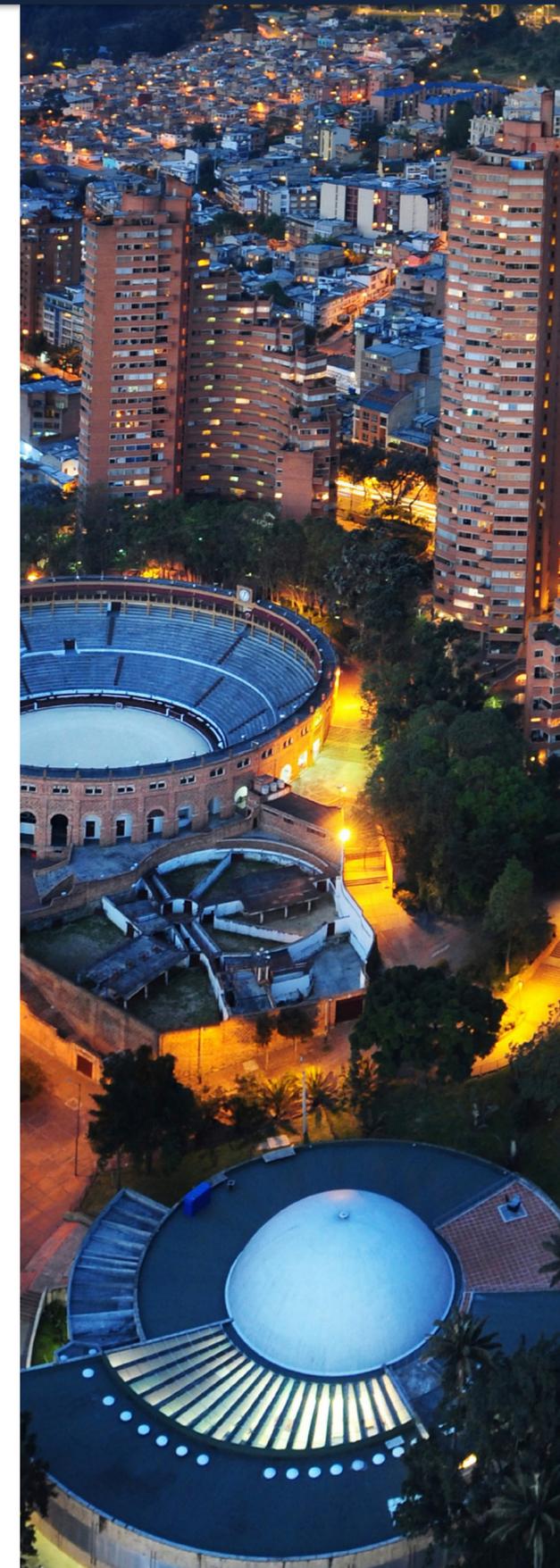
The influencer shall refrain from messages or expressions that may induce to error or cause confusion to the consumer. Moreover, the information given by the influencer shall be visible, considering aspects such as its place in the post or video, type, color and font size.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#Publicidad (#Advertising)	#Promocionado (#Promoted)
#AnuncioPagado (#HiredAdvertisement)	"Gracias a" ( <i>"Thanks to"</i> )
"Este video ha sido patrocinado por [nombre del anunciante]" ( <i>"This video has been sponsored by [advertiser's name]"</i> )	"Esto es posible por [nombre del anunciante]" ( <i>"This is made possible by [advertiser's name]"</i> )
#publicidad seguido de @[anunciante] #Advertising followed by @[advertiser]	"En asocio con [nombre del anunciante]" ( <i>"In partnership with [advertiser's name]"</i> )

### Describe specific laws, regulations or guidance aimed at influencers in Colombia.

Under Colombian law, influencers are not subject to specific regulations. Nonetheless, they shall comply with the general regime:

- Law 1480 of 2011 – “Consumer Statute”
- Law 256 of 1996 – “Unfair Competition Law”
- Law 1581 of 2012 – “Data Protection Law”
- CAN Decision 486 of 2000 – “General Intellectual Property Regime”
- CAN Decision 352 of 1993 – “General Copyright Regime”
- Decree 975 of 2013 – “Specific rules on children’s and adolescents’ products’ advertising”
- Influencer Advertising Good Practices Guide issued by the SIC. This is considered as soft law and contains guidelines to set out how the influencer’s practices should be made to comply with the laws above mentioned.



### What are the consequences for influencers if advertising content is not clearly labelled?

If the influencers include misleading information in the advertising piece, and they have informed consumers about the commercial relationship they have with the advertiser, they will only be liable if they knew or should have known that the information was not true, complete, or verifiable.

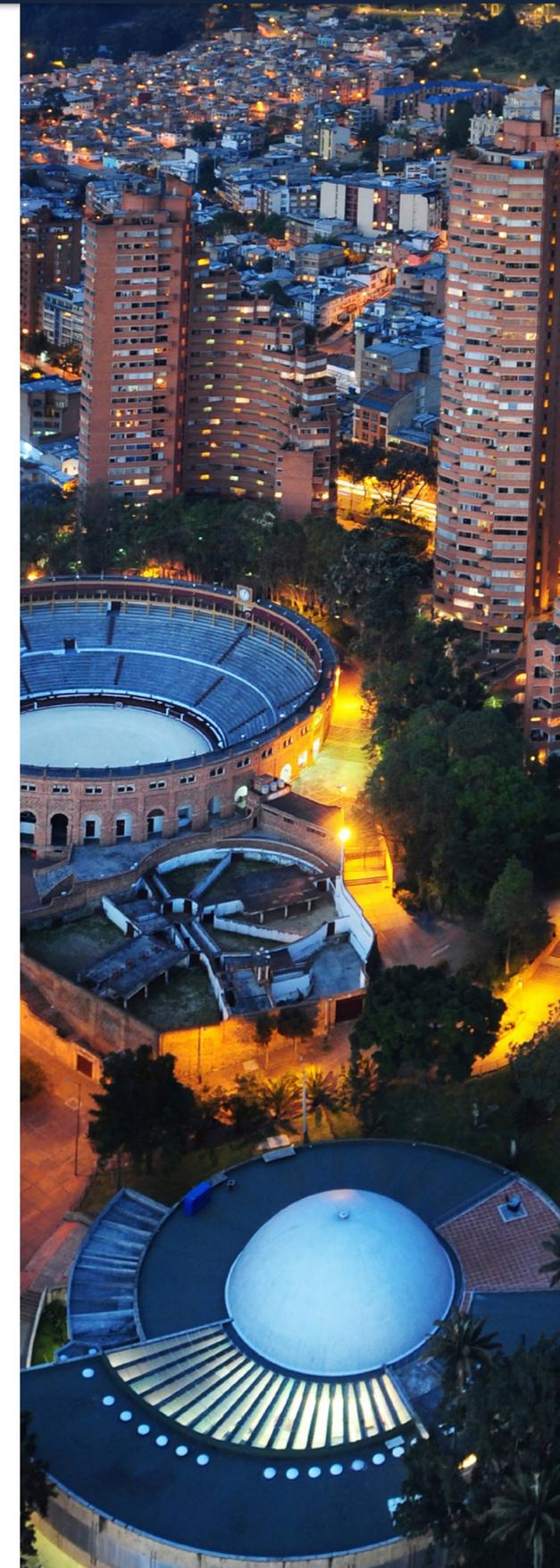
If influencers (i) do not indicate that they have a commercial relationship with the advertiser; (ii) do not indicate clearly enough that the message is an advertising piece and that it is not based on their personal experience or opinion; or (iii) know or should know that the information that they included on their accounts was not true, complete or verifiable, they may be liable for all damages caused to the consumer. Furthermore, if found liable, the influencer may incur in fines of up to COP2,000 minimum wages (approximately USD500,000) or may even be ordered to close his/her web page or profile.

The penalties that are described next may apply if the influencer is found liable for non-compliance with any of the above-mentioned regulation:

- a. Lack of compliance with the unfair competition regulation may be investigated by the SIC if the conduct had effects on the market as such, affecting the general public. In such cases, it may fine the undertakings under investigation with fines of COP100,000 monthly minimum legal wages (approximately USD25 million).

- b. A breach of data protection regulation may lead to the following penalties:
  - i. Fines for up to COP2,000 monthly minimum legal wages (approximately USD500,000). The authority might impose successive fines if the breach remains.
  - ii. Suspension of any activity related to the data processing for up to six (6) months. In this case, the SIC might give specific orders regarding corrective measures that shall be taken by the offender.
  - iii. Temporary closing of any operation related to data processing if the above-mentioned measures are not taken.
  - iv. Immediate and definitive closing of any operation that involves data processing.
- c. Non-compliance with specific advertisement regulation may lead to fines of up to COP2,000 minimum wages (approximately USD500,000) or be ordered to close his/her web page or profile.

Moreover, influencers may be civilly liable for any damages that their conducts bring upon consumers, data subjects or other undertakings. Any potential claimants must prove (i) that the influencer behaved with negligence, fault or willful intent; (ii) the existence of damages; (iii) the existence of a relationship between the infraction and the damages that were caused, and (iv) the value of the damage caused.



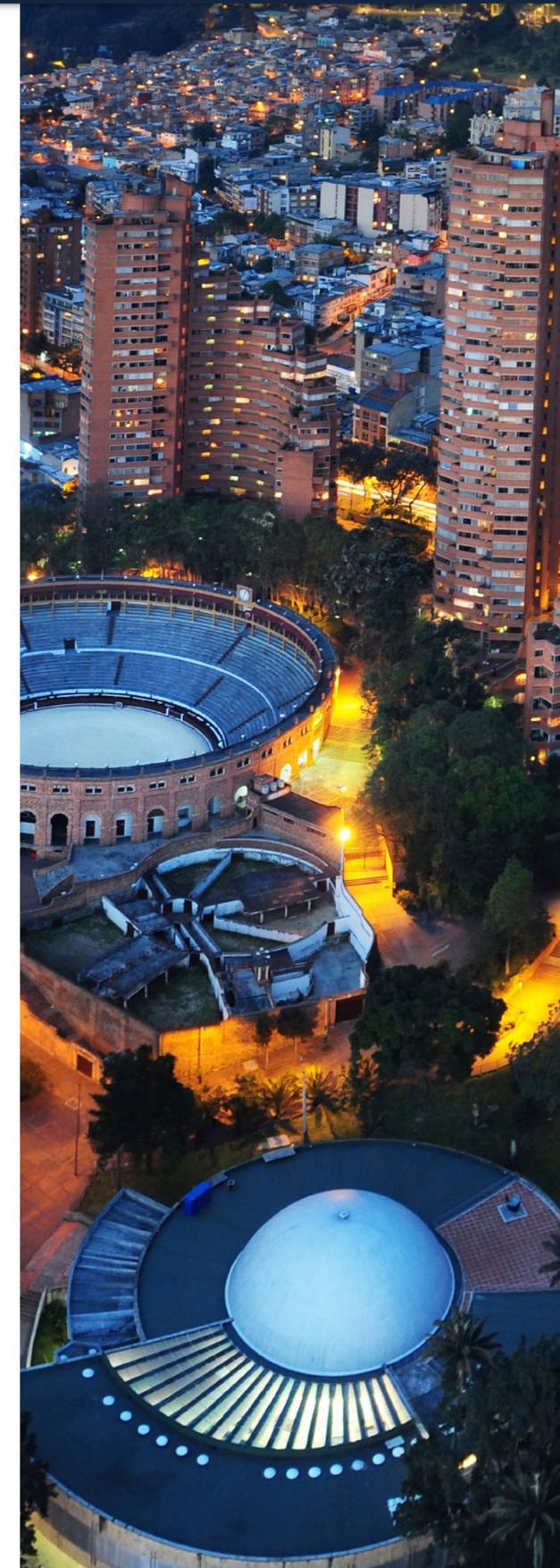
## What legal risks apply when cooperating with influencers in Colombia?

Whenever an advertiser cooperates with an influencer, and the influencer does not comply with the applicable laws on advertisement, the advertiser may be held responsible if it was aware about the influencer practices.

Non-compliance with the Consumer Protection Statute may lead to fines of up to COP2,000 Colombian minimum legal wages (approximately USD500,000), the temporary or permanent prohibition to import, produce or distribute the products until it is proven that the products' failures have been fixed within the Colombian territory, or the destruction of products that may jeopardize consumers' health or safety. These sanctions are imposed by the SIC after it undertakes an investigation in the frame of an administrative proceeding.

If the SIC decides to forbid the production, import, distribution or supply of a product, the affected undertaking may request the SIC to lift this sanction if it demonstrates that the production process has been modified to ensure compliance with adequate conditions of quality and suitability.

## Key contacts





## Czech Republic

**Risk and enforcement level: Moderate**

# Czech Republic

## What qualifies as advertising under Czech law?

In Czech law, advertising is regulated by the Act No. 40/1995 Coll., on the Regulation of Advertising, as amended (hereinafter referred to as the "Advertising Act"), where advertising is defined as follows:

"Unless otherwise stated, advertising means announcements, demonstrations or other presentations disseminated mainly by communication media, aimed at promoting business activities, in particular promoting the consumption or sale of goods, construction, rental or sale of real estate, sale or use of rights or obligations, services or trademark promotion."

The description of advertising is further contained in many other regulations based on European legislation. Here, advertising is usually regulated more specifically for specific needs (e.g. by Consumer Protection Act or the Act on the Operation of Radio and Television Broadcasting). These specific provisions are field-specific (to the rather general) Act on the Regulation of Advertising.

In addition to the above-mentioned laws, there is a Code of Ethics for Advertising in the Czech Republic, which falls under the Advertising Council (in Czech: "Rada pro reklamu"). In this Code, the advertising is defined as follows:

"The process of commercial communication, carried out for remuneration by any business entity or other entity acting in its interest, the purpose of which is to provide consumers with information about goods and services and charitable activities and projects."

## What are typical influencer practices in the Czech Republic and in which cases are they considered advertising?

There is a wide range of influencer practices, including the following examples:

- Posting (posts mentioning or featuring third party products or services or influencer's own products or services)
- Offering or directing followers to access discount codes
- Offering competitions for promoted products or services
- Affiliate links
- Tags

An advertisement is any message that meets the defining characteristics of an advertisement and may affect the recipient.

The practices used are:

- through media, in which there is possibility to mark the message as advertising (e.g. Instagram through the function "mark the sponsorship", hashtags or directly in the description of the post); and
- the used method must be clear (i.e. it must be easy and convenient for the consumer to find out what is advertising and what is not by easily distinguishing the advert through the options in the point above).

Unfortunately, currently there is no comprehensive legislation and case law in the Czech Republic, concerning influencer marketing, as it is still quite a new area (unlike, for example, Germany).



### Which legal obligations apply?

Different requirements are set for advertising depending on which product, service, etc. the advertisement applies to.

Besides that, the Code of Ethics for Advertising states that advertising must not incite or give the impression that it agrees to violate the law and at the same time be fair, honest and truthful. It must be created with an awareness of responsibility towards both the consumer and society. It must respect the principles of fair competition of competitors and not jeopardize the reputation of advertising as such. It must also not lead to a waste of energy, raw materials from non-renewable sources and damage to the environment.

The law generally regulates prohibitions within the regulation of advertising, i.e. advertising must comply with permitted regulations and must not be in conflict with good morals.

Please note that recently an amendment to the Czech Advertising Act was introduced, which came into effect at the end of May 2021. This amendment makes it illegal for influencers to recommend glasses and contact lenses.

### What labelling requirements do you need to be aware of?

According to the Consumer Protection Act, advertising and paid sponsorship must be clearly marked in order to avoid the deceptive acts described in the Consumer Protection Act.

The label should be clear, e.g. #ad could be considered as unsatisfactory.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
"paid partnership with" ( <i>name of entity</i> ) and at the same time #cooperation	#ad
#advertising	
#sponsoring	
#sponsored content	

There is no requirement that the labels must be in the Czech language (i.e. it is not clearly defined how an advertisement should be labelled). However, it must be clear from this that it is an advertisement and it must be clear to everyone to whom the post is intended (according to the respective target group).



### Describe specific laws, regulations or guidance aimed at influencers in the Czech Republic

Please note, there are currently (April 2021) no laws specifically aimed at influencers in the Czech Republic. Laws listed below therefore concern advertising more generally.

**The Act No. 40/1995 Coll., on the Regulation of Advertising**, is a basic regulation in this area. Its aim is to regulate advertising in general, as well as advertising focused on specific products and services. At the same time, it regulates the supervision of the regulation of advertising and the sanction for non-compliance with such regulation.

**The Act No. 231/2001 Coll., on the Operation of Radio and Television Broadcasting**, regulates the conditions of such broadcasting. A large part of this Act is focused on the Council for Radio and Television Broadcasting, licenses to operate broadcasting. One of the parts concerns also advertising, program sponsorship and teleshopping.

**The Act No. 634/1992 Coll., on Consumer Protection**, regulates business conditions that are also important for consumer protection. This Act also regulates unfair practices in the field of advertising.

**The Advertising Code** is a document issued by the Advertising Council regulating other specifics of advertising, such as the conditions of honesty, clarity, comprehensibility, etc. At the same time, it also focuses in its specific sections on specific services and products, in a similar way as the Advertising Regulation Act.

### What are the consequences for influencers if advertising content is not clearly labelled?

When the conditions and requirements set by the above-mentioned laws are not met, the result of this breach of law could be at the level of (i) civil, (ii) administrative or (iii) criminal liability, depending on both the relevance and severity of breach.

If influencers violate labelling obligations, they may face legal proceedings brought by competitors or consumer or they can be sanctioned by regulatory authorities (usually competition authorities and/or Czech Trade Inspection Authority).

If the advertisement is not clearly labelled, it may be considered misleading the consumer or unfair competition. Penalties for misleading consumers are fines of up to CZK50 million (i.e. approximately USD22 million). Unfair competition can be punished by criminal law or by a fine imposed in administrative proceedings.

## What legal risks apply when cooperating with influencers in the Czech Republic?

Any influencer and the company that commissioned such influencer to publish the advertisement are jointly and severally liable for the breach. The company will be released from liability if it proves that the influencer did not follow their instructions, and as a result of this, the content of the advertisement broke the law. If the influencer proves that it was not able to assess the veracity of the data published by the contracting authority, it may be released from liability. If an influencer is also an ad processor, it can never be released from liability.

The promotion of a product by an influencer does not exclude the company's liability. It is recommended that companies enter into an agreement with influencers in order to ensure compliance with the relevant rules.

In the case of liability, both entities may be subject to fines.

## Key contacts





## Denmark

Risk and enforcement level: Robust

# Denmark

## What qualifies as advertising under Danish law?

A post by an influencer qualifies as “advertising” under Danish law if the post directly or indirectly promotes the sale of goods or services.

If an influencer makes a post after making an agreement with a company, or if the influencer gains an advantage by posting, the influencer must clearly state this in the post.

### AGREEMENT BETWEEN THE INFLUENCER AND THE COMPANY

If it is agreed between the influencer and the company that the influencer mentions, for example, a certain product from the company, then the influencer’s post will be regarded as “advertising” given that the purpose of the post was to increase the awareness of the company and to promote the sale of the company’s products.

It is irrelevant whether the company sets requirements for the wording or content of the post or not. It is however important that the company has a commercial intent in providing the influencer with their product.

Any agreement may be in writing, oral or implied. An implied agreement is, for example, if the company regularly sends products to the influencer, and the influencer continuously mentions these products positively, irrespective of whether the influencer has or has had any direct contact with the company.

The post will be considered as advertising if:

- A company pays the influencer to mention the company or its products;
- the influencer receives a discount or other benefit for promoting a company (e.g. as an ambassador);
- the influencer arranges competitions or giveaways for a company;
- the influencer uses advertising links (so-called “affiliate links”), where they mention a company or a company’s product at the same time as they link to the company’s store and they receive payment for clicks on the link which lead to a purchase; or
- the influencer is awarded a discount when buying products from the company if the influencer mentions the company’s products in their posts.

The rationale is that such posts are not intended to increase the sale or the procurement of goods or services, but to express the influencer’s opinion or to inform the public about the matter in question.



### NO SPECIFIC AGREEMENT BETWEEN THE INFLUENCER AND THE COMPANY

Even if no agreement is entered into between the influencer and a company there may still be a commercial intent behind the post which requires advertising labelling. For example, this applies in the following situations:

**Gifts:** The general rule is that if a company sends an influencer a product as a gift, it is assumed that the purpose of sending the gift is that the influencer mentions the product in one or more posts. Therefore, the commercial intent must be clearly stated in the influencer's post involving the product. The same applies where the influencer is asked to "test the product" or "give honest reviews" about the products or services that the influencer has received from a company. If an influencer receives a product from a company and must decide whether to use the product or destroy it, the influencer has acquired the product and, therefore, the influencer must include advertising labelling in a post regarding the product. Further, if the company continuously furnishes the influencer with products that the influencer is supposed to mention in posts, such posts must be labelled as advertisements.

**Event invitations:** If an influencer is invited to an event hosted by a company, one might assume that the company is anticipating that the influencer will mention the event. In case the influencer receives goods or services at the event, for example a "goodie bag" or a free dinner, and the influencer posts a picture of that goodie bag, the post must be clearly labelled as an advertisement.

Transparency is important. Consumers who see the post must be able to easily perceive the reasoning behind the post. Therefore, if the commercial interests of the company cannot be clearly perceived from the post itself, the commercial interests of the company behind the products/services, must be explicitly disclosed in the post.

### EXAMPLES OF POSTS THAT DO NOT REQUIRE TO BE LABELLED AS ADVERTISEMENTS



## What are typical influencer practices in Denmark and in which cases are they considered advertising?



### Which legal obligations apply?

#### HIDDEN ADVERTISING IS PROHIBITED

A trader must clearly state the commercial intent of any trading practices, including advertising, cf. section 6(4) of the Danish Marketing Practices Act. The provision prohibits hidden advertising.

The purpose of the prohibition is to ensure that consumers are aware of marketing messages and can judge their contents accordingly.

#### THE BUSINESS PARTNER MUST BE MENTIONED

It must be clear from the post on whose behalf the influencer is advertising, cf. section 9(1) of the Danish E-commerce Act. It suffices if it is clearly explained in the post or from the context. It is recommended to use “Advertising for [business partner]” or “Advert for [business partner]” immediately after the “advertisement” label.



## What labelling requirements do you need to be aware of?

### GENERAL RULE

The label must be so conspicuous in the post that the average consumer would not be in any doubt as to the commercial intention behind the post.

### EXAMPLES OF LABELS FROM CASE LAW

A post which contains advertising is not labelled sufficiently if only vague terms or indistinct labels are used. This is, for example, the case if:

- the advertising label is placed at the bottom of a post or among hashtags;
- ambiguous words have been used e.g. "spons" or "ad";
- only the company name is tagged in the post; or
- the advertising posts are shared from one social media to another.

It is recommended to use the Danish terms for advertisement, these being "Reklame" or "Annonce".

### POSITION OF THE LABEL

The influencer decides how to label the advertising as such, if the followers/ receivers become aware that it is advertising when they see the mention. If the followers must search in the caption to find out if the post is advertising, the labelling requirement is not met. Thus, the labelling must be visible at first glance. If it is necessary to click on certain buttons or to scroll down to become aware of further information, the labelling will be considered insufficient. The labelling should therefore be inserted at the beginning of the post, e.g. at the beginning of the caption on Instagram. If a video focusses on a certain product throughout, it might be advisable to use a permanent insertion. Information on product placements must be inserted at the beginning of the video.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
"Reklame" ( <i>"Advertisement"</i> )	"I samarbejde med" ( <i>"In collaboration with"</i> )
"Annonce" ( <i>"Advertisement"</i> )	The name of the company is tagged in the post, i.e. "@[business partner]"
	"Spons"
	"Ad"
	Unclear font size and colour
	The label is placed at the bottom of a post, hashtags or disappears in other texts/illustrations

With regard to some labels, it remains to be seen whether these are sufficient. For example to "Betalt partnerskab med [virksomhedens navn]" ("Paid partnership with [business partner]").



### ADVERTISEMENT LABELS WITH TEXT/IMAGES

The influencer must at the beginning of the text, in the image itself, or at the beginning of the text attached to the image, clearly state that the post is an “advertisement” with one of the acceptable labels in Danish language, these being “Reklame” or “Annonce”.

The influencer may choose to use other words than the acceptable label examples, provided that the said words/terms enable the influencer’s followers and other third parties to clearly perceive these words as “advertising labels”. In accordance with practice, statements like “in collaboration with” do not clearly indicate that it is advertisement.

Information as to where a product can be purchased, the name of the company – for example: “[business partner], “Affiliate agreement”, “[Product name],” “Sponsor” or “Ad” are examples of advertisement labels that do not sufficiently indicate that it is an “advertisement”.

Further, tagging the company in a post containing advertising, for example, on Instagram with @[company name] does not suffice.

### LABELLING OF ADVERTISING VIDEOS

Advertising videos will be sufficiently labelled if each video is clearly labelled as “Reklame” or “Annonce” in the title of the video. The crucial factor is that it is immediately clear to the viewer that the video is advertising.

The prohibition of hidden advertising covers all aspects of marketing, including the presentation of the video (e.g. its title). An influencer may choose other words as long as it is clear to the influencer’s followers and others that the words/terms are “advertising labels”.

If a series of videos are shown consecutively and provided that it is not possible to become aware that the videos are advertising before the viewer chooses to watch them, for example on Snapchat or Instagram Stories, the influencer must clearly state in the beginning of the videos that they are advertising. Each video must be clearly labelled.

### LABELLING OF ADVERTISING LINKS (AFFILIATE LINKS)

Advertising links (affiliate links) must be labelled as advertising. An advertising link will be adequately labelled if “Reklamelink” or “Annoncelink” is used.

The influencer may fulfil the requirement by using other words. However, it must be words that the influencer’s followers and others clearly perceive as “advertising labels”.

Advertising links or affiliate links will not be sufficiently labelled if the label is, for example, at the end of the post, or if the links in question are simply labelled by “affiliate aftale” (in Danish – affiliate agreement), “affiliate link”, or if it appears from the post that “the post may contain advertising links”. The crucial point is that the readers become aware that a link is an advertising link before or at the same time as they see the link itself.

If an influencer has written a post that is advertising, where he or she has inserted advertising links, it must be clear from both the post and from the link itself that they are advertising. It must also be clear on behalf of whom the influencer is advertising.

If the influencer has clearly stated that the post is an advertisement, there is no need to label every single link by “Advertisement”. However, if the reader may have doubts the influencer should state, for example, “advertising link or “affiliate link” above or following the link.

### ENGLISH LABELLING OF ADVERTISING

An advertisement post in English aimed at persons who understand English will be sufficiently labelled if the post is clearly labelled with the statements “Advertisement” or “Commercial promotion”. If the advertisement is in Danish, the advertisement label must also be in Danish.



## Describe specific guidance aimed at influencers in Denmark

No laws nor regulations in Denmark apply exclusively or specifically to influencers.

### ADMINISTRATIVE GUIDELINES

The “Danish Consumer Ombudsman’s guidelines to influencers regarding hidden advertising” is written for influencers to enable them to avoid violating the prohibition of hidden advertising. These guidelines include recommendation as to when and how to label posts which have a commercial intention and/or content.

These guidelines are regularly updated to reflect changes in the industry and to ensure consumers’ understanding of advertising labelling.

## What are the consequences for influencers if advertising content is not clearly labelled?

Violation of the prohibition on hidden advertising is subject to fines, cf. section 37(3) of the Danish Marketing Practices Act.

Further, the Danish Consumer Ombudsman can report the influencer or the company to the police.

If a post of a product or company is advertising but it is not flagged as such, then the influencer in question will be held liable. The company that the influencer is advertising for will also be held liable for violation of section 6(4) of the Danish Marketing Practices Act.

The size of the fine varies since the fines are calculated on a case-to-case basis, taking into consideration: the gravity of the violation, its extent, and the intended or obtained profit of the influencer and/or the company.

If the violation is reported to the police by the Danish Consumer Ombudsman, the police’s prosecution entity must decide whether to initiate criminal proceedings with the courts. Regardless of whether the Danish Consumer Ombudsman issues a fine or ask for a police report, a press release on the case will be issued.

In 2017, the Danish Consumer Ombudsman closed two cases regarding hidden advertising.



In 2019, the Danish Consumer Ombudsman investigated the commercial advertisements of 37 influencers on social media and made random compliance checks on several accounts if they had more than 100,000 followers.

In August 2019, the Consumer Ombudsman reported four influencers to the police for hidden advertising. The police prosecution authority has filed charges in one of the cases and in the indictment it is stated that the prosecution is aimed at a fine of DKK 120,000 (approximately USD1,800).

In addition to the four police reports, two other influencers have received a warning letter from the Danish Consumer Ombudsman for not properly labelling their posts as advertising.

### What legal risks apply when cooperating with influencers in Denmark?

If an influencer violates the labelling requirements, the company that mandated the influencer may also be held liable.

A company would be liable if it exerted control over the composition of the respective post. Exertion of control would be assumed if, for example, a company had instructed the influencer not to insert the necessary advertisement labelling.

The company is required to ensure that advertisements are clearly labelled as such. The Danish Consumer Ombudsman recommends that companies enter into agreement containing provisions on how to mention the company's products and how to label them and to continuously monitor whether the influencers' references are correctly labelled in accordance with the agreement.

If a company becomes aware that an influencer's posts involving their products or services are not sufficiently labelled, the company must persuade the influencer to properly state the company's commercial intent or to delete the post.

Agencies that advise influencers and facilitate contacts between influencers and companies may also be held liable. Advertising agencies and public relations agencies will be liable if they are hired by a company to enter into an agreement with an influencer with the effect that the influencer must mention the company or the company's products or services in their posts.



## Key contacts



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# Finland



Risk and enforcement level: Robust



# Finland

## What qualifies as advertising under Finnish law?

There is no single all-encompassing definition of what constitutes advertising, marketing communications and marketing, which are often used interchangeably. In general, any measures that a company takes in an effort to promote its sales or raise the profile of its brand are qualified as advertising. In other words, advertising means any representation in connection with a trade or business in order to promote the supply of goods or services.

Influencer marketing is commercial cooperation between companies and influencers whose goal is to promote the sale of the company's products or to raise their brand profile. Commercial cooperation can be established by, for example, the company and influencer making an agreement to produce content involving the company's products. The end product of influencer marketing might be a video, audio clip, photograph or a blog entry published by the influencer that deals with the company or its products.

Whether, a post by an influencer is considered an advertisement, and therefore promotes the supply of goods or services, depends on several factors, such as:





## What are typical influencer practices in Finland and in which cases are they considered advertising?



## Which legal obligations apply?

The following legal obligations are based on valid legislation and its preparatory work, legal praxis and the Consumer Ombudsman's oversight decisions:

### RECOGNISABILITY OF ADVERTISING

Advertisements must be easily recognisable as such, regardless of the method of presentation or advertising channel. Consumers have the right to know when attempts are being made to influence them commercially. This requirement concerning the recognisability of marketing applies to all forms and channels of marketing, including social media.

Whether a post is clearly recognisable as advertising depends on numerous factors, particularly:

- the influencer's appearance;
- the influencer's audience; and
- the presentation of the products and services.

General principles regarding the recognisability of advertising:

- Commercial messages must not be hidden.
- The advertiser must be recognisable from the advertising.
- Subliminal and hidden advertising are unacceptable.

The recognisability requirement applies not only to the content and presentation of advertisements, but also to their placement. Advertisements must be clearly separated from other materials. It must be clear to the audience where the advertisements begins and ends.



### THE RULE OF GOOD PRACTICE

No conduct that is inappropriate or otherwise unfair from the point of view of the consumers shall be allowed in marketing.

### CHILDREN AND YOUNG PERSONS AS A TARGET GROUP

Underage persons (children and adolescents under the age of 18) enjoy a special position in the Consumer Protection Act. Marketing targeted at underage persons is subject to stricter rules than other marketing, because children are considered to be more susceptible to the effects of marketing due to their limited knowledge or experience. It is important that companies take into account the special position of underage persons especially when instructing the influencers. For example: games, pastimes and other entertainment must be clearly separated from advertisements.

### LABELLING REQUIREMENTS

The principle rule of influencer marketing is that it must be clearly stated at the beginning of all publications that it is an advertisement for a company or other recognisable commercial name (e.g. a trademark).

### SEPARATION OF ADVERTISING AND EDITORIAL CONTENT

If advertising takes place in the context of editorial content, e.g. on a fashion blog, such promotional content needs to be clearly separated from the editorial content (the so-called separation rule).

## What labelling requirements do you need to be aware of?

### GENERAL RULE

Advertising must clearly indicate its commercial purpose and on whose behalf it is being carried out. The rule is the same regardless of what media or methods are used.



The principle rule of influencer marketing is that it must be clearly stated at the beginning of publications:

- that it is an advertisement;
- for a company or other recognisable commercial name (e.g. a trademark).

If the publications include marketing for several products, the name or other commercial name of all companies advertising must be stated clearly at the beginning of the publications. It is recommended that these publications be labelled with the term “advertisement”. Alternatively, the term “commercial cooperation” can be used.

The [guidelines](#) regarding the recognisability of advertising given by the Finnish Competition and Consumer Authority (KKV) sets out that the advertisements must be easily recognisable as such, regardless of the method of presentation or advertising channel. Consumers (also e.g. children, people with disabilities and/or senior citizens) have the right to know when attempts are being made to influence them commercially. Even though it is not obligatory to translate the label into Finnish, it is highly recommended.



ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Mainos” <i>(“Advertisement”)</i>	“Sisältää maksettua mainosisältöä” <i>(“Includes Paid Promotion”)</i>
“Mainos [Yrityksen] kanssa” <i>(“Advertisement with [Company]”)</i>	“Postilaatikkoon kolahti tuote X” <i>(“Product X ended up in my mailbox”)</i>
“Mainos [Tuotemerkin] kanssa” <i>(“Advertisement with [Trademark]”)</i>	“Osa tuotteista saatu [Instagramin tms.] kautta” <i>(“Some of the products received through [In-stagram, etc.]”)</i>
“Sisältää [Yrityksen, Yrityksen, ...] mainoksia” <i>(“Includes adverts for [Company, Company, ...]”)</i>	“Kiitos yritys XX tästä tuotteesta/ mahdollisuudesta” <i>(“Thanks to Company XX for this product/opportunity”)</i>
Kaupallinen yhteistyö [Yrityksen] kanssa <i>(“Commercial cooperation with [Company]”)</i>	#Yhteistyö <i>(#Cooperation)</i>

### Describe specific laws, regulations or guidance aimed at influencers in Finland

The legal requirements are based on valid legislation, such as the Consumer Protection Act (1978/38) and the Unfair Business Practices Act (1978/1061), and legislation’s preparatory work, legal praxis and the Consumer Ombudsman’s oversight decisions.

#### ADMINISTRATIVE GUIDELINES

The supervisory authorities have issued guidelines on [“Influencer marketing in social media, 2019”](#). The document contains basic guidance on the recognisability of marketing on social media, the labelling requirements for advertising on different types of platforms and minors as a target group and marketing to minors. However, courts are not bound by these administrative guidelines and may deviate from the recommendations mentioned therein.



### What are the consequences for influencers if advertising content is not clearly labelled?

Both the company benefitting from the post and the influencer are obligated to ensure that the commercial purpose of influencer marketing is clearly stated and that no subliminal advertising is being practiced. The company engaged in influencer marketing is, under the Consumer Protection Act, responsible for stating the commercial nature of the cooperation, regardless of whether the commercial cooperation is being carried out with a professional influencer or a non-professional one.

A professional influencer is, under the Consumer Protection Act, responsible for stating the commercial nature of cooperation in the same manner as a company making use of influencer marketing. Professional influencer refers to an individual for whom influencing is their primary occupation.

A non-professional influencer refers to a consumer for whom content production for social media is a leisure time activity and not an occupation. In this case, the activities carried out by the influencer are not subject to the Consumer Protection Act or the authority of the Consumer Ombudsman. Despite this, the labelling of advertising is demanded, because followers will not otherwise be able to avoid subliminal advertising.

#### REGULATORY AUTHORITIES

There is a risk of sanctions imposed by the supervisory authorities. The Consumer Ombudsman supervises compliance with the Consumer Protection Act. If the company cannot be persuaded to cease the unlawful activities, the Consumer Ombudsman can take the necessary enforcement actions or refer the issue to the court for resolution. In practice, these situations are subject to imposing a prohibition reinforced with a penalty payment. Matters involving prohibition are resolved by the Market Court.

### What legal risks apply when cooperating with influencers in Finland?

The company is responsible for its marketing, regardless of the party it chooses to handle its marketing. Yet, even without knowledge of such violation, the company may be held liable under certain circumstances, for example, if:

- the influencer is integrated into the sales organisation,
- the success of his or her actions benefits the company; and
- the company had the possibility of exerting influence on the behavior of the influencer in the area in which the violation occurred.

In addition, companies may be liable for other legal infringements by the influencer, e.g. of third-party copyrights. Such liability may arise if the company encouraged the influencer to infringe certain rights or expected (or should have expected) such an infringement and did not intervene.



## Key contacts



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# France

Risk and enforcement level: Robust

# France

## What qualifies as advertising under French law?

Directive 2006/114/EC (dated 12 December 2006), which concerns misleading and comparative advertising, defines “advertising” as the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

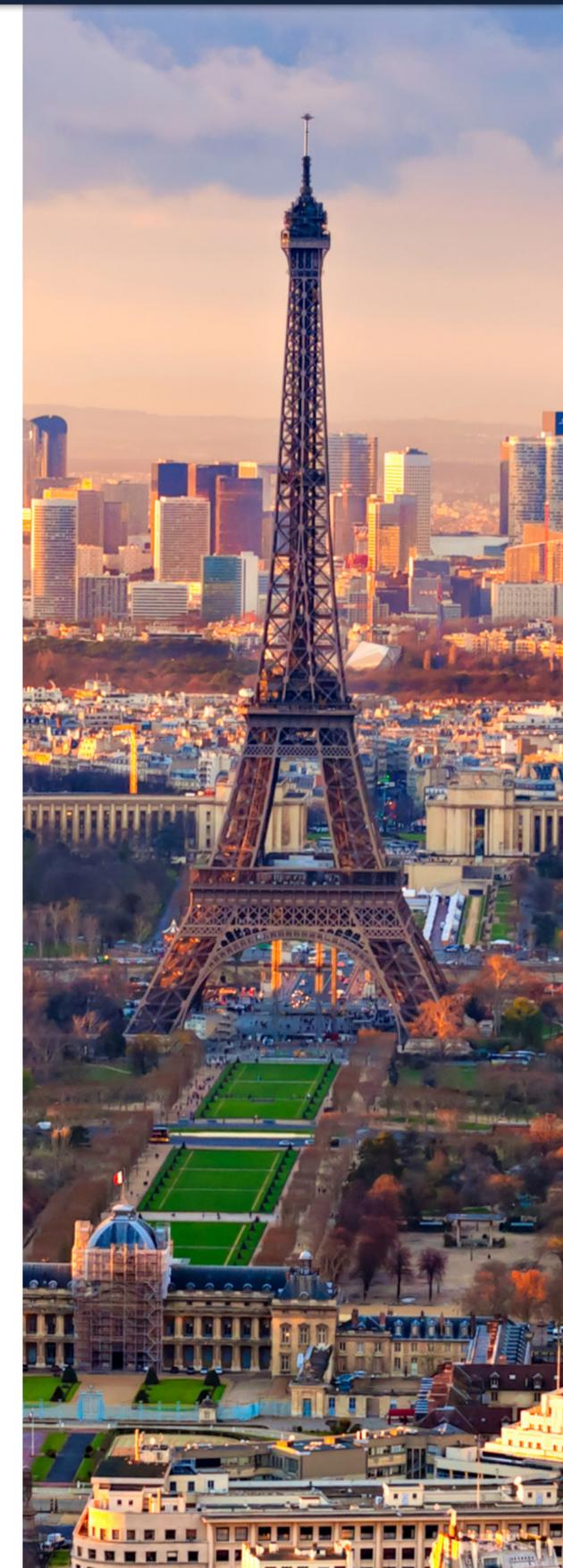
An influencer may work in an editorial context or in collaboration with a brand in order to publish content (product placement, participation in content production, publication of commercial content, etc.).

A post from an influencer, i.e. a person expressing a point of view or providing advice in a specific area and according to their own style or process, may be qualified as advertising. Whether or not a publication is considered “advertising” by nature turns based on the following cumulative criteria:

- Reciprocal commitments, i.e. payment or intervention of the influencer against payment, invitation or delivery of products or services;
- Editorial control of the advertiser over the content and requirement from the latter to validate the content before publication; and
- Promotion of a product or service.

## What are typical influencer practices in France and in which cases are they considered advertising?

Any posts published by an influencer which meet the adjacent criteria may be qualified as advertising. In this respect, influencers may:



## Which legal obligations apply?

When the criteria to characterize advertising are met, posts must comply with the legal provisions related to advertising, including without limitation, provisions related to (i) identification of advertising and advertiser, (ii) unfair, misleading or aggressive commercial practices, (iii) comparative advertising, (iii) specific products (e.g. tobacco and alcohol), (iv) use of the French language.

Advertising messages must be easily and clearly identifiable. In this respect, directive 2010/13/EU (dated 10 March 2010) and Decree No. 92-280 (dated 27 March 1992) provide that television advertising and teleshopping must be readily recognisable and distinguishable from editorial content. These advertisements must be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

Order No. 2020-1642 of 21 December 2020 partly transposes the Audiovisual and Media Services Directive into the Law No. 86-1067 of 30 September 1986 on freedom of communication. It extends to video-sharing service providers certain obligations already applicable to audiovisual media services, and in particular provides that these providers must comply with the requirements laid down by decree (Decree No. 2021-1922 of 30 December 2021) with regard to audiovisual commercial communications which they market, sell or arrange themselves and take appropriate measures to ensure that these rules are also complied with in respect of audiovisual commercial communications marketed, sold or arranged by third parties and clearly inform users of the existence of such commercial communications within programmes and videos created by users, where such communications have been declared by the users who post them online or where they are aware of them.

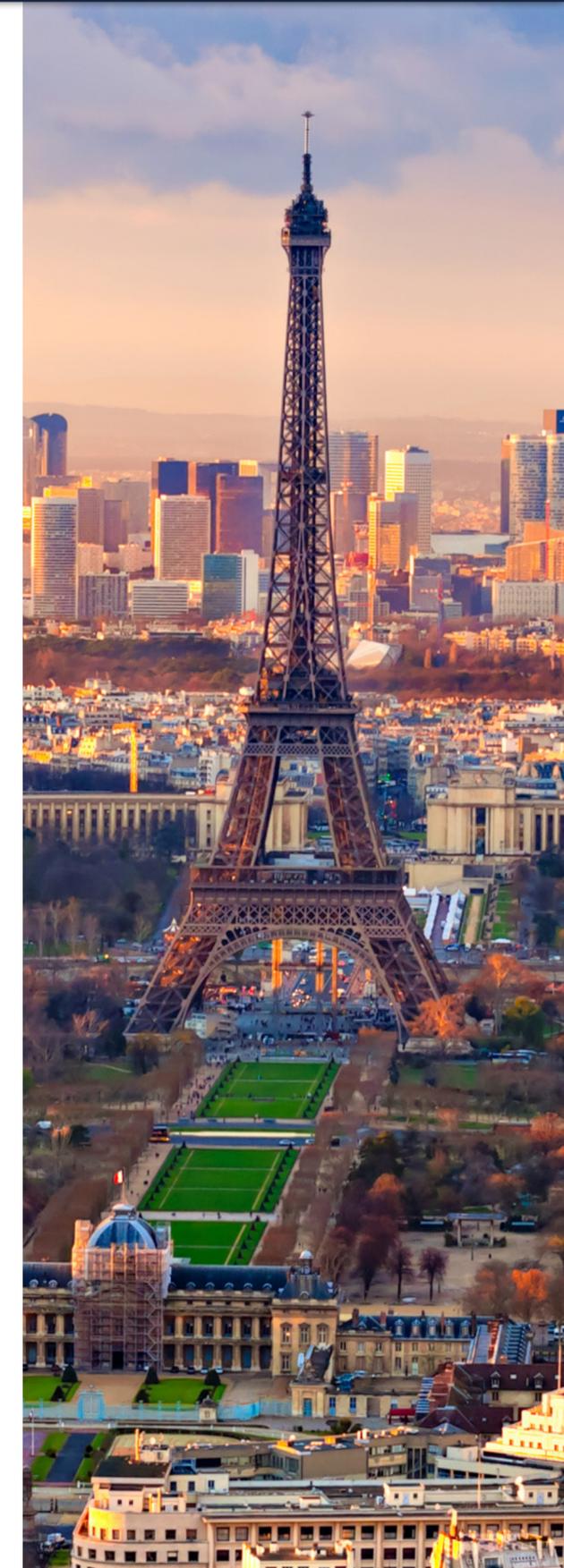
Further, specific rules apply such as:

- the ban of surreptitious advertising;
- the obligation to disclose sponsorships; and
- the obligation to clearly indicate product placements.

In addition, it is highly recommended that the advertising comply with ARPP (Autorité de régulation professionnelle de la publicité) recommendations, even despite the fact that they are not legally binding in.

Posts must also comply with intellectual property laws, such as copyright (“droits d’auteur”), trademarks, design rights and image rights.

Influencers must comply with all applicable laws and regulations.



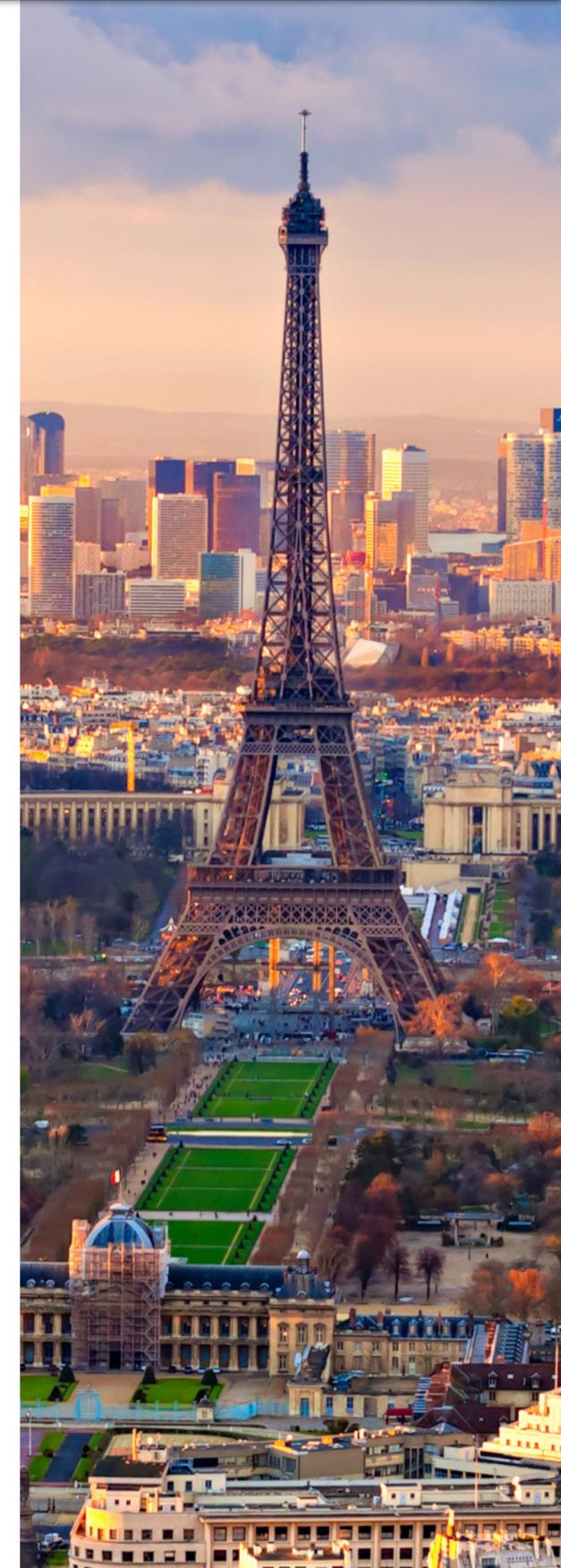
## What labelling requirements do you need to be aware of?



Advertising must disclose any collaboration between influencers and advertisers:

- In an explicit and immediate way: at the beginning of the post (first lines of the post or first seconds of the video), users must not have to scroll down and click to see the disclosure. Some social media, such as Instagram and YouTube also offer tools to highlight commercial collaboration.

The ARPP guide, published in May 2019, identified two categories of posts which do not comply with this requirement, these were:



Pursuant to the ARPP guide published in 2020, this practice represented only 33% of the analysed content.

- In French; and
- By any means (i.e. verbally or in writing alongside the content).

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Partenariat rémunéré avec XXX” <i>(“Paid partnership with XXX”)</i>	#AD
“Par partenariat sponsorisé @XXX” <i>(“By paid partnership @XXX”)</i>	*AD
“Pour cette #collaboration [rémunérée] voyage&beauté avec @XXX” <i>(“For this #collaboration travel &amp; beauty with @XXX”)</i>	“On m’a proposé de tester” <i>(“I have been offered to test”)</i>
“Partenariat rémunéré avec XXX” <i>(“Paid partnership with XXX”)</i>	“J’ai été contacté par” <i>(“I have been contacted for”)</i>
“En collaboration [rémunérée] avec XXX” <i>(“In collaboration with XXX”)</i>	“Merci pour cet essai” <i>(“Thanks for this test”)</i>
“Publication réalisée en partenariat [rémunéré] avec @XXX” <i>(“Publication made in partnership with @XXX”)</i>	“Produit gratuit” <i>(“Free product”)</i>

The relationship between an influencer and an advertiser mentioned on the influencer’s Instagram account must also appear on their Facebook account if the two media refer to each other. In other words, cross-referencing between platforms necessitates a disclosure of collaboration on both platforms.

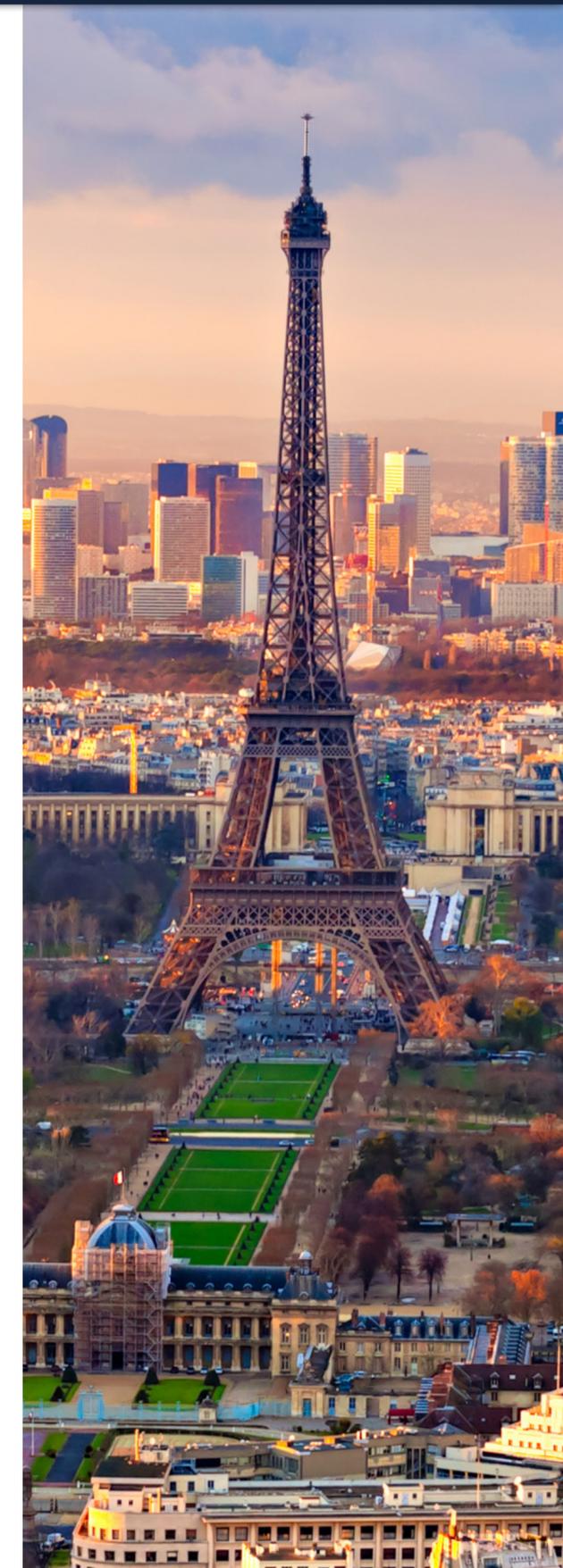
### Describe specific laws, regulations or guidance aimed at influencers in France

**Decree No. 2019-1530 dated 3 December 2019:** companies producing or marketing human healthcare products or providing services related to these products must make available, on a separate public website: the subject, date, beneficiaries, value, and participants to the collaboration, in circumstances where health products are being promoted and influencing the public.

**Law No. 2020-1266 of 19 October 2020 regarding the regulation of the commercial exploitation of the image of children under the age of sixteen on online platforms:** this creates a legal framework to extend to children influencers the prior individual authorization regime applicable to children working in the entertainment sector. This law also gives children the possibility to exercise their right to be forgotten on their own, without their parents. Video-sharing platforms are strongly encouraged, under the supervision of the Conseil Supérieur de l’Audiovisuel (French Broadcasting Authority), to adopt charters to inform children about the consequences of the dissemination of their image on their private life, as well as the psychological and legal risks that arise from it.

**ARPP recommendations:** Although not binding, the recommendations related to digital advertising communication provide guidelines in respect of influencers.

Note that the French Competition Authority tends to acknowledge a relevant market related to activities of management of influencers’ career and image (decision No. 19-DCC-94, May 24, 2019).



## What are the consequences for influencers if advertising content is not clearly labelled?

The potential legal consequence for influencers if they do not (or do not clearly enough) label advertising content as advertising is that the content in question be characterised as a **misleading commercial practice**, which opens the influencer up to the following:

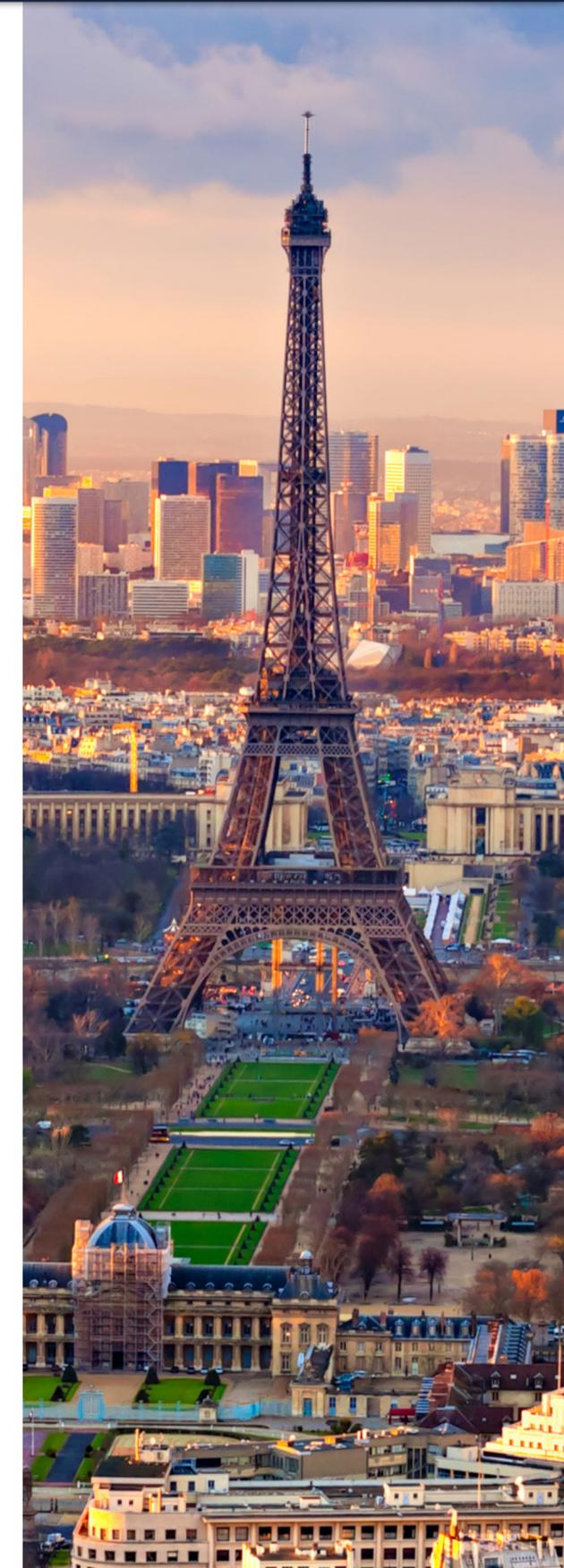
- up to 2 years' imprisonment and a fine of up to EUR300,000 (approximately USD338,000) for individuals and EUR1,500,000 (approximately USD1,700,000) for corporate entities;
- the fine may be set, for individuals, at up to 10% of the average annual turnover during the three preceding financial years or 50% of the cost of the practice constituting the offense;
- the fine may be set, for corporate entities, at up to 50% of the average annual turnover during the three preceding financial year or 250% of the cost of the practice constituting the offense;
- possible additional sanctions for individuals: prohibition from exercising the activity in the context of which the violation was made/a commercial or industrial profession/managing or controlling a commercial/industrial business or a commercial company, for up to 5 years;
- possible additional sanctions, including for corporate entities:
  - (i) prohibition for up to 5 years from: operating a business, operating one or several establishments having been involved in the violation, issuing securities to the public, submitting public procurement bids, issuing checks or using credit cards, (ii) placement under judicial control for up to 5 years, (iii) confiscation of the means used to commit the infraction, and (iv) publication of the decision;
- in addition, a Court may order the cessation of the misleading practice.

In addition, competitors may also bring a claim against the influencer and/or the brand, considering that the post constitutes an unfair commercial act, which could result in a court ordering (i) the payment of damages, (ii) cessation of the unfair commercial act, and (iii) publication the related decision.

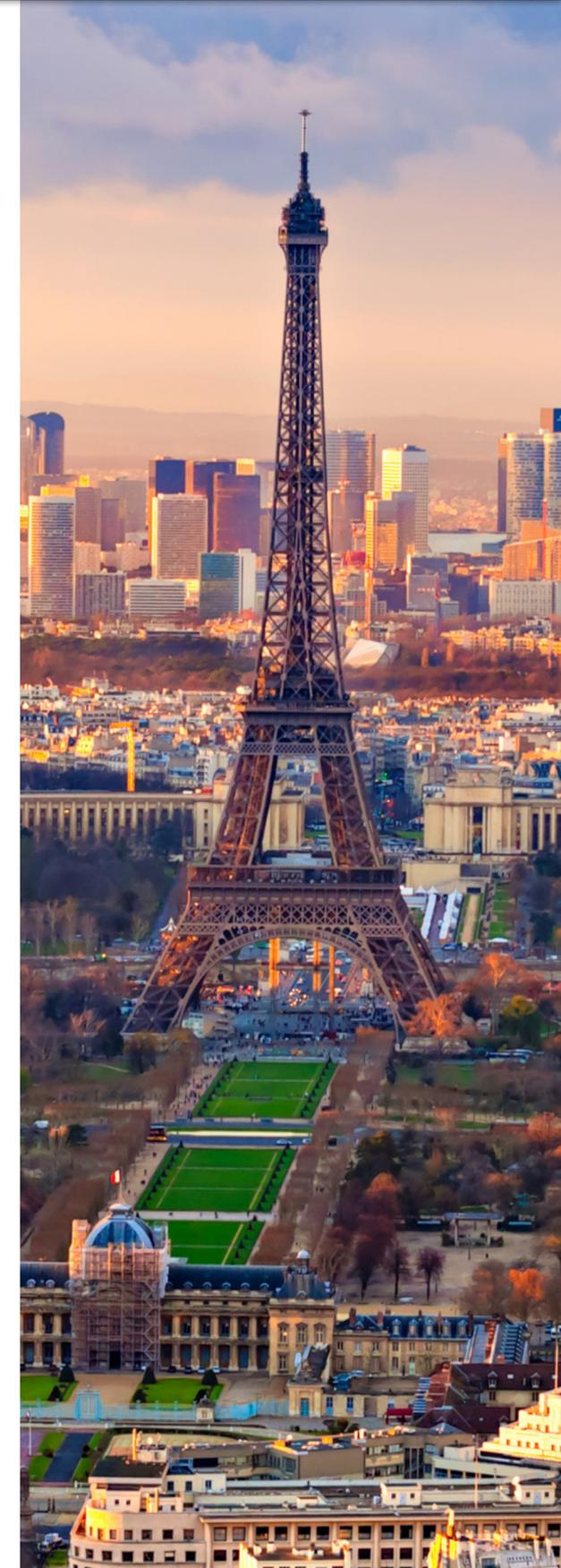
## What legal risks apply when cooperating with influencers in France?

The promotion of a product by an influencer does not exclude the brand's liability. When the influencer's publications are made in a commercial purpose, advertisers may also be held liable.

In this respect, it is recommended for companies to enter into an agreement with influencers in order to ensure compliance with the relevant rules.



## Key contacts



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# Germany



Risk and enforcement level: Robust



# Germany

What qualifies as advertising under German law?



## What are typical influencer practices in Germany and in which cases are they considered advertising?

There are various influencer practices which can be classified as advertising according to sec. 6 (1) no. 1 TMG or sec. 22 (1) sentence 1 MStV:



## Which legal obligations apply?

### RECOGNISABILITY AS ADVERTISING

The basic rule is that advertising in Telemedia/Media must always be clearly recognisable as such by the targeted audience, cf. sec. 6 (1) no. 1 TMG and sec. 22 (1) sentence 1 MStV. This needs to be assessed considering the outer appearance of the post/account in each individual case.

Whether a post is clearly recognisable as advertising depends on numerous factors, particularly:

- the influencer's audience
  - It must be assessed who the average member of the targeted audience is and whether he or she clearly recognises the content as advertising.
- the influencer's appearance
  - All circumstances of each individual case must be considered. Possible indicators are e.g. whether the account is public, verified, how many followers the influencer has as well as what kind of posts are published on the account (mainly private or promotional).
- the presentation of the products and services.

### RECOGNISABILITY OF ALL ACTS THAT ARE ADVERTISING

It must be clearly recognisable whether the influencer promotes his or her own business or (also) one or more third-party businesses. This needs to be assessed considering the outer appearance of the post/account in each individual case. However, as already stated, in most cases where influencers run a business and have (e.g.) a verified and public profile plus many followers, it should be considered clearly recognisable that they use the account to promote **their own business** by posting content and therefore advertise themselves.



### LABELLING REQUIREMENT

If an advertisement is not directly apparent from the circumstances, its commercial nature must be made clear by labelling it as advertising. This ensures that members of the relevant public are aware of the commercial nature of the post and do not have to study it in detail in order to recognise it.

### SEPARATION OF ADVERTISING AND EDITORIAL CONTENT

If advertising takes place in the context of editorial content, e.g. on a fashion blog, such promotional content needs to be clearly separated from the editorial content (so-called *separation rule*).

Further specific rules apply to on-demand audiovisual media services, e.g. content for information, entertainment or educational purposes posted on YouTube, namely:

- the ban of surreptitious advertising;
- the obligation to disclose sponsorships; and
- the obligation to clearly indicate product placements.

For additional information, see the guideline on “Advertising labelling in online media” published (in German) by the State Media Authorities, i.e. the competent supervisory authorities for the enforcement of the MStV:

[die-medienanstalten.de/fileadmin/user\\_upload/Rechtsgrundlagen/Richtlinien\\_Leitfaeden/ua\\_Leitfaden\\_Medienanstalten\\_Werbekennzeichnung\\_Online-Medien.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Leitfaden_Medienanstalten_Werbekennzeichnung_Online-Medien.pdf)

### GENERAL RULE

The labelling must be so apparent that, from the point of view of an average member of the relevant public, there is no doubt about the commercial purpose of the post.

### EXAMPLES FROM CASE LAW

- “#ad” as one of several hashtags under a post was considered insufficient; and
- “#sponsoredby” was held to be insufficient.

Instead, it is required to use the German terms for advertisement, i.e. “Werbung” or “Anzeige”.

### PLACEMENT OF LABELLING

The labelling must be visible at first glance. Thus, if it is necessary to click on certain buttons or to scroll down in order to become aware of further information, the labelling will be considered insufficient. The note should therefore be inserted at the beginning of the post. Furthermore, it must be clear which part of the post the labelling refers to and what kind of advertising it is (self- or third-party advertising). If a video focuses on a certain product throughout, it can even be advisable to use a permanent insertion. Information on product placements must be inserted at the beginning of the video.

### LABELLING REQUIREMENTS FOR AFFILIATE LINKS

It is mandatory to provide information about how the affiliate link works and that the influencer receives a commission.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Werbung” (“Advertisement”)	#ad, #promotion
“Anzeige” (“Advertisement”)	#sponsoredby



### Describe specific laws, regulations or guidance aimed at influencers in Germany

There are no laws or regulations that apply exclusively or specifically to influencers.



### What are the consequences for influencers if advertising content is not clearly labelled?

If influencers violate these labelling obligations, they may face legal proceedings brought by competitors or certain business or consumer associations. In some instances, such violations can also be sanctioned by regulatory authorities:

#### COMPETITORS/BUSINESS OR CONSUMER ASSOCIATIONS

If an advertisement is not sufficiently labelled, this constitutes an unfair commercial act. In this case, competitors have a claim to cease and desist. They can therefore send a warning notice and assert the claim in court. Furthermore, such claims can also be raised by certain consumer protection or business associations. In addition, such associations or competitors may be entitled to damages, e.g. reimbursement of their costs for the warning notice.

#### REGULATORY AUTHORITIES

Moreover, there is a risk of sanctions imposed by the supervisory authorities. If advertising is not clearly recognisable as such and not clearly separated from the rest of the content, fines of up to EUR500,000 (approximately USD56,000) may be imposed.



## What legal risks apply when cooperating with influencers in Germany?

If an influencer violates these labelling requirements, the company that mandated him or her may also be liable. In particular, a company would be liable if it exerted control over the composition of the respective post. Such an exertion of control would be assumed, for example, if a company had instructed the influencer not to insert the necessary labelling.

Yet even without knowledge of such violation, the company may be held liable under certain circumstances, i.e. if:

- the influencer is integrated into the sales organisation;
- the success of his or her actions benefits the company; and
- the company had the possibility of exerting influence on the behavior of the influencer in the area in which the violation occurred.

Such claims based on labelling infringements can be brought either against the influencer, the company, or both.

In addition, companies may be liable for other legal infringements by the influencer, e.g. of third party copyrights. Such liability may arise if the company encouraged the influencer to infringe certain rights or expected such an infringement and did not intervene.

Thus, before the start of a campaign, a company should stipulate in its contract with the influencer how posts are to be designed and labelled. Additionally, compliance with these provisions should be monitored throughout the campaign.

## Key contacts



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# Hong Kong

**Risk and enforcement level: Moderate**

# Hong Kong

## What qualifies as advertising under Hong Kong law?

There is no influencer-specific definition of advertising under Hong Kong law.

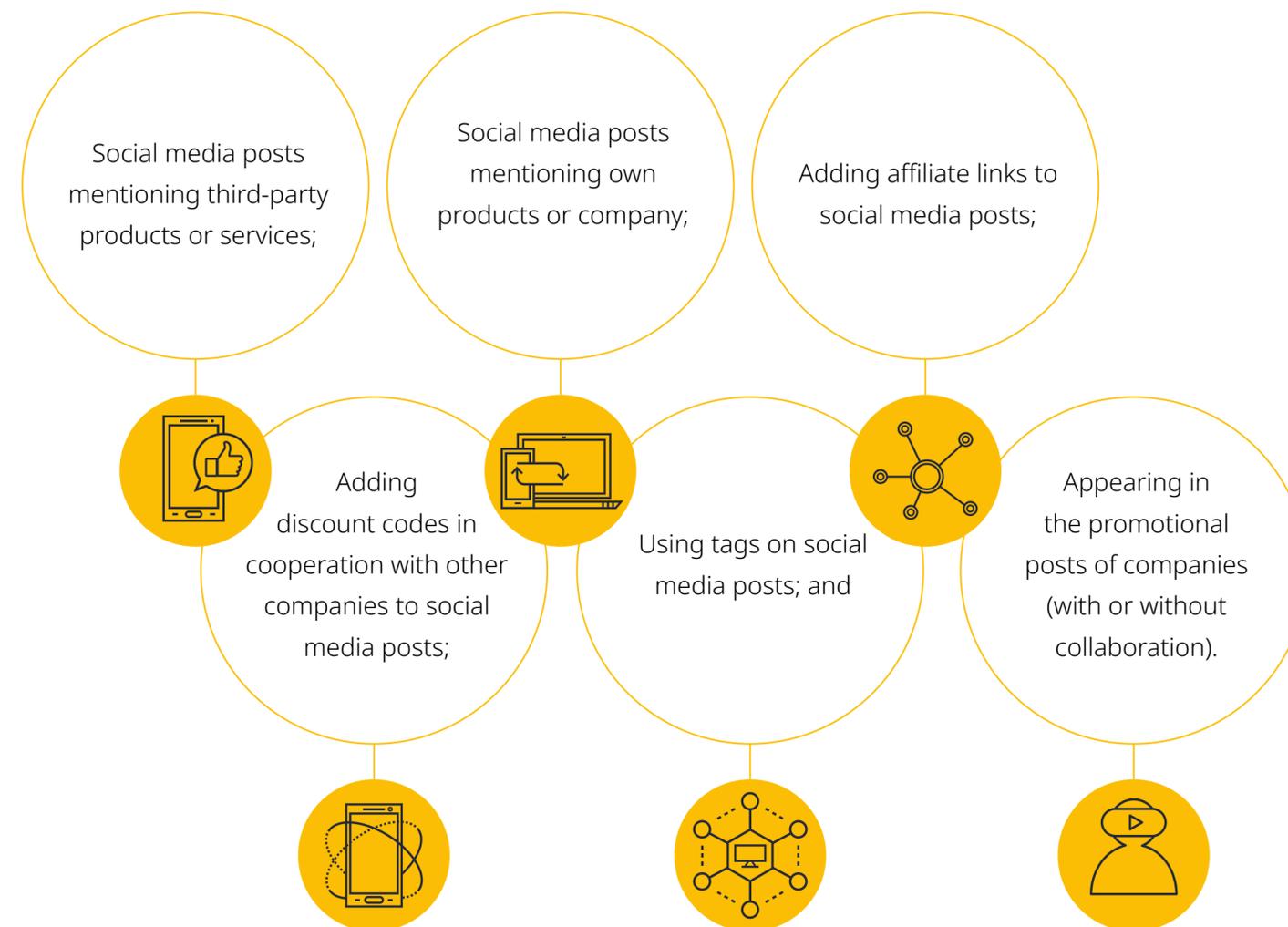
However, in the context of advertisements on television programme services, the Generic Code of Practice on Television Advertising Standards issued by the Communications Authority pursuant to section 3 of the Broadcasting Ordinance (Cap. 562) defines:

“advertisement” or “advertising materials” as any materials included in a television programme service which is designed to advance the sale of any particular product or service or to promote the interests of any organisation, commercial concern or individual; whether by means of words, sound effects (including music) and/or of visual presentation and whether in the form of direct announcements, slogans, descriptions or otherwise, as well as any promotional reference in the course of a programme to any products or services.

In addition, whilst not directly defining what would constitute “advertising by an influencer” in Hong Kong, the Trade Descriptions Ordinance (Cap. 362) (“**TDO**”) was amended in 2013. The amendment resulted in the creation of a number of new offences, including the offence of misleading omission in advertising and marketing texts. Under the amended Trade Descriptions Ordinance, an offence is committed where a company fails to identify the commercial intent of a commercial practice that is not otherwise apparent from the context.

## What are typical influencer practices in Hong Kong and in which cases are they considered advertising?

There are various influencer marketing practices:



The TDO applies to traders engaging influencers in product promotion activities including the above-mentioned influencer marketing practices.



### Which legal obligations apply?

Although there is no comprehensive legal framework governing advertising in Hong Kong, there are different pieces of legislation as well as common law torts that will potentially affect influencers. We have set out the main pieces of legislation and briefly discussed some of the common law torts below.

- As mentioned above, the TDO prohibits the application of false trademarks, false trade descriptions in respect of goods and services, misleading omissions, aggressive commercial practices, bait advertising and bait-and-switch tactics.
- In respect of misleading omissions in particular, the authorities charged with the enforcement of the TDO issued a set of Enforcement Guidelines. Among other things, the Enforcement Guidelines provided examples of what would constitute a “misleading omission”. An “omission” (as set out in the TDO) will be considered “misleading” if:

it omits material information;	it hides material information;
it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or	it fails to identify its commercial intent, unless this is already apparent from the context,

and as a result, it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

- The Enforcement Guidelines require traders (who, in turn, would require the influencers engaged by them to comply with these guidelines) to clearly identify the commercial intent of all posts and reviews. Companies that disguise themselves as consumers and post comments in discussion forums or social media platforms to promote their own products or undermine their competitors’ products will commit the offence of misleading omission under the amended TDO.

Some other pieces of legislation/common law torts that may be applicable include the following:

- The Sale of Goods Ordinance (Cap. 26) provides that any goods sold must correspond to their samples and descriptions which are provided by their sellers and/or printed on their packages.
- Influencers also have to comply with the Copyright Ordinance (Cap. 528) and the Trade Marks Ordinance (Cap. 559), as well as be aware of the risks of the common law tort of passing off when advertising products, especially with respect to the language of the advertisement and when the products or services offered in the advertisement are supplied to consumers in Hong Kong.
- Influencers must also bear in mind the risks related to misrepresentation. A misrepresentation is a false statement of fact which is relied on by the person to whom the statement is made when entering into a contract or a legally binding transaction. An action for misrepresentation can be brought in respect of a misrepresentation of fact or law, for damages suffered arising from the misrepresentation.
- An influencer may also be liable under defamation laws in Hong Kong for publishing or authorising the publishing of or distributing defamatory marketing material via social media outlets.



### What labelling requirements do you need to be aware of?

There are no specific examples of labelling requirements for such advertising under Hong Kong law, save that traders must procure that the influencers engaged by them clearly identify the commercial intent of all their posts and do not disguise or attempt to disguise themselves as consumers without disclosing the contractual relationship between the influencers and the traders. In our view, some labels used by influencers are acceptable (see below for examples), but there is, at present, no case law confirming that these are sufficient.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#sp	There are no specific examples from the TDO on this point.
#ad	
#sponsored	
"this post contains affiliate links..."	

### Describe specific laws, regulations or guidance aimed at influencers in Hong Kong

There are no laws or regulations that apply exclusively or specifically to influencers. However, as mentioned, amendments were made to the TDO in 2013 to take into account the risks of misleading omissions that may occur in sponsored social media posts by influencers.

### What are the consequences for influencers if advertising content is not clearly labelled?

The making of a false trade description or failing to disclose the commercial intent of a post are both offences under the TDO. The authorities in charge of enforcing the TDO have the option of accepting undertakings from the trader instead of prosecuting for the offence. These undertakings are undertakings not to continue or repeat the conduct, or engage in conduct of that kind or conduct of a substantially similar kind.

### What legal risks apply when cooperating with influencers in Hong Kong?

In addition to the TDO offences described above, the Personal Data (Privacy) Ordinance (Cap. 486) is strictly enforced, particularly in relation to breaches of the direct marketing and protection provisions. Among other things, companies cooperating with influencers for advertising have to ensure the data user and the purpose of data collection (if any) is made known to consumers at the time of collection.



## Key contacts





# Hungary

Risk and enforcement level: Moderate



## Hungary

### What qualifies as advertising under Hungarian law?

The term “advertising” is defined in subparagraph c) of Section 3 of Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (“**Advertising Act**”). In accordance with the Advertising Act *commercial advertising* shall mean any form of communication, information or the making of a representation in any form with the aim or having the direct or indirect effect of promoting the supply of goods of a fungible nature that are capable of being delivered, including natural resources that can be utilized as capital goods, including money, securities and financial instruments (“product”), and services, immovable property, rights and obligations (all of the above collectively as “goods”), or in connection with this objective, the representation of the name, the trade mark or the activities of a producer of goods or a provider of services.

Apart from advertising, another relevant term of the Advertising Act is *sponsorship* which is defined as any form of public or private contribution to any event or activity, or to any individual in connection with an event or activity with the aim or having the direct or indirect effect of promoting the purchase or use of a product.

The key legal instrument with respect to influencer marketing and advertising is Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (“**UCP Act**”) as it serves as the primary basis for procedures initiated by the regulatory authority (the Hungarian Competition Authority) in procedures initiated against influencers. The UCP Act generally prohibits unfair commercial practices aimed towards consumers, and also contains a detailed list of practices that are considered unfair by definition.

One of these is defined in Point 11 of Annex 1 to the UCP Act as “*advertising disguised as editorial content*” and it shall cover the following: “using editorial content in the printed or electronic media to promote the sale or other form of use of a product where a business entity has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer”.

The three elements of the above are: (i) editorial content; (ii) compensation; and (iii) it is not evident for the consumer that compensation was provided to the influencer.

Compensation for promotion shall be widely interpreted, it encompasses all incentives offered for publication, including but not limited to financial compensation, discounts or goods (e.g. clothing, cosmetic products, event tickets, use of motor vehicles, etc.) which would otherwise be paid for. It is important to note that such incentives are not limited to financial compensation but include also cases where the parties undertake to provide services to each other without any obligation to pay (i.e. ‘bartering’).



### What are typical influencer practices in Hungary and in which cases are they considered advertising?

Pursuant to the guidance of the Hungarian Competition Authority the content and the practice of influencers may include opinions, comments, notes, expressions of mood, spontaneous reactions, labels using the # (hashtag) sign, marking of web links (<https://www...>), product placements, sponsored posts, advertisements, promotions, publicity messages, articles raising consumers' awareness, commentaries and explanations disseminated through optional mediums including online and various digital channels.

These practices trigger the competence of the Competition Authority if they are deemed unfair commercial practices, namely "advertising disguised as editorial content", as discussed above. If the communication of the influencer fits into the definition of "advertising disguised as editorial content", then it is considered an unfair commercial practice towards consumers and the Competition Authority may initiate a procedure.

### Which legal obligations apply?

If the content shall be considered advertising, influencers are in breach of the UCP Act if the content they publish is deemed advertising disguised as editorial content (as described above). Such non-compliance shall trigger the liability of the influencer, and that of the company in the interests of which the content was published, and the regulatory authority may initiate a procedure.

The influencer must state clearly, simply, unequivocally and in an understandable manner any existing business relationship and direct economic interest in the published content as paid or supported. Any kind of business relationship or co-operation between influencer and advertiser should be clearly and accurately identifiable. The influencer must convey a true, fair and authentic image of the product or service. The content needs to be simple and capable of clear interpretation by consumers. Unknown or mysterious abbreviations, signs or expressions that are open to different interpretations are unlikely to comply with the requirement of clear and understandable wording.

Any business relationship to the content concerned needs to be directly indicated. Additionally, reference to the existence of a business relationship in the introduction or legal disclosure can help to further ensure that consumers are properly informed.



### What labelling requirements do you need to be aware of?

The guidance (available [here](#)) issued by the Hungarian Competition Authority provides a detailed list of Do’s and Don’ts.

Indicators of business relationships should be emphatic, conspicuous, legible and clear. It is worth noting that content differs in appearance across electronic devices (smartphone, tablet, desktop computer). It is important that text elements are clearly identifiable i.e. in cases of longer content, the mark should be visible to consumers before any potential click opportunity, without requiring a search or other consumer activity. For example, users of Facebook or Instagram on smartphones typically only see the first two or three lines of content unless they click on the ‘More’ button. Publication or disclosure of a business relationship cannot take a hidden or disguised form (e.g. in footnotes, hyperlinks or other parts of the text unlikely to be read by the consumer or only seen briefly, or in an unreadable size).

Considering the differences among social media platforms, the characteristics of the environment in which the content appears should also be taken into account. Each platform offers different technical solutions for the publication e.g. the ‘branded content’ or ‘paid promotion’ tag.

It is important that the reference to sponsored ‘#’ is still readable in the first place it appears before further ‘#’ labels are used. The brand name of the undertaking should be marked and can be further supported by the display of any trademark, as this may facilitate information exchange among market participants.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Reklám” (“Advertisement”)	“Köszönöm, partner” (“Thank you partner”)
“Hirdetés” (“Advertisement”)	“Promóció” (“Promotion”)
“Fizetett tartalom” (“Paid content”)	
“Szponzorált tartalom” (“Sponsored by”) – but exclusively if the relationship of the parties suggest that	

### Describe specific laws, regulations or guidance aimed at influencers in Hungary

There are no specific laws or regulations in this regard. However, the Hungarian Competition Authority issued a guidance in this subject which can be accessed [here](#) in English.



### What are the consequences for influencers if advertising content is not clearly labelled?

Pursuant to the labelling requirements mentioned under Question 4, the content of the publishing influencer shall meet those standards.

As of today the Hungarian Competition Authority has imposed fines on influencers and/or companies as a result of their initial findings on a number of occasions, and also obliged the parties to undertake certain obligations that are in compliance with the requirements as set out above. The amount of the fine may be up to 10% of the annual turnover of the company and it shall be determined with regard to all applicable circumstances, in particular, the gravity of the infringement, the nature of market and economic conditions affected by the commitment, the existing level of competition, the public interest underlying the resolution prescribing the commitment, the company's market position and attributability, and the extent of the commitment undertaken has been fulfilled up to that point. The gravity of the infringement shall be determined, in particular, on the basis of the degree of obstructing competition and the scope and extent of injury to the interests of competitors and trading parties.

Please note that as of today the Authority initiated proceedings in a number of cases, and also intends to 'educate' the public rather than initiating many proceedings. The published cases were initiated against influencers with great reach and not against influencers with a smaller audience.

### What legal risks apply when cooperating with influencers in Hungary?

In accordance with the so-called '*interest-principle*' any undertaking is responsible for the publication of the content if it has a direct interest in the sale or promotion of the product associated with the commercial practice. Therefore, in addition to the publishing influencer, the producers of the product, as well as distributors (e.g. advertisers, contributing agencies and offices) may also qualify as a responsible party, and be subject to fines. With respect to fines, the above under Question 6 shall also apply to companies.

### Key contacts



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## Ireland

**Risk and enforcement level: Moderate**

# Ireland

## What qualifies as advertising under Irish law?

Marketing and advertising in Ireland is overseen by the advertising Standards Authority for Ireland (“**ASAI**”), an independent self-regulatory body set up and financed by the advertising industry. It is committed to promoting the highest standards of marketing communications and covers advertising, promotional marketing and direct marketing.

Its rules are set out in the Code of Standards for Advertising and Marketing Communications in Ireland (the “**Code**”). ASAI members are required to abide by the Code and not to publish an advertisement or conduct a promotion which contravenes Code rules. Complaints can be brought by consumers or competitors (if the interests of consumers are involved).

A post by an influencer will come within the scope of the Code if:



**The influencer receives compensation for the advertiser; and**



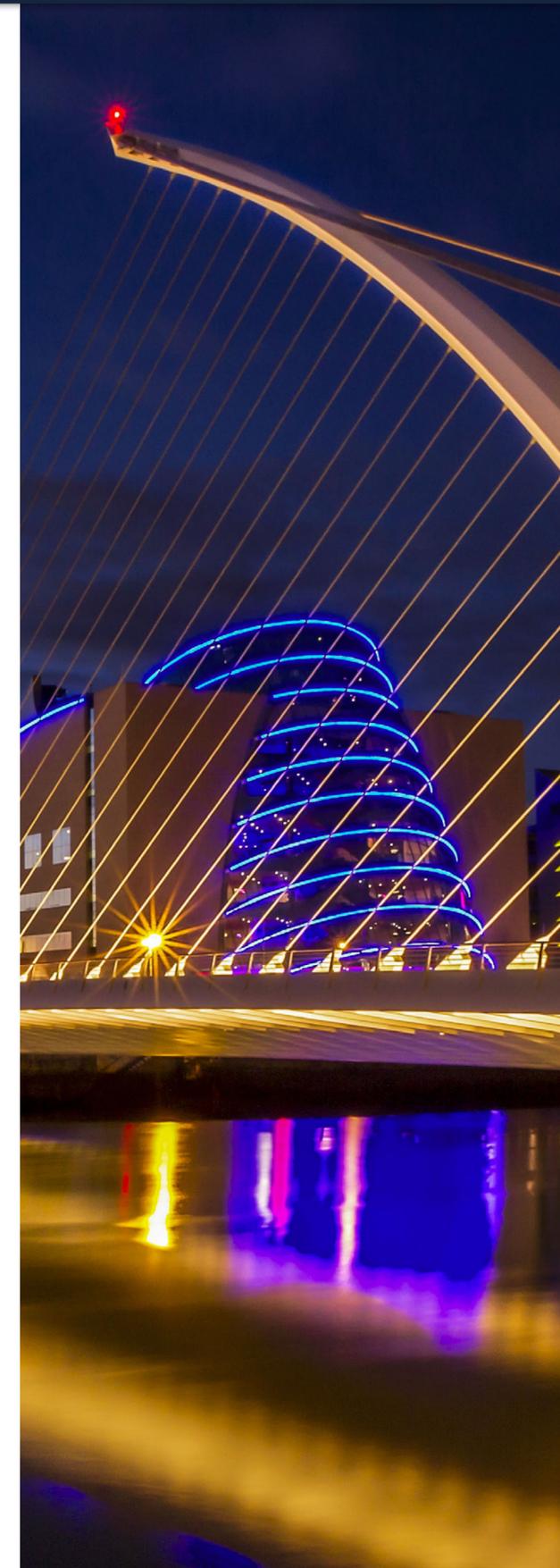
**The advertiser exercises significant control over the contents of the post.**

The code is not clear on whether the compensation itself (where the influencer is not directed, controller or instructed by the advertiser) is sufficient for it to constitute advertising. However, it is recommended that any commercial relationship is always disclosed.

It is important to note that if an influencer receives a product for free, with a requirement that a post/review is positive, this would be considered marketing communication/advertising.

## What are typical influencer practices in Ireland and in which cases are they considered advertising?

There are various influencer practices which could be classified as advertising:



## Which legal obligations apply?

### RECOGNISABILITY

Marketing communication/advertising should always be presented in such a way that it is clear that it is a marketing communication/advertising. Such communication should not be mischaracterised or presented as market research, consumer survey, user-generated content, etc. Any marketing communication/advertising should be clearly identified and distinguished from editorial matter. The identity of the advertiser, product and service should be clear and the contact details of the advertiser should be included where appropriate.

### TRUTHFULNESS

The marketing communication/advertising should not mislead, or be likely to mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise.

### HONESTY

The advertisers should not exploit the credulity, inexperience or lack of knowledge of consumers. The design and presentation of marketing communication/advertising should allow them to be easily and clearly understood.

## What labelling requirements do you need to be aware of?

Where influencers are sponsored by brands or advertisers, or are paid directly to promote a product, it must be clear that their posts are marketing communications/advertising.

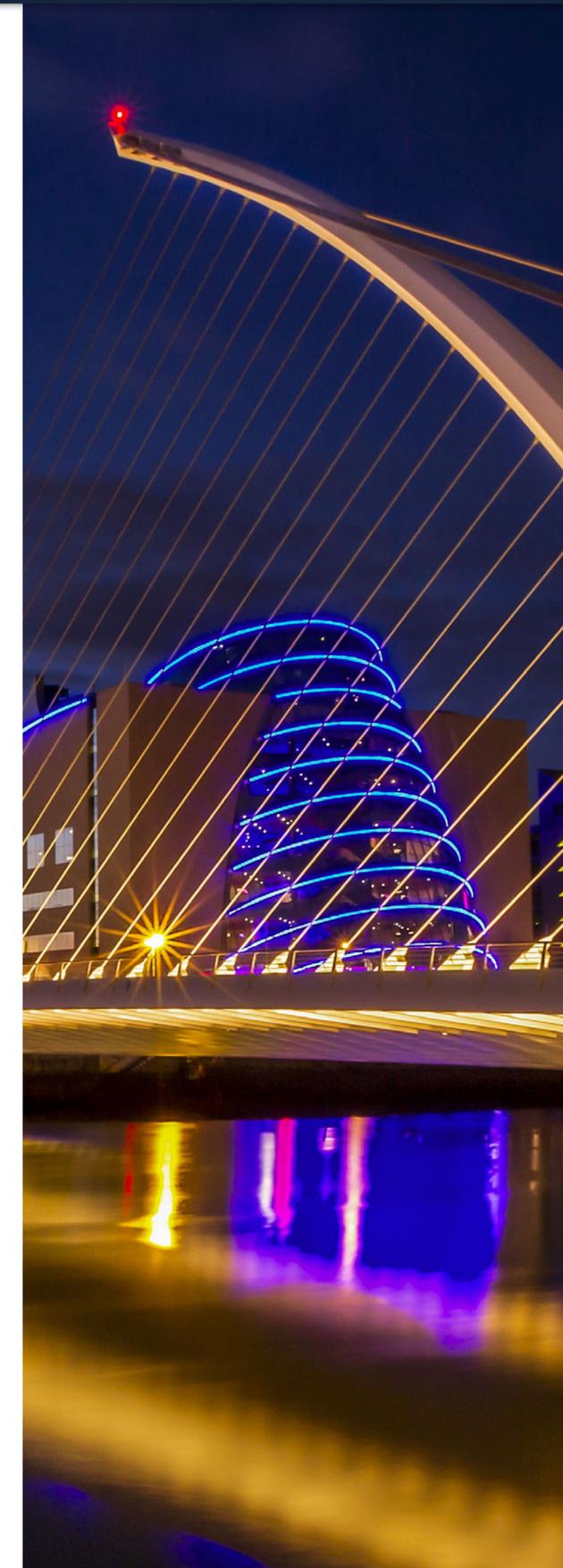
ASAI is not specific regarding acceptable and unacceptable labelling other than saying that it must be made clear when influencers are being paid to promote a product or a service. It does stress, that if the context does not make it clear that a post is advertising, flags such as #ad should be used. Although not specifically mentioned by ASAI, burying such information at the end of the post might not suffice.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#ad	
#SP	

## Describe specific laws, regulations or guidance aimed at influencers in Ireland

There are no laws or regulations that apply specifically to influencers.

However, in November 2016 ASAI issued a [Guidance Note](#) on recognisability of marketing communication which addresses the majority of issues related to influencer marketing. ASAI regularly monitors the space of influencer marketing, most recently by surveying the sentiment towards influencer marketing in Ireland which revealed that close to 51% of people in Ireland are concerned by the lack of transparency in influencer marketing. The results of the survey can be accessed [here](#).



### What are the consequences for influencers if advertising content is not clearly labelled?

It is important to note that ASAI can only take enforcement action against its members (i.e. the advertising industry in Ireland). The influencers themselves are unlikely to be ASAI members but will be indirectly (through advertisers) bound by the Code.

The ASAI's powers include:

- Power to remove advertising that breaches the Code;
- Power to direct the advertiser to change the advertisement;
- Power to publish Case Reports including names of advertisers and influencers who have been subject to a complaint;
- Power to fine the advertisers;
- Power to suspend the advertiser's ASAI membership.

As far as influencers are concerned, the posts (if they are marketing communication/advertising) which violate the Code can be taken down. Depending on the agreement in place between the advertiser and the influencer, the latter might also be at risk of breaching such an agreement.

Repeated breaches are likely to result in a reputational damage to the influencer and a reluctance of advertisers to cooperate.

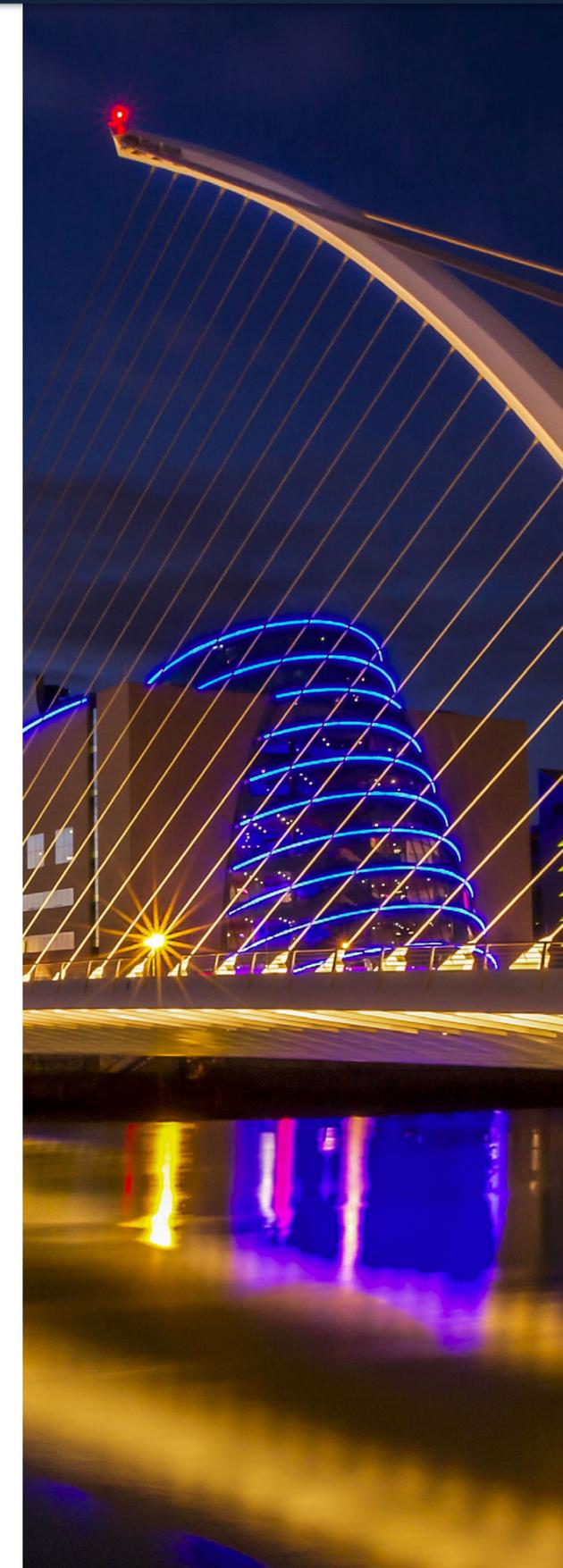
### What legal risks apply when cooperating with influencers in Ireland?

Please see the answer to question 6. The sanctions described above are directly applicable to advertisers given: 1) their membership with ASAI, 2) their products being advertised.

In addition to the sanctions described above, advertisers are exposed to a potential reputational risk.

It is therefore important to have a robust agreement in place between the advertiser and the influencer.

### Key contacts





# Italy

Risk and enforcement level: Robust



# Italy

## What qualifies as advertising under Italian law?



Under Italian law, any kind of communication, distributed by whatever means, qualifies as “advertising” if it directly or indirectly promotes the sale of goods or services. However, online communication does not constitute advertising, if it can be considered as editorial content – i.e. if it is primarily intended to express the influencer’s personal point of view on the products and the influencer has not received any consideration from the company whose products are mentioned.

Given the special environment and features of digital marketing, it is often difficult to establish whether an influencer’s post has a promotional or editorial nature. Italian advertising authorities generally consider as indicators of the commercial purpose of a post the following:





## What are typical influencer practices in Italy and in which cases are they considered advertising?

### ENDORSEMENT

Posts where the influencer presents products or services of a third-party or from the influencer's own company in a way aimed at increasing the visibility, credibility or reputation of the products/services and the related brand.

### NATIVE ADVERTISING

Native advertising is developed with the aim of dipping the advertising message in a specific context, through content that takes the form of the original ("**native**") content of the platform that hosts them, to capture the interest of the public. A commercial communication that tries to establish an engagement with users, placing itself in a less "intrusive" perspective. Among the many types of native advertising, the most common and widespread currently online are: in-feed units, paid search units, and recommendation widgets.

### REPOSTING

The reposting by the influencer of a post published by the sponsored brand on its social media channels constitutes a new act of communication to the public, subject to the authorisation of the holder and also qualifies as advertising.

### EVENTS

Even if the relationship between the influencer and the brand is not governed by an existing agreement, but merely consists of the brand sending an invitation to take part in an event, the posts and other messages produced by the influencer online that convey information about a product or brand in relation to the event are still considered as advertising.

## Which legal obligations apply?

Under the general principle of transparency provided by advertising regulations and the Italian Consumer Code, the influencer shall disclose the existence of a relation with the sponsored brand and the promotional nature of the post. There is no specific national regulation on payments to bloggers and standard tax and employment regulations will apply.

## What labelling requirements do you need to be aware of?

One of the following labels must be clearly inserted at the beginning of the post, or in another message posted online:

*"Pubblicità/Advertising", or "Promosso da ... brand/Promoted by ... brand" or "Sponsorizzato da ... brand/Sponsored by ... brand", or "in collaborazione con ... brand/In partnership with ... brand";*

and/or within the first three hashtags of a post, provided it is clear and prominent, one of the following labels should be inserted:

*"#Pubblicità/#Advertising", or "#Sponsorizzato da ... brand/#Sponsored by ... brand", or "#ad" together with "#brand".*



For contents available for “a limited time”, for instance the stories, one of the above labels should be superimposed in a clear and readable manner for any promotional content.

Conversely, should the relationship between the influencer and the brand not be governed by an existing agreement, but consist merely in the advertiser occasionally sending the influencer its products free of charge or for a modest consideration, rather than the notifications stated above, posts or other messages distributed online in which the influencer mentions or represents these products must feature a disclaimer of the following type: “product sent by... brand”, “supplied by... brand” or equivalent.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#pubblicità/#advertising	#ad plus brand name <i>(without spaces and hashtags)</i>
#ad #brand name	#partner/#ambassador
#sponsoredby...	#spon
#giftedby...	#thanks

### Describe specific laws, regulations or guidance aimed at influencers in Italy

There are no State law specifically dealing with digital marketing, but blogs and influencers have been addressed in the Digital Chart Guidelines of the Advertisement Self-Regulatory Authority (Istituto Autodisciplina Pubblicitaria - IAP), which are rules of soft law regarded as the best practices to be followed in such field and are part of the Code of Advertising.

In addition, general misleading advertising (d. lgs. 145/2007) and unfair commercial practices (d. lgs. 206/2005) regulations will apply.

Likewise depending on the context, general rules on intellectual property rights, freedom of speech, data protection, protection of rights of publicity will also apply.

### What are the consequences for influencers if advertising content is not clearly labelled?

In case of misleading advertising there can be a wide range of negative consequences, including:

- cease and desist obligations,
- publication of the court decision in the media,
- and damages compensation.

Also the Italian Unfair Competition Authority (AGCM) can issue heavy monetary sanctions (from a minimum of EUR5,000 (approximately USD5,631) up to a maximum of EUR5 million (approximately USD5,631,000), considering the gravity and duration of the infringement) when it determines an unfair commercial practice had been perpetrated.

Furthermore, the IAP could prevent the communication of unfair and misleading advertisings, which are communicated (i) by digital means by companies that have upheld the Code of Advertising; or (ii) on TV, radio and on magazines/newspapers that have upheld the Code (which is the vast majority). The IAP cannot issue monetary sanctions, but the continuous non-compliance with the Advertisement Code could trigger the publication of the decisions, with substantial reputational consequences.



### What legal risks apply when cooperating with influencers in Italy?

Under art. 2049 of the Italian Civil Code, the company can be held liable for vicarious liability for the conduct of the influencer and the same sanctions illustrated in answer six above in relation to influencers apply. Therefore, under Italian law companies are subject to a very strict liability regime because both the IAP and the AGCM hold the advertiser liable even when the content has been spontaneously published by the influencer, if the advertiser is unable to demonstrate that it has adopted monitoring, deterrence and sanctioning tools to prevent the infringement of the law. This is why it is so important that companies cooperating with influencers enter into specific agreements with them where all such provisions shall be inserted.

### Key contacts



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## New Zealand

**Risk and enforcement level: Moderate**

# New Zealand

## What qualifies as advertising under New Zealand law?

There is no definition of advertising, or any specific regulation covering advertising or influencers under New Zealand law. Rather, the Fair Trading Act 1986 prohibits certain conduct in trade (relevantly misleading and deceptive conduct generally and certain false or misleading representations about products). Influencers and suppliers of goods and services will likely be considered in trade. Accordingly, all their conduct will be regulated by the Fair Trading Act (whether or not the relevant message is or is not considered advertising).

New Zealand does operate a self-regulatory advertising regime which, among other things, established an Advertising Standards Authority/Advertising Standards Complaints Board and various advertising codes (including the Advertising Standards Code). Members include organisations representing advertisers, agencies, and the media, and the codes are generally complied with by mainstream industry players and firms. Advertising for the purpose of the code is broadly defined as:

“any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion, or behavior of those to whom it is addressed”.

## What are typical influencer practices in New Zealand and in which cases are they considered advertising?

The typical practices of influencers (either based in New Zealand or with a significant New Zealand following) generally mirror those in other jurisdictions such as Australia, the UK or the US. This includes posts mentioning or featuring third party products or services or the influencer’s own products or services. As noted in question 1 above, the types of posts which will be considered advertising for the purpose of the advertising codes are very broad. Essentially, the broad definition will capture content that is controlled directly or indirectly by an advertiser for payment. Payment includes any benefit the influencer may receive in exchange for the content they have distributed such as money, free products or services, event tickets, travel or product loans.

Organic influencer content relating to the influencer’s personal opinions or lifestyle choices is unlikely to be considered advertising, as there is no form of payment. However, most influencers will distribute a mix of advertising content and organic influencer content and must clearly distinguish the two.



## Which legal obligations apply?

As noted above, the main legal obligation is to comply with the Fair Trading Act 1986 (i.e. no misleading or deceptive conduct).

Rule 2(a) of the Advertising Standards Code deals with the identification of advertisements (i.e. posts which are 'advertising' or for which the influencer has received a benefit must be clearly identified as such). The Advertising Standards Authority has published an influencer specific guidance note which informs the conduct that will and will not comply with rule 2(a).

The Guidance Note on Identification of Advertisements (found [here](#)) provides two steps for consideration to ensure influencers, and advertisers, comply with rule 2(a):

1. Is the content being generated in relation to the advertiser's product or services an 'Advertisement'? (**Consideration 1**)

2. If the content is deemed to be an 'Advertisement', is this being appropriately identified to the relevant audiences? (**Consideration 2**)

Under Consideration 1, the Guidance Note explains that the definition of 'advertisement', as identified above, is very broad and will capture a wide range of advertising activity. Additionally, the definition does not necessarily require an influencer to receive financial payment in exchange for published content. Instead, other arrangements such as the provision of a free product to an independent third party may fall within the definition.

Under Consideration 2, the Guidance Note explains that it must be clear to an audience that the relevant content is advertiser controlled. This means an influencer must use advertisement 'identifiers' such as the acceptable labels identified below and position those identifiers clearly to ensure it is well understood by an audience that the content is an advertisement.

Importantly, the Guidance Note confirms that all parties to the advertisement, including the advertiser, agency, media and influencer, are each responsible for ensuring the audience is aware they are engaging with an advertisement.

In addition to the above, the Advertising Standards Authority has produced the Influencer AdHelp Information note (found [here](#)). This clarifies that 'Influencer' is a broad term used by the Advertising Standards Authority to describe any person who has influence over the choice, opinion, or behavior of their followers. This includes any person who has access to an audience to which they can broadcast organic content and ad content. The AdHelp Information note also provides examples of advertising content and common labelling mistakes, and the Advertising Standards Authority frequently asked questions relating to influencers.



## What labelling requirements do you need to be aware of?

Labels must be obvious to consumers interacting with an influencer’s post. This means an influencer must ensure any label is in a colour that sufficiently contrasts the background colour, is of a large enough size, and is located immediately at the beginning of the influencer’s post.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Ad” or “#Ad”	To avoid confusion with other uses of these terms by some platforms, “Sponsored” or “Sponsored Content” should not be used by influencers to label their advertising content about brands, products, or services.
“Advert” or “#Advert”	“#sp” or “sp” as it is unclear.
“Advertisement” or “#Advertisement”	

Influencers may include other labels, **in addition to, but not instead of** the acceptable label examples identified above. Examples of additional labels an influencer could include, but are not limited to: Gift, Gifted, FreeGift, FreeSample, ProductReview, ProductTrial, PRSample or collab.

## Describe specific laws, regulations or guidance aimed at influencers in New Zealand

As described above:

- Rule 2(a) of the Advertising Standard Code states:  
*“Advertisements must be identified as such.”*
- The Advertising Standards Authority has published a “Guidance Note on the Identification of Advertisements” aimed at influencers. In addition, the Advertising Standards Authority provides further guidance to influencers in the form of a document entitled “Influencers AdHelp Information”. These publications provide general commentary to guide interpretation of the Advertising Standard Code as well as helpful examples of compliant and non-compliant advertising.

## What are the consequences for influencers if advertising content is not clearly labelled?

Depending on the nature of the messaging, the influencer may breach the Fair Trading Act. This can give rise to civil and criminal penalties including personal liability for both the influencer and the advertiser.

The consequences for an influencer (as opposed to the advertiser) for breaching the Advertising Standards Code are less clear. As noted, the regime is self-regulatory, and the influencer is unlikely to be a member of an organisation which is party to the regime. The more likely impact is reputational and commercial to the extent that the mainstream advertisers and their agencies will be bound by the complaints process and will take steps to give effect to any rulings by the complaints body (including to remove or change the content).



## What legal risks apply when cooperating with influencers in New Zealand?

The key risks are those noted above, namely that the influencer will breach the Fair Trading Act (with the potential for the advertiser to become a party to or knowingly concerned in such conduct), breach the Advertising Standards Code, and face related costs (with resulting reputational damage and need to take corrective steps/action).

## Key contacts





## Norway

Risk and enforcement level: Heavy

# Norway

## What qualifies as advertising under Norwegian law?

The Marketing Control Act is the primary law in Norway governing advertisement. The act covers marketing in all media, however, The Broadcasting Act contains some special rules on advertising on an influencer's own channel on YouTube or on other video-sharing platforms, such as a website dedicated to video clips.

Advertising is not expressly defined in the Marketing Control Act, however, the Consumer Authority (CA), who is responsible for supervising and enforcing the act, has drafted an own guideline for when and how posts in social media must be marked as advertisement.

A post by an influencer qualifies as advertising if it can contribute to promoting a trader's sale of a product or service, and if the influencer posts because he/she is paid or receives other advantages for doing so.

Examples of posts considered advertising:

- The influencer is paid to post something about a product, a service or a trader.
- The influencer is given or lent something for free, is invited to take part in events or trips, or is given free services or discounts in return for an expectation that he/she will mention this or give it exposure.
- The influencer has a general agreement to promote a trade (e.g. as an ambassador or partner). In such instances, it will be considered advertising both if it has been agreed that the influencer will post particular things, and if the influencer describes or gives exposure to goods or services that can be identified with and have a marketing effect for the trader.
- Competitions or giveaways organised for a trader.
- Affiliate links. The influencer uses advertising links for which the influencer is paid, for example per click or purchase. All exposure or mention of the trader that the influencer links to the link, and that can increase the traffic to the links is also advertising.
- If the influencer runs his or her own business and posts advertising for it.



## What are typical influencer practices in Norway and in which cases are they considered advertising?

Typical influencer practices are: 🏠

These will all constitute advertising provided that the influencer posts because he or she is paid or receives other advantages for doing so.

## Which legal obligations apply?

### GOOD MARKETING PRACTICE

There is a general clause in the Marketing Act which applies to all marketing. Marketing shall not conflict with good marketing practice. In the assessment, emphasis shall be given to whether the marketing offends against general ethical and moral views, and to whether it employs aggressive means.

In determining whether the good marketing practice clause has been infringed, emphasis shall be given to whether the marketing stands out as particularly intrusive by reason of its design, format or scope, or other means employed.

### IDENTIFICATION AND LABELLING

A post must be marked as advertising every time the product or service is mentioned or given exposure in a way that has marketing value.

The person on whose behalf marketing is carried out shall be clearly identifiable.

### CONTENT CANNOT BE MISLEADING OR ILLEGAL

Influencers are under the same obligation as any other advertiser to ensure that the marketing is not incorrect, misleading or in any other way illegal. This applies regardless of the publisher referring to a link in which the consumers can get more information about the product. Any advertising claims must also be possible to document, and the information about the most important characteristics of goods and services, including their price, must be correct and not misleading.

Furthermore, it is not permitted to advertise for tobacco, alcohol, unauthorized gambling or illegal products. There are also specific regulations for the marketing of cosmetic products and such.



### MARKETING DIRECTED AT CHILDREN

The Marketing Control Act is interpreted more strictly when children and adolescents are the target group for advertising. Any influencer who has followers which are under 18, must exercise extra caution when advertising, and clearly inform the followers which posts are advertising in a language that children can understand.

Moreover, it is prohibited to directly exhort or encourage children to buy something, as well as to persuade their parents or other adults to buy a product for them.

When asserting whether advertising violates this prohibition, the Consumer Authority examines the following issues:

- How clearly the exhortation to buy or persuade parents is worded, including what impression the advertisement gives.
- In what way the advertising is aimed at children, e.g. in media that target children directly and individually.
- How easy it is to buy the advertised product, e.g. whether it is possible to buy it directly by clicking a link.

Examples of marketing in social media with young followers that the Consumer Authority has intervened in include slimming products, consumer loans and cosmetic surgery.

### LABELLING OF MANIPULATED PHOTOS

A new legislation has been introduced which states that the advertiser and the person designing the advertisement must ensure that any advertisement where the body's shape, size or skin is changed by retouching or other manipulation, shall be marked as such.

This legislation has not entered into force yet, and further regulation will be given with specific provisions regarding as to how such advertising shall be marked.

## What labelling requirements do you need to be aware of?

### SOCIAL MEDIA

As a point of departure, the influencer can decide themselves how to label the advertising. Some labels may be considered sufficient for some instances, but unacceptable in other situations.

However, there are certain requirements that must be met;

- The post is clearly identifiable as advertising.
- It is apparent who the advertising is for.
- The marking must be in a prominent position, written in a clear and big enough font.
  - Prominent: immediately visible. It must never be necessary to search or scroll down a post to discover that it is advertising. Good practice is that the labelling of the advertising is the eye-catcher when a post is viewed.
  - As a minimum, the labelling should be of the same font size as other text in the post.
- If the content is in Norwegian, the labelling must also be in Norwegian. Consequently, words like 'ad' or 'adlinks' are not clear enough.
- It must be clear who the influencer is advertising for. This can be explained in the post, or be clear from the context of the post.



ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Reklame” (“Advertisement”)	#ad
“Annonse” (“Advertisement”)	Betalt partnerskap (“Paid partnership”)
	I samarbeid med (“In cooperation with”)

If the influencer posts a link to a YouTube video or such which contains advertisement, the post itself must also be labelled as advertisement.

### YOUTUBE/TV

If the influencer posts advertising on YouTube or other video-sharing platforms, the influencer must comply with the special rules in the Broadcasting Act. The Norwegian Media Authority has drafted a separate guide to advertising on YouTube and other video-sharing services.

The guideline separates between two scenarios. In scenario A, the product is the main feature of the video. In these instances, the video must be marked in written, either before the presentation of the product or at the beginning of the video. The advertiser must use the term “reklame” or “annonse”, and it must be labelled clearly, and long enough for the viewer to register. The labelling must also be clear against the background and the title or description of the video should state that it contains an advertisement.

In scenario B, the product is not the main feature of the video, but merely present in it (product placement). The influencer is not recommending or in other ways directly promoting the product. In these instances, the video must be marked with «P - Inneholder produkt plassering» both at the beginning and the end of the video, and the marking must stay at least for four consecutive seconds.

The media authority has made a suggestion for a mark that may be used by the influencer.

The media authority does not consider so-called paid videos as advertising. In these instances, the video is paid for by a sponsor, however, there is no advertising in the video itself, and the sponsor has no effect on the content of the video. For paid videos, the influencer must identify the sponsors, for instance by writing (“**sponsored by**”). The identification can be made both in written or orally.

### PODCASTS

The Marketing Control Act applies to podcasts, however a separate guideline by the consumer authority has been drafted for advertising on podcasts.

A radio show (and livestreaming) will as a point of departure be regulated by the Broadcasting Act, however the Marketing Control Act may apply if the show is taped and published as a podcast at a later stage.

There may be different types of advertising in a podcast.

- Agreement with a business who pays for the whole or parts of the production (main sponsor).
- Podcast is produced and run by a business, which decides the content of the podcast (for instance a business runs its own podcast).
- The influencer or a guest conducts marketing for a product or a service during the podcast. For example the guest talks about the launch of product or service.
- Special episodes where the advertiser has bought a slot in which a specific topic related to the advertisers business is discussed.
- Editorial podcast, in which a media house is responsible for the content of the podcast. Important to separate advertising from other editorial content.

Any marketing in a podcast must be clearly informed of, and be separated and identified as such. In terms of labelling requirements, the influencer must inform the listener before the advertising about the advertising and for who the advertising is for. It might be sufficient to state at the beginning that there will be advertising (and for whom) at the beginning of the commercial. The advertising can also be pre-recorded.

### Describe specific laws, regulations or guidance aimed at influencers in your jurisdiction

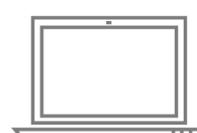
There are no laws or regulations that apply exclusively to influencers, however, both the CA and the Media Authority has drafted guidelines for influencers in Norway.



Podcast



Social media



Social media

The Marketing Control Act contains rules that are relevant when using social media as an advertising channel.

Electronic Commerce Act section 9 first paragraph requires that the person on whose behalf marketing is carried out shall be clearly identifiable.

The Marketing Control Act is the primary law in Norway governing advertisement. The act covers marketing in all media, however, The Broadcasting Act contains some special rules on advertising on an influencer's own channel on YouTube or on other video-sharing platforms, such as a website dedicated to video clips.

The Marketing Control Act has a separate chapter, Chapter 4, on the protection of children, which entails that the provisions of the Act must be interpreted more stringently when advertising is directed at children, when it can be seen or heard by children or if it is of particular interest to children.

The Broadcasting Act contains special rules on advertising on the influencer's own channel on YouTube or on other video-sharing platforms, such as a website dedicated to video clips.

Additionally, a committee for influencer marketing (called FIM) has been established by ANSO (Annosørforeningen, English "association for advertisers") and MBL (Mediebedriftenes landsforening, English "National association for media businesses"). The committee has created guidelines for responsible advertising, and handles complaints. Influencers and advertisers who are members of either ANFO or MBL are bound by the FIM guidelines.

The FIM primarily focus on two areas:

- The effects of advertising on children and young adults.
- Cosmetic surgeries and food supplements.

However, FIM does not have the authority to impose sanctions, but merely state that a specific advertisement by an influencer is in breach of the guidelines.



### What are the consequences for influencers if advertising content is not clearly labelled?

The CA may prohibit this conduct (MCA § 40) and impose administrative fines (MCA §§ 42 and 43). Natural or legal persons that are accessories to infringements, may also be the subject of decisions by the CA. The CAs decisions may be appealed to the Market Council (MCA § 37).

### What legal risks apply when cooperating with influencers in Norway?

The advertiser is principally liable for breaches of the law. In addition, everyone who makes a significant contribution to the advertising can be held responsible for violation of the Marketing Control Act, including those who publish the advertising.

The sanctions are prohibitions, enforcement penalties and infringement penalties. Material infringements to some sections of the Marketing Act, such as the prohibition of misleading, incorrect or aggressive marketing practices, may in theory result in imprisonment of up to six months.

### Key contacts



# Perú

Risk and enforcement level: Moderate

# Perú

## What qualifies as advertising under Peruvian law?

Pursuant to Legislative Decree N° 1044 – Legislative Decree that approves the Peruvian Unfair Competition Repression Law (hereinafter, the “**Peruvian Unfair Competition Repression Law**”), advertising is defined as any form of communication disseminated through any means or support, and objectively suitable or directed to promote, directly or indirectly, the image, brands, products or services of a person, company or entity in the exercise of its commercial, industrial or professional activity, within the framework of a competition activity, promoting the contracting or carrying out of transactions to satisfy their business interests (Article 59 of the Peruvian Unfair Competition Repression Law).

The “Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual” (hereinafter, “**Indecopi**”) is the Peruvian multipurpose market regulator in charge of investigating and sanctioning the infringements to the advertisement applicable laws in Perú.

## What are typical influencer practices in Perú and in which cases are they considered advertising?

According to the Peruvian Influencers Advertising Guidelines issued by Indecopi, available [here](#) (hereinafter, the “**Peruvian Guidelines**”), an influencer is defined as a person who has some credibility on a given topic and who, given its ability to convince or reach its followers – without necessarily taking into consideration the number of followers – can become a determining component in the decisions that consumers make in the market.

Concerning influencer practices, it is important to clarify that these will only be considered as advertising, when they: (i) promote directly or indirectly, the advertiser’s brands, products, or services; and (ii) are subject to a payment or consideration of any kind from the advertiser (this may include: (i) discounts in products and services; and (ii) free products or services). On the other hand, whenever an influencer disseminates content in which he/she promotes a company product or service, as a result of its previous experience, it will not be considered as advertising, provided that the influencer will not receive compensation (of any kind) from the advertiser.

The typical influencers practices in Peruvian jurisdiction are the following: 



### Which legal obligations apply?

Due to the fact that influencer practices – considered as advertising – may generate mercantile benefits for the advertiser, these practices are under the scope of the Peruvian Unfair Competition Repression Law.

In that regard, the influencers must avoid – primarily – committing the following acts, which are found in the above-mentioned law:

- **Acts against the Authenticity Principle:** Influencers must not disguise the advertising nature of their publications (e.g. photos or videos on their profile, or limited-time stories).

In that regard, in order to avoid infringements to the Authenticity Principle, influencers must properly state that the announcement is subject to a relationship with the advertiser, in order to allow the targeted audience to recognize the nature of the hired advertisement. For this purpose, the influencer may use the “Accepted Labels” detailed below.

- **Acts of Deception:** The advertisement must not be publicized as if it is an influencer’s personal experience with the advertiser’s brand, unless it relates to a recent and authentic experience or can be duly credited to the advertiser. Moreover, content that is presented in an ambiguous way or omits relevant information that influences the follower/audience decision, may also constitute an act of deception.
- **Acts against the Principle of Legality:** Influencers’ advertisement practices must comply with the mandatory rules of the legal system applicable to advertising activity.
- **Acts against Sectoral Rules:** Influencers advertisement practices must not fail to respect the restrictions and prohibitions of practices commercial for consumer health and safety reasons; which include, for example, provisions regarding alcoholic beverages, tobacco products, medical products, or processed foods.

### What labelling requirements do you need to be aware of?

Whenever it is not evident to the consumer that content is advertising content, or there are doubts as to whether what is being communicated is enough for the consumer to recognize its advertising nature, the influencer must expressly place or mention on the publication the words that reflect advertisement or hired advertisement. One way to do this is to use the accepted labels detailed below:

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#Publicidad (#Advertisement)	“Publi” (Shorthand term for “Advertisement”)
#Anuncio Contratado (#Hired advertisement)	“Socio” (“Partnership”)
“Este video ha sido realizado en colaboración con [nombre del anunciante]” (“This video contains advertising for [name of the advertiser]”)	“Ad” (Shorthand term for “Advertisement”)
“Este video ha sido patrocinado por [nombre del anunciante]” (“This video has been sponsored by [name of the advertiser]”)	“Embajador” (“Ambassador”)



<p>“Gracias [nombre del anunciante] por enviarme estos productos”  <i>(“Thank you [name of the advertiser] for your products”)</i></p>	<p>“[nombre del anunciante] publicidad.”  <i>(“[name of the advertiser] advertisement”)</i></p> <p>Regarding this unacceptable Label, please take into consideration that the label advertisement cannot mix with the advertiser’s name.</p>
<p>“Gracias [nombre del anunciante] por invitarme a este viaje/evento.”  <i>(“Thank you [name of the advertiser] for your invitation to this event/trip”)</i></p>	<p>“Socio”  <i>(“Partnership”)</i></p>
<p>“[Nombre del anunciante] y yo nos hemos unido para sortear un...”  <i>(“[Name of the advertiser] and I have come together in order to giveaway a...”)</i></p>	

### Describe specific laws, regulations or guidance aimed at influencers in Perú

There are no laws or regulations that apply exclusively or specifically to influencers. However, the following laws apply – in general – to advertising, and, consequently, they may apply to influencer practices consider as such:

- Peruvian Unfair Competition Repression Law.
- Law 29571, Peruvian Consumer Protection and Defense Code (the **“Consumer Protection Code”**).
- Legislative Decree N° 822 and Legislative Decree N° 1075 (hereinafter, together as the **“Intellectual Property Laws”**).
- Sectoral rules like for example those that regulate: (i) alcoholic beverages; (ii) tobacco products; (iii) medical products; and (iv) processed foods.

Moreover, the Peruvian Guidelines have been issued in order to set out how the influencer practices should be carried out and to set out the current legal framework for these practices under Peruvian Legislation.



### What are the consequences for influencers if advertising content is not clearly labelled?

As we stated before, in order to comply with the Authenticity Principle, the advertising content should be clearly labelled in order to allow the influencer's followers (targeted audience) to recognize the nature of the paid advertisement. In that regard, advertising content not clearly labelled will breach the aforementioned principle, which is considered as an advertising infringement.

Advertising infringements can be sanctioned by Indecopi with a reprimand or with a fine which can amount to 700 UIT (Tax Reference Unit). The value of the Tax Reference Unit for the current year 2021, is PEN4,400, which amounts to approximately USD1,222. Nevertheless, the sanction will always be relative to the severity of the infringement and the fines cannot exceed ten percent (10%) of the gross income received by the offender, relative to all its economic activities, in the year immediately prior to the issuance of the sanctioning resolution.

Indecopi may also impose fines where an advertisement infringes the Consumer Protection Code (where Indecopi can sanction with fines up to 450 UIT) or Intellectual Property Laws (where Indecopi can sanction with fines up to 180 UIT). Again, the sanctions will be subject to the severity of the infraction.

Finally, Indecopi may as well order corrective measures that may consist of, for example, the removal of the advertisement.

### What legal risks apply when cooperating with influencers in Perú?

Pursuant to article 23 of the Peruvian Unfair Competition Repression Law, the administrative responsibility that arises from the advertisement infringements, will always apply to the advertiser as well.

Therefore, whenever an advertiser cooperates with an influencer, and the influencer fails to comply with the applicable laws, the administrative responsibility will also revert on the advertiser, who will also be subject to the sanctions and corrective measures detailed in section 6 above.

In that regard, it is always advisable that the advertiser and the influencer enter into agreements where it is clearly established -among other dispositions- that the influencers must follow a script for the hired advertising, in order to avoid possible infringements.



## Key contact





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## Poland

Risk and enforcement level: Robust

# Poland

## What qualifies as advertising under Polish law?

Under Polish law there are several legal definitions of “advertising”. Application of the appropriate definition varies based on context. Advertising matters are covered by:

- Act of “16 April 1993 on Combating Unfair Competition”;
- Act of “23 August 2007 on Combating Unfair Market Practices”;
- Act of “6 September 2001 Pharmaceutical Law”; and
- Act of “29 December 1992 on Broadcasting”.

The general definition of “advertisement” is clarified in the following excerpt from Polish Supreme Court’s judgment, which emphasise a broad scope of the definition:

*“Advertising is any statement addressed to potential consumers relating to goods, services, as well as to an entrepreneur who offers goods or services, aimed at encouraging them to purchase goods or services. The encouragement may be expressed directly, e.g. by the use of terms referring to specific acts which will result in the sale of goods or services, or indirectly. The latter means a creation of an evocative image of the goods and services or the trader himself, to the extent that the recipients may have a compelling urge to purchase the goods and services.”*

(Judgement of the Supreme Court of 16 January 2006, Case V CSK 83/05)

Whether or not a post is considered an “advertisement” will depend on:





## What are typical influencer practices in Poland and in which cases are they considered advertising?

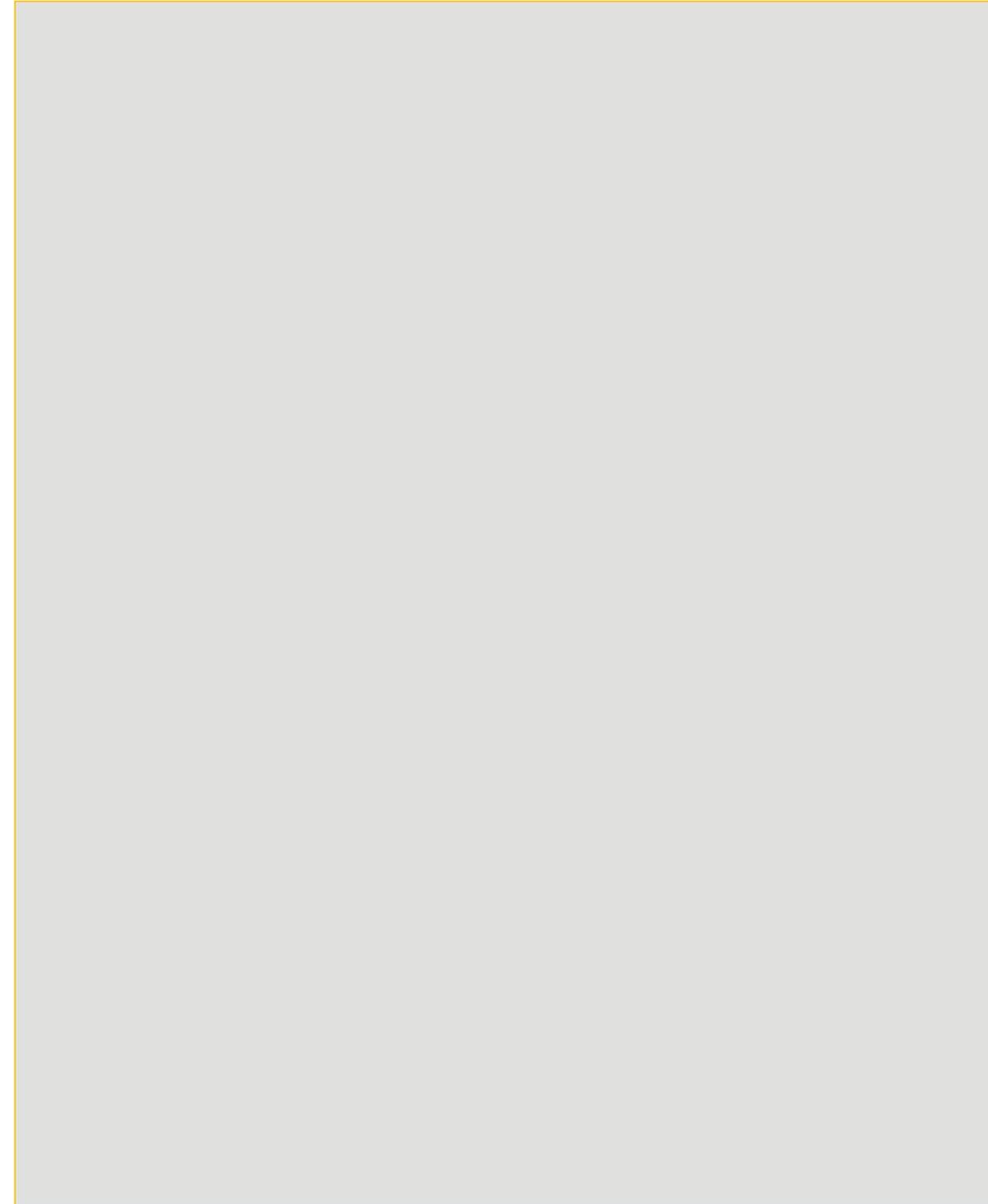


As a rule, influencer activities consists of creating and conducting promotional campaigns via social media (e.g. through the mediums of a blog, vlog, or social media profile). In accordance with the letter issued by the Director of the National Tax Information, the duties of the influencer may include activities such as:

- preparing content (including familiarisation with the subject of the post, market analysis, writing blog entries, and producing content on social media);
- photography sessions, selection and photo processing;
- preparing the graphic design of a post;
- posting content on a blog, vlog or social media account; and
- maintain content on a blog, vlog or social media account for a fixed or indefinite period.

The agreement specifies the broad scope of freedom of the influencer's actions as part of a promotion – the influencer, apart from using his own creative invention, may also receive ready-made content from the advertiser and only post and maintain it in his own online media.

According to the report of the Polish Association of Bloggers and Vloggers from 2015 (no more updated data), 26% of Poles admit that they are not guided by classic advertising when shopping. As a result, alternative methods of marketing are gaining popularity, bringing influencer practices to the fore among other marketing activities. Influencer practices include:





## Which legal obligations apply?

### RECOGNISABILITY AS ADVERTISING

Advertising must be recognisable as such.

### LABELLING REQUIREMENT

There is no legal obligation to use specific labels of advertising materials. However, it is important that the advertising material is marked in a way that allows the recipient to determine whether a given message is being an advertisement. Therefore, a variety of terms are used, including “advertising”, “promotion”, “announcement”, “sponsored text”, or “sponsored article”. Sole addition of the brand’s hashtags or highlight their social media profile may not be sufficient to fulfil these obligations. In order to avoid any doubts it is recommended to highlight promotional nature of the post in both Polish and English.

### SEPARATION OF ADVERTISING AND EDITORIAL CONTENT

The recipient should clearly see whether a post is sponsored. Hiding advertising content amongst normal content without sufficient marking is not permitted. Making a false impression as to the objectivity of influencer’s assessment or the neutrality of a statement shall be assumed to be a misleading practice which affects consumers’ purchasing decisions and therefore would constitute an unfair market practice. As a precaution, those markings should appear at the beginning of any text.

### SPECIFIC OBLIGATIONS

It is crucial to mention that certain goods have their own specific advertisement regulations (e.g. alcohol beverages, tobacco products, medicine, and dietary supplements).

## What labelling requirements do you need to be aware of?

Disclaimers stating that a given content is an advertisement should be, above all, clear and understandable for the average reader - otherwise the advertisement may be considered crypto-advertising - an unfair market practice involving the use of journalistic content in the mass media to promote a product in exchange for money (or similar). Under Polish law, such action violates the Act on Counteracting Unfair Market Practices.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Post sponsorowany” (“Sponsored post”)	#ad
“Reklama” (“Advertisement”)	

The designation of the advertising material should be understandable to the average reading. As such, the hashtag “#ad” may not be considered sufficient in Poland due to the language barrier.



### Describe specific laws, regulations or guidance aimed at influencers in Poland

There are no separate laws, administrative measures or guidance which relate specifically to influencer marketing in Poland, nor any self-regulatory measures (such as codes of good practice). Therefore, general rules regarding advertising should be applied to influencer marketing.

The case law relating to influencer marketing is scarce - the only court judgements relate to tax issues, or more recently, the criminal liability of an influencer for defamation by publishing highly critical opinion on the product. There are few decisions of regulatory bodies relating to (1) advertising of prohibited products, (2) services by bloggers/vloggers and (3) relating to the Advertising Ethics Committee (a self-regulatory adjudicating body operating in the Polish advertising market). Note however, this self-regulatory and administrative case law is still relevant to defining what can be regarded as editorial or advertising content.

#### Legislative Discussions

There are opinions that influencer marketing should be at least regulated by the means of self-regulatory measures (a specific advertising code should be adopted by business associations). Currently the Polish government is also producing new legislation on medical devices (restricting the advertising of such devices). The draft provisions refer to the typical practices of influencers/bloggers and determine that publicly communicated opinions on are advertisements, if remuneration is given. It should be noted that this broad definition may also influence the way advertising is defined in sectors other than pharmaceutical.

### What are the consequences for influencers if advertising content is not clearly labelled?

If influencers do not label advertising content in an appropriate way (disclosing the commercial character of their activity) they may face allegations of carrying out covert or misleading advertising. In such circumstances legal proceedings may be brought by following entities and under following acts:



### What legal risks apply when cooperating with influencers in Poland?

If an influencer violates the labelling requirements and publishes covert (or misleading advertisements), the company that mandated them to publish the advertisement may be liable. This liability may arise even if the company does not directly instruct the influencer to hide the commercial nature of their publications, but also if the company simply does not control whether these materials are properly labelled (intentional as well as negligent behaviors may give rise to such liability). Liability of the company cannot be waived by the fact that advertising agency or influencer is an entrepreneur providing professional advertising services.

The company may also be liable for damages, in addition to influencer, in cases where the influencer infringes upon third party's intellectual property, in particular copyrights, trade mark or image rights. This liability will arise, if the company instigates the influencer to use a third party's IP while being aware that it has no rights to use such materials; provides them to the influencer or allows for its use and gains benefits from using them in advertising. It also cannot be ruled out, that the company may be regarded as a direct infringer, since according to some judgments (albeit in the area of unfair completion), it is the company that actually uses the advertising (and thus uses third party's materials), regardless of who is technically publishing the advertisement.

With this in mind, it is crucial to properly secure companies' interests in the contract with any influencer. First of all, the contract should precisely describe how influencer's materials should be labelled (also to avoid potential disputes around the issue of whether the contract was properly performed by influencer) and provide for the influencer to indemnify and hold harmless the company of any damage arising from materials published by the influencer. The contract should also vest the company with the right to pre-approve the influencer's materials or demand their amendment or immediate removal. From practical point of view, it is necessary to monitor the influencer's compliance with labelling requirements since the argument that the influencer was in breach of their contractual obligations with the company is unlikely to be a successful defence.





## Key contacts



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## People's Republic of China (PRC)

**Risk and enforcement level: Moderate**

# People's Republic of China (PRC)

## What qualifies as advertising under PRC law?

There is no specific definition of advertising by an influencer under PRC law and there is no single set of laws or guidelines that regulates social media marketing in China.

However, in the context of online advertisements, the Interim Measures for the Administration of Internet Advertising ("**Internet Ad Measures**") define "internet advertising" as commercial advertisements which directly or indirectly promote goods or services through the Internet such as via website, web pages, applications, etc., in the form of texts, images, audios, videos or other means.

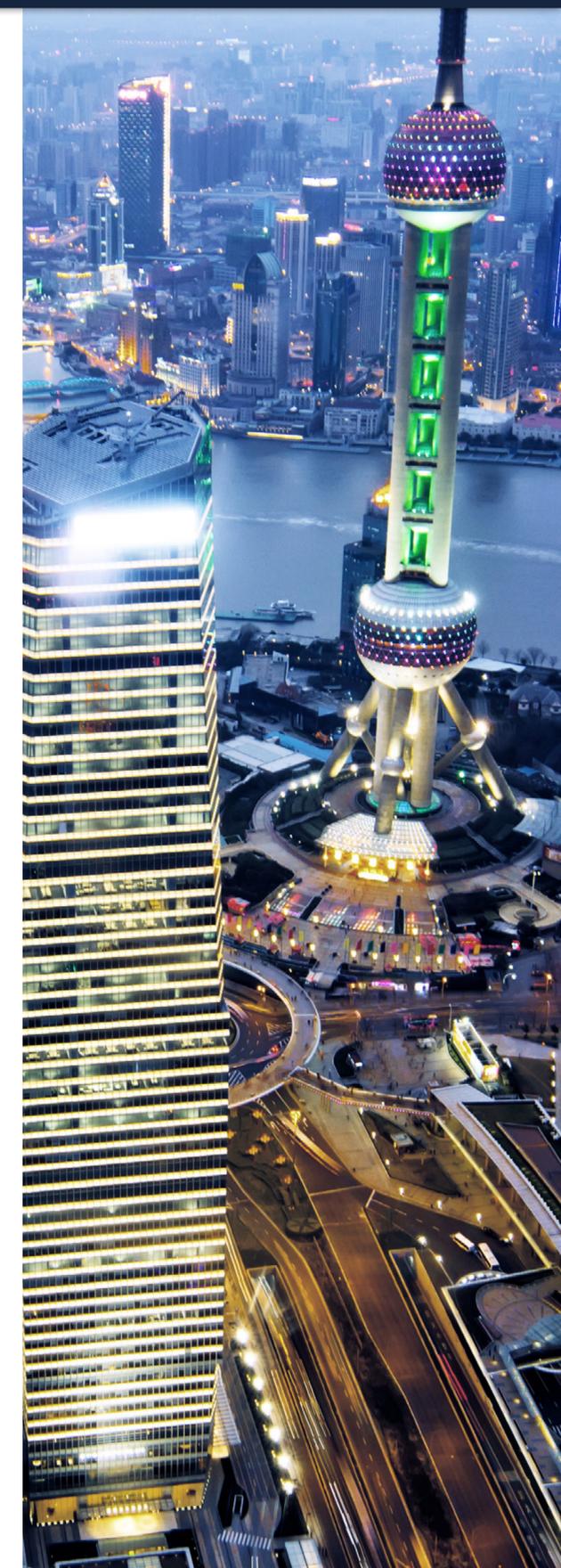
In addition, while lacking clear definition of what would constitute "advertising by an influencer", the PRC Advertising Law defines commercial advertising as activities that directly or indirectly introduce, and/or promote goods or services via certain media.

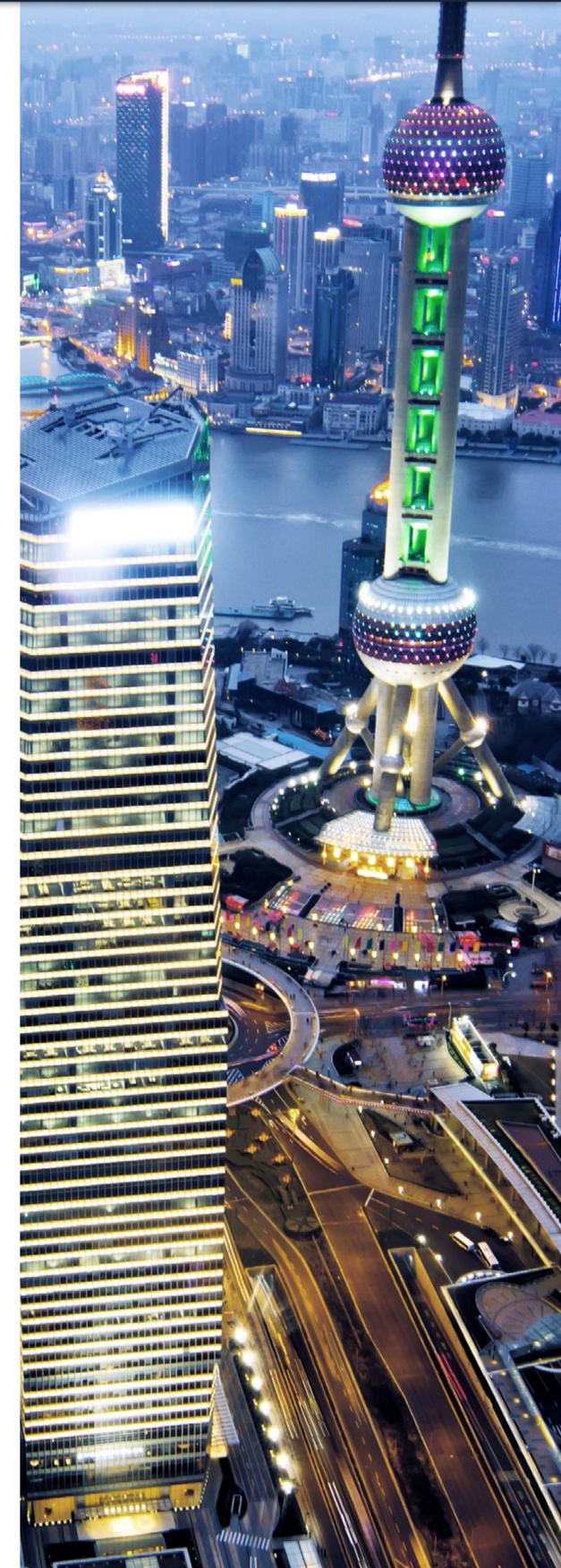
## What are typical influencer practices in PRC and in which cases are they considered advertising?

The following marketing practices of influencers are examples of what would be considered "internet advertising" and "commercial advertising":

- Adding affiliate links to social media posts;
- Adding discount codes under cooperation with other companies to social media posts;
- Using tags on social media posts; and
- Appearing on promotional posts of companies (with or without collaboration)

## Which legal obligations apply?





### What labelling requirements do you need to be aware of?

The advertising must be clearly and conspicuously labelled as “广告” (“advertisement” in Chinese).

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“广告” (“Advertisement”)	Labels other than “广告” (“Advertisement”)

### Describe specific laws, regulations or guidance aimed at influencers in PRC

There are no laws or regulations that apply exclusively or specifically to influencers. However, as mentioned, typical influencer practices would be regarded as “internet advertising” stipulated under the Interim Measures for the Administration of Internet Advertising.

### What are the consequences for influencers if advertising content is not clearly labelled?

Failure to label the content as advertising may be ordered by the regulators to take corrective actions, and/or subject to administrative fines of up to RMB100,000 (approximately USD14,000).

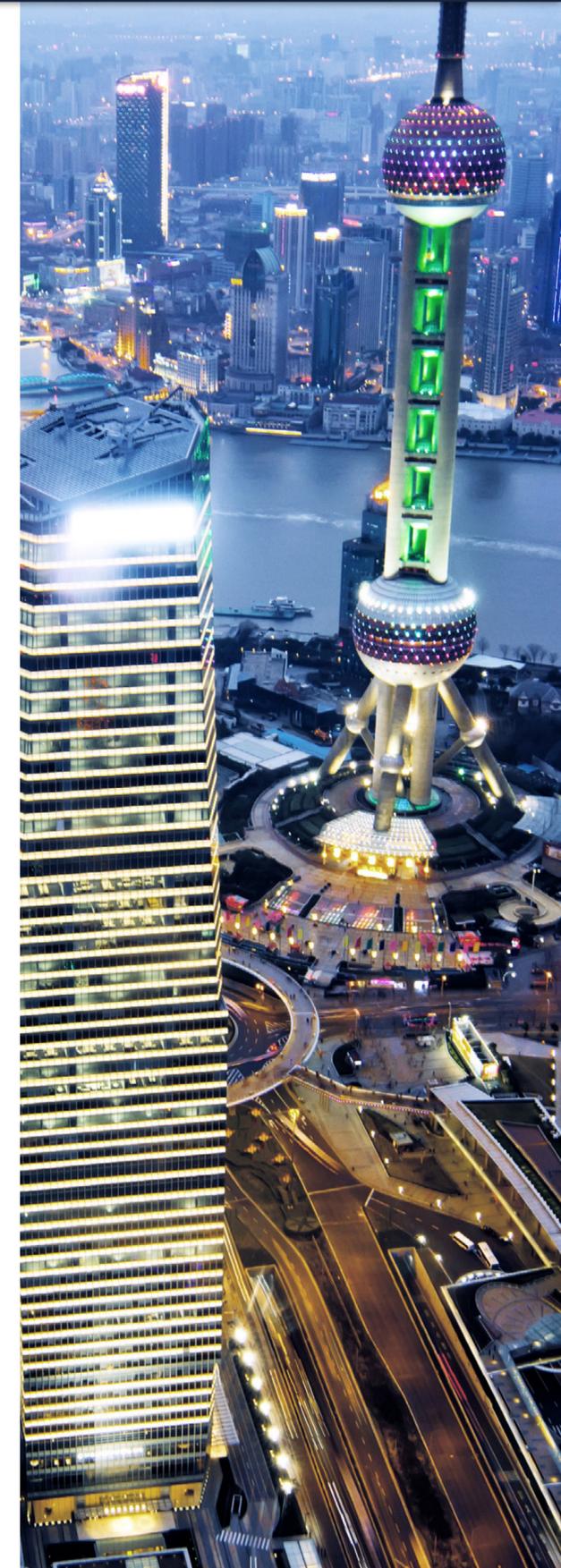
### What legal risks apply when cooperating with influencers in PRC?

- **False or misleading content** – companies may be held liable if the influencer advertising contains false or misleading content, or defrauds or misleads consumers.
- **Copyright infringement** – companies may be liable for copyright infringement by the influencer. Such liability may arise if the company instigated the influencer to infringe certain rights or had expected such an infringement and did not intervene.
- **Reputational risk** – this is not a legal risk per se. However, the image and reputation of the company may be negatively impacted if the influencer posts personal posts that feature improper behavior or which contain negative comments. Prior to engaging an influencer, companies may want to carry out a background check on the influencer to get an indication of how the influencer generally behaves online.

Before the start of a campaign, it is highly recommended that a company stipulate in its contract with the influencer how posts are to be designed and labelled. Compliance with these provisions should be monitored throughout the campaign.



## Key contacts





# Singapore

Risk and enforcement level: Moderate

# Singapore

## What qualifies as advertising under Singapore law?

Advertising using social media is regulated in Singapore by the Guidelines for Interactive Marketing Communication & Social Media (“**Social Media Guidelines**”). The Social Media Guidelines were issued in 2016 in response to feedback from the public, and are to be read together with the Singapore Code of Advertising Practice (SCAP). The Social Media Guidelines and SCAP are administered by the Advertising Standards Authority of Singapore (ASAS).

The Social Media Guidelines set out standards of how marketers should conduct online marketing on digital platforms such as blogs, Facebook, Instagram, Twitter, etc.

While neither the SCAP or the Social Media Guidelines have force of law, the ASAS is empowered to request that offending marketers amend or withdraw any advertisements which are contrary to the SCAP.

A post by an influencer will be considered “advertising” if it is communication that uses social media to promote goods and services or to influence consumer behavior. All marketing communication should be clearly identified as such.

“Social media marketing” is defined very broadly in the Social Media Guidelines as any form of marketing communication that incorporates user interactions that the consumer agrees to display and be shared. It includes marketing that promotes the interest of any person, product or service for a commercial purpose and is paid media. “Paid media” is media where a financial investment is made to place a marketing message. Examples include affiliate marketing, paid search, sponsored content (where sponsorship includes complimentary samples, trials, junkets, etc.), paid endorsements and testimonials, video seeding, and social network advertisements. “Sponsored content” refers to posts on social media that are paid in cash or in kind by the sponsor, who has a role in guiding the creation of the content.

A post will not be considered to be marketing communication if it is an editorial or personal opinion.

Where there is a connection between the influencer and the sponsor/the company whose product/service is being promoted which may materially affect the weight or credibility of the endorsement, this connection must be disclosed. Examples of such connections include: commercial relationships between the influencer and the sponsor/company, complimentary samples, friendly favours and special invitations.



### What are typical influencer practices in Singapore and in which cases are they considered advertising?

The following marketing practices of influencers are examples of what would be considered “internet advertising” and “commercial advertising”:

- **Review of sponsor/company’s products/services at the sponsor/company’s expense:** The influencer provides a review of a product or service at the expense of the sponsor/company. These include preview events, product launches and food tastings;
- Featuring a sponsored product or service in the content of the post;
- **Sponsored content space in exchange for a mention:** Where the sponsor/company sponsors content space in exchange for a mention. The content produced by the influencer may include a “listicle” or an educational message; and
- Promotion of an event, a contest or an offer for a sponsor/company, where the sponsor/company pays for the promotion.

### Which legal obligations apply?

If the content is considered to be advertising or social media marketing, the following must be applied to the content:

- Clearly distinguishing the marketing communication from editorial or personal opinions;
- Clearly disclosing the commercial relationship between the influencer and the sponsor/company in the content;
- Clearly indicating the commercial nature of the content in the content;

- The content should not be portrayed as originating from a credible and impartial source if it has been created by the sponsor/company for the purpose of promoting a product or service; and
- Clearly indicate to consumers whether they will be charged a fee for the use of the services. Influencers should not charge consumers unless such warning has been provided beforehand.

### What labelling requirements do you need to be aware of?

Disclosures in marketing communication of social media marketing should be simple and straightforward. Influencers should use clear language and syntax and avoid legalese or technical jargon. All disclosures should be clear and prominent.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#adv, #sp, #sponsored, #endorsed	Labels that are hard to read
“This post contains affiliate links”	Labels that are not visible
“This post was sponsored by...”	Labels that are hidden in the content
“This post was brought to you by...”	



The disclosures for sponsored content should:

<b>Be displayed as early as is reasonably possible so that they are noticeable to consumers with minimal scrolling or clicking</b>
<b>Convey and clearly show that the content has been paid for</b>
<b>Be in a colour that contrasts well with the background to emphasise the text of the disclosure</b>
<b>Be visible and readable on a variety of devices</b>
<b>Be easily read without referring the consumer elsewhere to obtain the information</b>
<b>Not be communicated through a hyperlink if they are an integral part of the marketing content, but placed on the same page as the marketing content.</b>

### Describe specific laws, regulations or guidance aimed at influencers in Singapore

As mentioned above, advertising using social media is regulated in Singapore by the Social Media Guidelines. The Social Media Guidelines were issued in 2016 in response to feedback from the public, and are to be read together with the SCAP. The Social Media Guidelines and SCAP are administered by the ASAS.

In addition, influencers should note that their income (including in-kind benefits) are taxable under the Income Tax Act. The Inland Revenue Authority of Singapore has clarified in a guideline entitled “Income Received from Blogging, Advertising & other Activities Performed on Social Media Platforms”

that income tax is payable on all payments and benefits derived from the carrying on of blogging, advertising and any other activity performed on social media platforms as a trade or business.

Thus, influencers will have to declare all monetary or in-kind benefits, unless the benefits meet the following criteria: (a) the product/service is given to them on an ad-hoc basis for one-off consumption or testing; and (b) the value of each product/service does not exceed S\$100. Influencers must maintain proper records for all income and expenses to meet annual income tax filing.

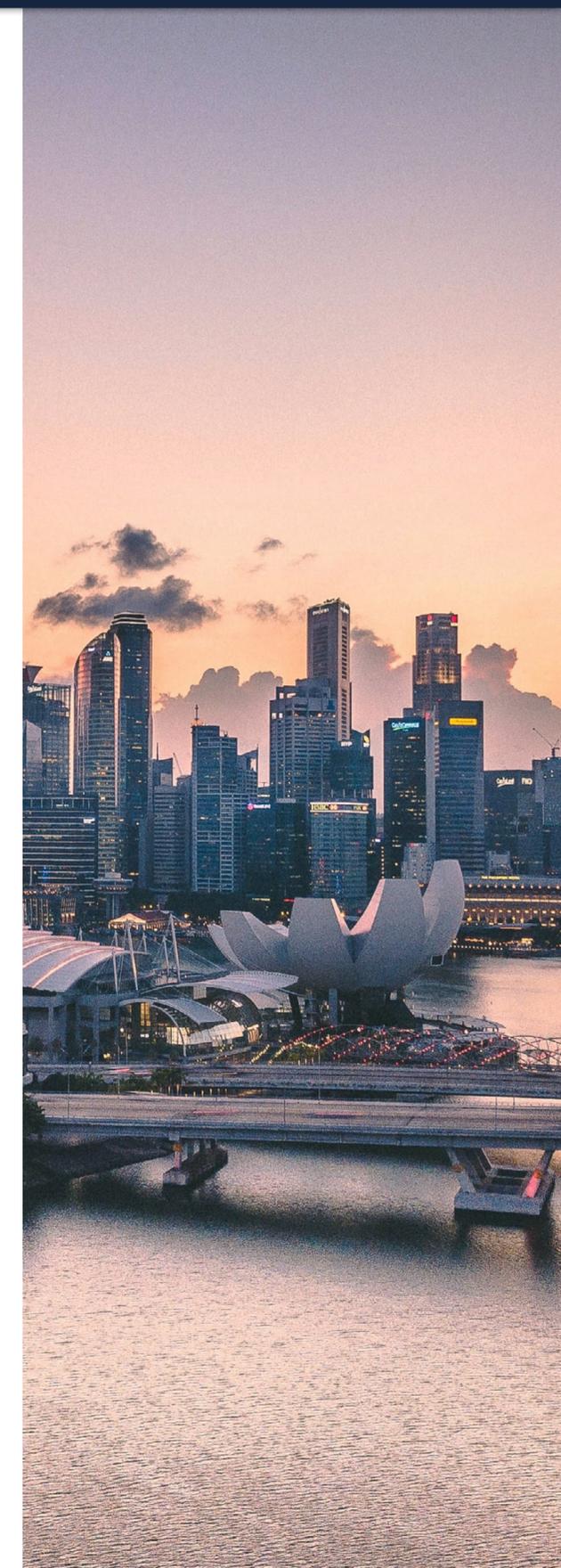
### What are the consequences for influencers if advertising content is not clearly labelled?

The ASAS has the power to require that influencers take down the advertisement/post.

### What legal risks apply when cooperating with influencers in Singapore?

As the Social Media Guidelines are only guidelines, the legal risks for companies cooperating with influencers is relatively low risk. The main risk would be reputational risk arising from the realisation afterward that a post had in fact been sponsored.

That being said, influencers have come under increasing scrutiny in Singapore, and we recommend that companies clearly require that influencers comply with at least the Social Media Guidelines when putting their sponsored posts/articles online.



## Key contacts





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## Slovenia

**Risk and enforcement level: Moderate**



# Slovenia

## What qualifies as advertising under Slovenian law?

In Slovenia, advertisements and other types of paid notices, the publication of which is ordered by a legal or natural person with the aim of promoting legal transactions of products, services, real estate, rights or obligations, acquiring business partners, or with the purpose of creating a good name in public qualify as advertising content. Advertisements are published for payment or other similar consideration or for the purpose of self-promotion.

Advertising by influencers is not specifically regulated (see below for more details).

## What are typical influencer practices in Slovenia and in which cases are they considered advertising?

In Slovenia, there is no legal definition of “influencer practices” but generally speaking, influencers are usually making use of the following practices which could be regarded as advertising and therefore subject to the applicable rules:



## Which legal obligations apply?

As the activities of influencers are in Slovenia not specifically regulated, however the basic rules of advertising are applicable. Centrally, advertising must always be clearly recognisable as such and it must be clear which company ordered it.

Advertising must also not be misleading and/or indecent.

Arguably, the part of the regulation regarding audio-visual commercial communications also applies, according to which an advertisement must be clearly identified as such and covert audio-visual commercial communications are prohibited.

## What labelling requirements do you need to be aware of?

Specifically for influencer advertising, the legislation and court practice did not yet provide any specific rules or guidance as regards labelling requirements.

Arguably, the Slovenian Advertising Code may contain some relevant regulations regarding the advertising, namely that it has to be apparent and clearly marked as advertising. However, there is no indication that the influencers in Slovenia are subject to such rules.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
N/A	N/A

### Describe specific laws, regulations or guidance aimed at influencers in Slovenia

There are no specific laws, regulations or guidance which is aimed specifically at influencers. In fact, there is a legal vacuum in Slovenian regulations regarding this topic as the recent expansion of influencer marketing has not yet been addressed by the Slovenian legislator. Consequently, the existing regulations (the Mass Media Act, the Audiovisual Media Services Act and the consumer protection laws) could potentially apply indirectly and to a limited extent to influencer marketing. However, currently influencer marketing does not seem to be subject to regulatory supervision and there are also no available court decisions concerning this topic.

Considering the revised Audiovisual Media Services Directive (Directive 2010/13/EU as revised with Directive 2018/1808/EU) which transposition deadline expired on 19 September 2020 and which provides an obligation to ensure the marking and visibility of advertising on video-sharing platforms and also in publications of influencers, it is expected that the Slovenian laws and regulations targeted at influencers will be further developed and revised in the near future.

Furthermore, it has to be noted that in Slovenia the changes of the Mass Media Act are contemplated and are currently subject to public debate. Regardless, any amendments of the media legislation are subject to considerable controversy in Slovenia and its adoption in the near future remains uncertain.

### What are the consequences for influencers if advertising content is not clearly labelled?

As noted above, currently it is not likely that influencers would be subject to legal consequences in case of inappropriate labelling of advertising content as advertising as the regulation in this respect is unclear and there seem to be no practical cases.

Although not legally binding, the Code of Advertising Practice of Slovenia stipulates very clearly and unambiguously that any advertising must be clearly identifiable as such, regardless of the chosen medium or other communication channel within which it is published. Any content published against payment or for another form of compensation is obliged to be clearly visible as advertising. In this respect publications of influencers can, in the view of the Slovenian Chamber of Advertising, also be subject to review under the Code of Advertising Practice of Slovenia, provided however that a complaint is filed. Although a decision of the Advertising Tribunal does not have a legally binding effect and only establishes compliance with the Code of Advertising Practice of Slovenia, a publicly announced decision could serve as basis for reporting to the Market Inspectorate of Slovenia.

Potentially, assuming that the existing regulations on mass media, audiovisual media services and consumer protection would apply, the breach of obligations related to advertising could be subject to a fine ranging from EUR1,050 to EUR62,600 (approximately USD1,173 to USD69,902) for companies or EUR250 or EUR350 (approximately USD279 to USD391) for individuals, depending on the breach and the regulation that would apply. In this regard it also has to be noted that it is not clear who would in fact be held responsible – the company that ordered the advertising or the particular influencer that carries it out.

### What legal risks apply when cooperating with influencers in Slovenia?

The same as outlined in previous question applies.



## Key contacts

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# Spain



**Risk and enforcement level: Moderate**

# Spain

## What qualifies as advertising under Spanish law?

Advertising in Spain is governed by a combination of national law and self-regulation.

According to the Spanish Advertising Act 34/1988 (“LGP”), “advertising” means any form of communication by a natural person or legal entity, public or private, in the exercise of a commercial, industrial, craft or professional activity, in order to promote directly or indirectly the acquisition of goods or properties, services, rights and obligations.

There is also a self-regulatory body called “Autocontrol” which provides codes of conduct and an arbitration court to resolve disputes. Autocontrol has a large membership of advertisers, agencies, media and other publicity-related entities and professionals. However, membership, although advisable, is by no means mandatory. This means that Autocontrol decisions are not binding for non-members except insofar as they decide to accept its authority as arbitrator. Nevertheless, despite not being an institutional body, Autocontrol’s Advertising Code of Conduct and resolutions are highly respected among Spanish market operators.

**Spanish regulations, however, do not contain explicit provisions regarding specifically the advertising by “influencers”.** Despite this, on 28 November 2019 Autocontrol issued its first decision which considered an influencer’s post on Instagram which was contrary to the principle of “authenticity of advertising” set forth in Section 13 of the Advertising Code of Conduct (the “**Decision**”). Section 13 is generally considered to be (particularly in light of its recent re-drafting) the catalyst for the future regulation of Spanish influencers. The principles contained in the decision have been reflected in the Code on Influencers established by Autocontrol for its members that became effective by January 2021 (available [here](#)).

The Decision provides guidance for determining whether content published by an influencer shall be deemed to be “advertising”. Its content and characteristics shall be sufficient to determine an advertising purpose – for example, if the post is focused on a single product, highlights the product’s benefits, fails to mention or suggest any disadvantages, or by failing to mention alternatives in a neutral and objective manner.

Furthermore, it is necessary to take into account that according to the Decision, it is not necessary to obtain any payment or compensation in order to classify an influencer’s post as advertising.



## What are typical influencer practices in Spain and in which cases are they considered advertising?

Despite the lack of explicit regulation in the Spanish Law on influencers' activities, the most common influencer practices in the Spanish market are as follows:



Influencers are not yet specifically regulated under any law or regulation in Spain. Their activities are still, so to speak, in no man's land from a legal perspective. They could be classified as "advertising" but there are equally good reasons under the laws of Spain to associate those practices to the activities of commercial agents. Nevertheless, certain legal provisions (specifically, those concerning unfair competition) apply to them in any event, irrespective of whether they are considered publicity market players or commercial agents. Self-regulatory bodies (for example, Autocontrol) in principle support the view that influencers' activities are advertising, however self-regulatory bodies play a much lesser role in Spain than in other European countries; their views are treated as being similar to the ones of any other third party.

## Which legal obligations apply?

The legal framework setting forth the advertisement mandatory requirements is formed by (i) Spanish General Act 34/1988 on Advertising ("**LGP**"), (ii) Spanish Act 3/1991 on Unfair Competition ("**LCD**"), and (iii) Spanish Royal Legislative Decree 1/2007 on the Defense of Consumers and Users ("**LPCU**").



According to this legal framework:

#### IT IS PROHIBITED, AS UNLAWFUL ADVERTISING, TO ENGAGE IN

- Advertising which undermines human dignity or violates the values and rights recognised in the Spanish Constitution (e.g. the promotion of violence; discriminatory advertising due to race, nationality, religion, disability, age, gender or sexual orientation). This also includes ads that present women in a humiliating or derogatory manner.
- Advertising addressed to minors that induces them to buy a good or a service, exploiting their inexperience or credulity, or in which they appear persuading parents or guardians to buy. Children shall not be presented in dangerous situations without a justified reason. The characteristics of the products, their safety and the child's ability and skills to use them without causing harm to him/herself or others must not be misconstrued.
- Subliminal advertising (the one that is delivered and perceived in a subliminal manner).
- The production of ads that infringe the regulations on the advertising of certain products, goods, activities or services (e.g. tobacco, medicine, or alcohol).
- Misleading advertising which contains false information or information that, although true, by its content or presentation misleads the viewer, is capable of altering their economic behavior, unfair advertising and aggressive advertising. Misleading advertising may, in certain circumstances, be run. For example, if disclaimers are given – such as whether or not the influencer is sponsored.
- Advertising that encourages harmful behavior to the environment and person safety.
- Comparative advertising is allowed insofar as it is conducted in an objective way, is verifiable and features comparisons of equivalent goods.

#### FONT SIZE

LPCU, states that the font size (in advertising or, more generally, in any information provided to consumers and users) cannot be less than one and a half millimetres and shall have sufficient contrast with the background so that reading may not become difficult. Such information has to be provided at least in Spanish to be binding and effective.

#### RECOGNISABILITY AS ADVERTISING

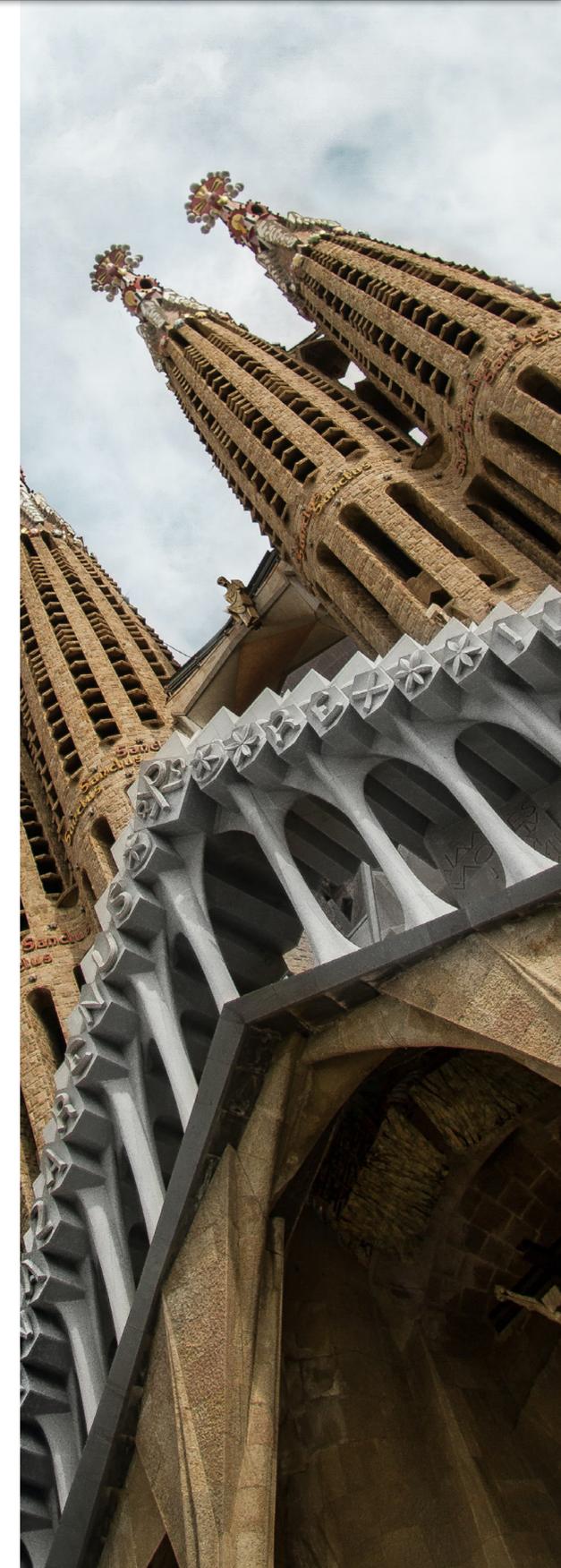
In accordance with Article 7 of the LCD, it is necessary to disclose the commercial purpose of the communication, where it is not immediately obvious from the context.

#### EXPLICIT IDENTIFICATION OF ADVERTISING CONTENT

In accordance with Article 26 of the LCD, it is considered unfair to include the promotion of goods and services, paid for by a professional, without being clearly specified and identifiable in the content itself that it is advertising content.

Furthermore, Autocontrol's advertising code of conduct, states in its Article 13 that:

- Advertising communications shall be identifiable as such, regardless of their form, format, or the media used.
- Advertising communications displayed on news media outlets should be presented in a way which renders them easily recognisable as advertising and, where necessary, labelled as such. The true purpose of advertising must be transparent. For example, communications which promote the sale of a good or service should not masquerade as market research, the results of a consumer survey, user generated content, blog posts, private publications in social networks or independent analysis.



The Decision issued by Autocontrol on 28 November 2019 clarified that a post on Instagram was not sufficiently labelled. Its **location** did not make it possible to see at first sight that it is indeed an advert. It leads the audience to believe that it is an opinion or experience rather than advertising. The warning “Ad”, was placed at the end of the message in a subtle manner, unnoticed to the target audience.

### What labelling requirements do you need to be aware of?

#### GENERAL RULE

the labelling as advertising must be immediately recognisable and displayed in a place identifiable at first sight so that, from the point of view of the general public, there can be no doubt as to the commercial purpose of the post.

According to Autocontrol’s Decision, the use of “#ad” as one of several hashtags under a post was considered insufficient. Considering the lack of specific regulation in Spain, we consider that the following labels could be deemed valid as long as those are displayed in a visible and identifiable place.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Publicidad” <i>(“Advertisement”)</i>	#ad
“Patrocinado por” <i>(“Sponsored by”)</i>	#advertising
“Colaboración pagada” <i>(“Paid collaboration”)</i>	

This finding of Autocontrol has been confirmed by the Spanish courts and is also explicitly reflected in Autocontrol’s new Code on Influencers (effective from January 2021).

### Describe specific laws, regulations or guidance aimed at influencers in Spain

There are no laws or regulations that apply exclusively or specifically to influencers.

Autocontrol, jointly with the Spanish Advertisers Association (“**AEA**”), is currently drafting a “Code of Conduct on the Use of Influencers in Advertising”, with the aim of providing solutions for the identification of advertising.

### What are the consequences for influencers if advertising content is not clearly labelled?

As for now, Autocontrol is the only Spanish market player which has published its position (but remember that Autocontrol’s Decision it is only binding on its members). To date, there is no case law concerning influencer advertising, however, this may be as a result of the fact that in Spain, High Court decisions are not typically published; this is the standard only for decisions issued by the Courts of Appeal or Upper Courts).

However, according to the provisions set forth in the LCD, influencers can face legal proceedings initiated by competitors or consumer associations, as undisclosed or disguised activities may amount to an unfair commercial practice. According to the LCD competitors or consumer associations may seek different types of decisions from the court such as (i) a declaration of disloyalty; (ii) an order to cease and desist; (iii) an order obliging the removal of the effects produced by the unfair conduct; (iv) an order to rectify the misleading, incorrect or false information; (v) an order to compensate the damages caused (by willful misconduct or negligence); and (vi) an order to return the “unfair profits” obtained.



From a Consumer Protection perspective, if a potential issue arises resulting in damage to consumers, regulatory Authorities may impose fines up to EUR601,012.10 (approximately USD 671,117). The specific amount of the fines depends on the circumstances of the case and of the region where the infringement occurs (there are 19 different potential combinations).

### What legal risks apply when cooperating with influencers in Spain?

As this topic is not yet regulated in Spain, no specific provisions dictate the responsibilities of companies cooperating with influencers.

However, according to LGP, the advertiser is the person or legal entity in whose interest the advertising is carried out. Therefore, the company will have general responsibilities applicable to advertisers, and thus may also be liable. Under LCP, it can be held that both the influencer and the sponsor are jointly responsible for any misleading publicity.

### Key contacts





## Sweden

Risk and enforcement level: Robust

# Sweden

## What qualifies as advertising under Swedish law?



A post, video or similar content published by an influencer qualifies as advertising if the content and objective behind it is commercial in nature. For example, if the content relates to a company's business or products and the purpose is to sell these, the post will be considered advertising. Furthermore, there are various kinds of practices that qualifies as advertising and some indicators are:



## What are typical influencer practices in Sweden and in which cases are they considered advertising?

There are various influencer practices which can be classified as advertising.



## Which legal obligations apply?

### IDENTIFICATION OF ADVERTISEMENT

The basic rule is that all advertising must be formulated and presented in such way that makes it clear that it is a matter of marketing. The recipient must also be able to immediately identify that the post or video is an advertisement and contains marketing content.

### CLEAR INDICATION OF THE PARTY RESPONSIBLE FOR THE MARKETING

It must be clear to the recipient who the sender of the message is (the company). This is usually done by providing information about the name of the sender or company details. In some cases, only the trademark or logotype is sufficient, provided that it is well established amongst consumers.

### LABELLING REQUIREMENT

In order to fulfil the obligation to clearly identify posts as advertising, it is necessary to adequately label posts as such. Advertising labels should also be added when influencers market their own products or services.

### SEPARATION OF ADVERTISEMENT AND EDITORIAL CONTENT

If advertising takes place in the context of editorial content, e.g. on a fashion blog, such promotional content needs to be clearly separated from the editorial content (the so-called separation rule).





## What labelling requirements do you need to be aware of?

### GENERAL RULE

The labelling must be so apparent that, from the point of view of an average member of the relevant public, there is no doubt about the commercial purpose of the post.

### PLACEMENT AND DESIGN OF LABELLING

The labelling must be visible at first glance. Thus, if it is necessary to click on certain buttons or to scroll down in order to become aware of further information, the labelling will be considered insufficient. In addition, labels made in a small font, an indistinct colour scheme or otherwise presented in a vague way will also be considered insufficient. The note should therefore be clearly designed and inserted at the beginning of the post.

In relation to video content, labels and/or other information about the advertiser, this must be inserted in both the video (through speech or in writing) and under the video (in the title or the description box). If a video focusses on a certain product throughout, it can even be advisable to use a permanent insertion.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Reklam” <i>(“Advertisement”)</i>	“Samarbete” <i>(“Collaboration”)</i>
“Annon” <i>(“Advertisement”)</i>	“I samarbete med” <i>(“In collaboration with”)</i>
“Reklamsamarbete” <i>(“Collaborative ad”)</i>	
“Annonssamarbete” <i>(“Collaborative ad”)</i>	
“I betalt samarbete” <i>(“In paid collaboration”)</i>	

## Describe specific laws, regulations or guidance aimed at influencers in Sweden

There are no laws or regulations that apply exclusively or specifically to influencers although the Swedish Marketing Act (*Sw. Marknadsföringslagen*) is applicable to advertising made by influencers.

### ADMINISTRATIVE GUIDELINES

The supervisory authority have issued guidelines on social media marketing (*“Vägledning om marknadsföring i sociala medier”*). However, courts are not bound by these guidelines and may deviate from the recommendations mentioned therein.



### What are the consequences for influencers if advertising content is not clearly labelled?

If influencers violate the labelling obligations, they may face legal proceedings due to misleading marketing. A claim can be brought by (i) the Consumer Ombudsman (ii) a trader affected by the marketing in question or (iii) a group of consumers, traders or employees.

#### COURT PROCEEDINGS

An appeal of the Consumer Authority's decision can be made to the Patent and Market Court. Furthermore, in case of a breach of the injunction, the conditional financial penalty may be enforced through the Patent and Market Court by the Consumer Ombudsman. The Patent and Market court will then decide if there has been a breach of the injunction and if the financial penalty shall be enforced. In addition, the influencer may also have to compensate any consumer or other trader for any damage arising from the violation.

In case of a serious violation, and on top of a conditional financial penalty, the Patent and Market Court can impose a market disruption charge which can vary from SEK10,000 (approximately USD1,100) to SEK10 million (approximately USD1,102,000) based on the seriousness of the violation and the breaching party's annual turnover.

#### REGULATORY AUTHORITY

The supervisory authority is the Consumer Authority through the Consumer Ombudsman. The Consumer Authority can send warnings and issue injunctions that prohibits an influencer from using certain marketing and/or orders to provide certain information in their marketing. An injunction issued by the Consumer Authority shall be subject to an imposition of a conditional financial penalty, unless there are particular grounds rendering this unnecessary.

### What legal risks apply when cooperating with influencers in Sweden?

In general, a company would be deemed to have the primary responsibility for the advertisement of their products. However, claims can be brought against either the influencer, the company or both, depending on who has designated or taken an active part in the design of the advertising material or otherwise actively participated in the marketing. Therefore, a company would be liable if it exerted control over the composition of the respective post. In such case, the company would risk facing the legal consequences described above.

Thus, before the start of a campaign, a company should stipulate in its contract with the influencer how posts are to be designed and labelled. Additionally, compliance with these provisions should be monitored throughout the campaign.



## Key contacts



## The Netherlands

Risk and enforcement level: Moderate

# The Netherlands

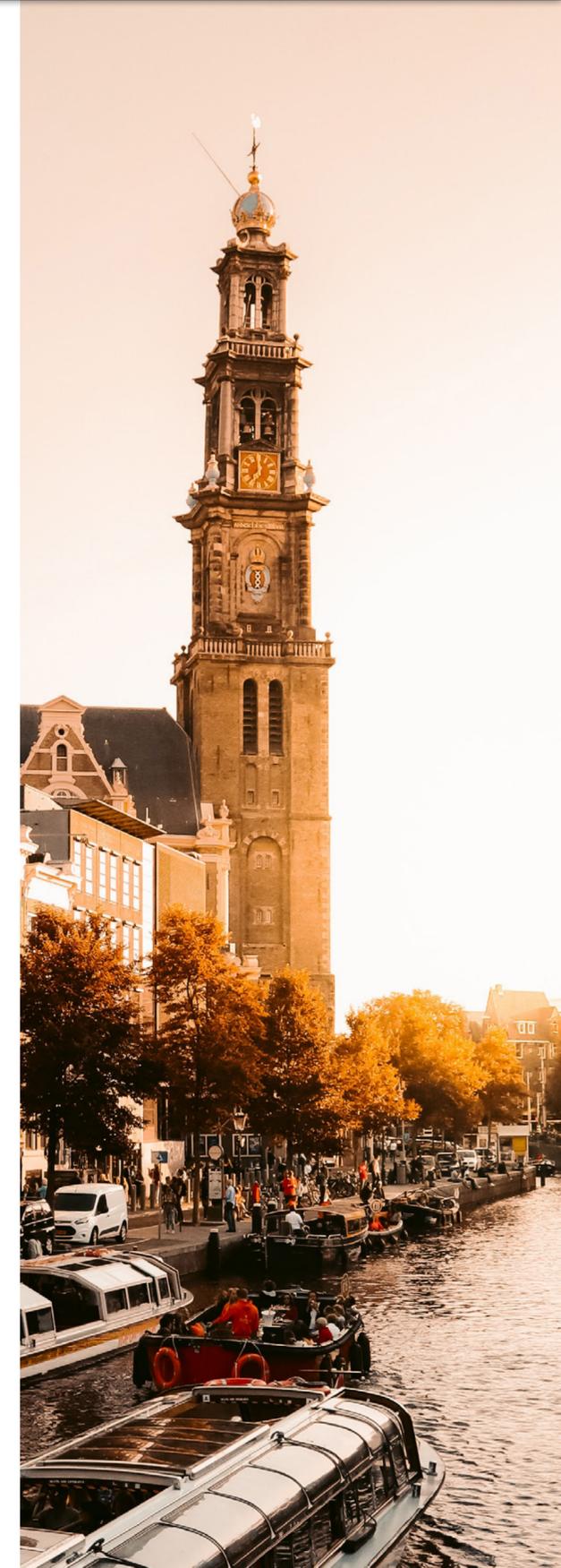
## What qualifies as advertising under Dutch law?

The Dutch Advertising Code defines advertising as “any form of public and/or systematic direct or indirect commendation of goods, services and/or ideas by an advertiser or, either wholly or partly, on behalf of him, with or without the help of a third party”. The solicitation of services is also defined as advertising.

In addition to the general Advertising Code, there is a specific code for influencer marketing: “the Advertising Code Social Media & Influencer Marketing 2019”. This Code applies to specific types of advertising, including the marketing activities of companies aimed at having influencers communicate about a product or brand, whether or not at the request of the company. The influencer must receive a fee or other compensation for this, or must have the possibility of such compensation. The Code also applies to editing of third-party communications via social media for the benefit of the company.

## What are typical influencer practices in The Netherlands and in which cases are they considered advertising?

The definition of advertising is broad and includes different types of influencer practices. Amongst others, it includes:



## Which legal obligations apply?

### THE CONTENT MUST BE RECOGNISABLE AS ADVERTISING

Content must be recognisable as advertising by virtue of its lay-out, presentation, content or otherwise. The recognisability must be clear; the user should preferably not have to click any further to understand that the content is an advertisement. The intended viewer must be considered by the assessment. Especially in the case of advertising aimed at children, their ability to understand must be taken into account.

### THE RELATIONSHIP BETWEEN INFLUENCER AND COMPANY MUST BE DISCLOSED

Specifically for influencer marketing, it is important that the commercial relationship between the influencer and a company is disclosed, so consumers can easily understand that the content of the influencer is advertising. It must be explicitly stated that compensation is received.

### THE CONTENT CANNOT BE MISLEADING

Advertisements are misleading if they entice the average consumer to make a decision on a transaction which they would not have made otherwise. Misleading information can apply to the existence of the product, the most important features of the product (e.g. its design), the price and the quantity characteristics. Misleading advertising can be done by active statements, but also by omitting essential information.

### THE CONTENT CANNOT BE AGGRESSIVE

Advertising is considered aggressive as soon as the consumer does not have a free choice in buying a product or service. Whether or not a consumer has a free choice depends on the advertisement. Furthermore, advertisements containing unnecessary offensive language or content is also considered aggressive.

Comparative advertising is only allowed in certain circumstances: Advertising in which a competitor is mentioned explicitly or implicitly is allowed, but not always desirable. In any case, such advertising cannot be misleading and should not contain insulting or disparaging content towards the competitor.

## What labelling requirements do you need to be aware of?

Disclosure of the commercial relationship between an influencer and a company is required and all content must be clearly recognisable as advertising. See below for some examples provided by the Dutch Advertising Code Committee of how this can be made clear to consumers and users on different platforms.

### ADVERTISING VIA VIDEO POSTS (E.G. YOUTUBE)

- via text in the video and/or in the description of the video that is directly visible, which means without having to click a button such as “show more”, and (if technically possible) visible on all types of devices and platforms on which the video can be viewed; and/or
- via a voice message in the video.

For example: *“This video contains advertising for ...” or “Thank you... for sending the products”.*

### ADVERTISING VIA POSTS (E.G. PHOTOS AND BLOGS)

- via hashtags in or under the photo/message, and/or
- via text in the description below.

For example: *#ad, #adv, #spon, #collab, #partner(ship) or “Collaboration with @ ...”.*



**ADVERTISING VIA PODCASTS**

- via text in the description of the podcast; and/or
- in the podcast itself.

For example: *“This podcast contains advertising for ...”* or *“I got the products which I discuss in this podcast from ...”*.

**ADVERTISING VIA PLATFORMS WHERE CONTENT IS ONLY VISIBLE FOR A LIMITED TIME (E.G. INSTAGRAM STORIES)**

- via hashtags in the content (where a series of messages appears consecutively, at least in the first and last posted content, which is visible during the time the content is available); and/or
- via text in the posted content that is visible during the time the content is available.

For example: *#ad, #adv, #spon, #collab, #partner(ship) and “Collaboration with @ ...”*.

It is not mandatory to use Dutch terms for labelling, it is sufficient to only include English terms.

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
#ad, #adv, #spon, #collab and #partner(ship)	Indirectly visible labels
“This video contains advertising for...”	

**Describe specific laws, regulations or guidance aimed at influencers in The Netherlands**

The Dutch Advertising Code Committee published an updated Advertising Code for Social Media & Influencer Marketing in 2019, which is specifically aimed at influencers.

In addition, there is the so-called “YouTube Social Code” which was implemented in 2017. However, this Code is voluntary and not legally enforceable. Furthermore, the Code only applies to advertising on YouTube.

Finally, the Dutch Media Act regulates advertising and marketing in the media. Social media are not yet covered by this law. However, in 2018 the revised Audiovisual Media Services Directive was adopted. This new directive contains provisions on video platform services and will (soon) be incorporated into the Dutch Media Act. After that, influencers on video platforms will also fall under the Dutch Media Act.

**What are the consequences for influencers if advertising content is not clearly labelled?**

When advertising is not in line with the Dutch Advertising Code or specifically the Advertising Code on Social Media & Influencer Marketing, a complaint can be filed with the Advertising Code Committee. Anyone, including a competitor, can file such a complaint and in principle every complaint results in a ruling. However, the only possible “sanction” is a recommendation from the Committee, which in essence is an opinion that the claim is misleading.

When the Dutch Media Act is amended, the supervisory body (in Dutch: het Commissariaat voor de Media) will be able to enforce the new provisions that are applicable for influencers on video platform services and hand out fines.



## What legal risks apply when cooperating with influencers in The Netherlands?

As mentioned above, the Advertising Code Committee may rule on complaints about advertisement. When the ruling results in a recommendation, the Committee will ask the company involved whether it will comply with the ruling. If not, the company will be listed as non-compliant on the website of the Committee. The only exception to the non-binding nature of the recommendations concerns radio and TV advertising. However, this will not be the case for influencer marketing on social media.

Furthermore, companies are obliged to inform influencers about the content of the Advertising Code Social Media & Influencer Marketing. Especially when influencers work on their instructions, companies must oblige influencers to comply with the relevant laws and regulations, including the above-mentioned Codes. However, a company cannot excuse themselves from these obligations on the mere fact that the influencer does not work on his instructions.

Advertising in line with the Codes is a shared responsibility. It is therefore recommended for companies to sign a contract with influencers on how content is to be posted on social media.

## Key contacts





## United Arab Emirates (UAE)

Risk and enforcement level: Robust

## United Arab Emirates (UAE)

### What qualifies as advertising under the laws of the UAE?

The UAE National Media Council (“**NMC**”) issued a Cabinet Resolution Concerning Media Content in 2017 (No. 23 of 2017), and since there has been an increased focus upon the regulation of digital content within the UAE, including with respect to digital advertisements.

Under recently passed legislation<sup>1</sup> the Ministry of Culture and Youth (“**MCY**”) has formally replaced the NMC as the body responsible for proposing “*legislation, bylaws, standards and principles required for regulating and licensing the media tools and activities including, online media and publication*” and “*supervis[ing] their implementation*”. Practically speaking, at the time of publication, the NMC continues to operate under the supervision of the newly created Media Regulatory Office at the MCY, with the NMC’s physical offices having been moved to the MCY building. Any licences previously issued by the NMC (including the licence referred to at response (5) below) are now issued by the MCY, with the portal on the NMC website redirected to a portal on the MCY website. An “**Advertisement**” is defined under the NMC Advertising Guide (issued in June 2018) (“**Advertising Guide**”) as “*any means intended to inform all people about a certain commodity or purpose, whether by presentation or publication in writing, drawing, image, symbol, sound or other means of expression*”.

An “**Electronic Advertisement**” is defined under the NMC’s Electronic Media Regulation (from which the obligations under the Advertising Guide appear to flow) as “*the mode used to present and promote the ideas, commodities and services through the electronic means or telecommunication applications and the paid or unpaid fees.*” We consider that this definition is broad enough to cover advertisements or posts on social media (and this interpretation is reflected by inclusion of specific obligations regarding social media posts within the Advertising Guide, as described more fully within section 4, below).

Under the Advertising Guide an “**Advertiser**” is any person, company, institution or entity that “*publishes paid or for any financial consideration or otherwise on websites and social media*”. This definition is broad enough to cover, and therefore impose accountability upon:

- the platforms which host such Advertisements (such as Instagram or Facebook);
- the brands who commission influencers to publish paid-for content on their social media accounts; and
- the influencers themselves.

<sup>1</sup> (Federal Law by Decree No. (16) of 2020 Amending Certain Provisions of Federal Law No. (1) of 1972 on the Competencies of the Ministries and the Powers of the Ministers)



In addition, it is stated under the Advertising Guide that a *“disclosure must be made clearly in case there is any material or in-kind payment paid by the issuing authority for publications or articles published on social media, websites or blogs.”* It is our understanding that a social media post made by an influencer would constitute a *“publication”* for the purposes of the Advertising Guide.

Advertisers (defined as *“Every juristic person who, by itself or through others, advertises the Good, Service or information by various means of advertising or announcement, whether the Advertiser is the Supplier himself or a person authorised to do so”*) are now also required to comply with the recently issued Federal Law No. 15/2020 On Consumer Protection (**“Consumer Protection Law”**). The definition of *“Advertiser”* is potentially broad enough to capture influencers marketing goods or services via social media channels. The Consumer Protection Law applies to *“all Goods and Services within the State, including free zones, and operations related thereto”*. The extent to which the term *“within the state”* would apply to *“Advertisers”* operating online from outside of the UAE, targeting the UAE market, is unclear.

### What are typical influencer practices in the UAE and in which cases are they considered advertising?

The following common influencer practices would likely be considered “Advertising” and therefore fall within the scope of the Advertising Guide and, potentially the Consumer Protection Law:





### Which legal obligations apply?

The NMC Advertising Guide provides, amongst other things, that Advertisements **must**:

- show respect for the UAE government, its emblems and political institutions, along with the cultural heritage of the UAE;
- show respect for the UAE government, its emblems and political institutions, along with the cultural heritage of the UAE;
- observe the conditions and terms concerning the use of the flag, emblem and national anthem of the UAE and respect its national identity;
- avoid harming national unity and social cohesion;
- avoid the inclusion of images or words that could violate public morality, a broad concept which is typically present within the laws of the UAE and which would typically cover anything which violates the societal norms around “modesty” across the GCC region. Any advertising for “witchcraft, sorcery and astrology” is also prohibited;
- respect the intellectual property rights of third parties;
- comply with codes of conduct and standards of honesty, including compliance with the rules governing business, especially those with regards to consumer protection and fair competition controls, prohibition of commercial fraud and illegal monopoly;
- comply with the rules of health advertisements contained in Cabinet Resolution No. 4 of 2007 (as amended);
- be approved by the relevant authorities for advertisements relating to health, medicine, energy drinks, nurseries, education, promotions and special offers, real estate and Hajj and Umrah campaigns;
- be real (which we understand to mean “accurate”) and unexaggerated;

- be clearly identified as Advertisements and appear distinct and independent from other editorial and information materials. Clear boundaries must separate Advertisements from any other material.

In addition, Advertisements must **not**:

- “offend God and Islamic beliefs” and must show respect for other religions;
- be vague, ambiguous or unclear;
- spread rumours or misleading, false, deceptive or malicious content, including any content which incites hatred or violence;
- include content which is intended to exaggerate, claim exclusiveness or “despise competitors” (which we interpret to be equivalent to “disparage”);
- disseminate information that harms or abuses children and women, or any other social groups;
- promote alcoholic beverages or narcotics in any form, whether directly or indirectly;
- promote tobacco or smoking of any kind;
- include any false, fake or unrightfully formulated mark, sign or image. We understand this to be a restriction upon using another party’s brand designation (such as its trade mark) without permission;
- create any confusion by any means with any other brand names, products or activities;
- advertise anything that involves a crime or violates the principles and standards of the media content and the applicable age restriction; and
- advertise anything which may harm the public interest directly or indirectly.



As is clear from the broad nature of the requirements listed above, the NMC can exercise a great deal of discretion in deciding whether or not an Advertisement is acceptable. Caution should therefore be exercised with regards to the posting of any Advertisement by an influencer on a brand's behalf in order to minimise the risk of falling foul of such restrictions (and the terms of any agreements with influencers should seek to apportion and/or mitigate this risk).

The Consumer Protection Law imposes a number of obligations on "Advertisers" (as defined at section 1 above). Those include:

- A prohibition against "describing the Good or Service in a manner that contains incorrect data and from making any Misleading Advertisement in connection therewith". "Misleading Advertisement" is defined as "[a]dvertising a Good or Service based on deceptive information or omitting essential or basic information related to the Good or Service, which affects the Consumer and leads him to enter into a contract that he would not have entered into without that information. Announcing fake or unreal prizes or Discounts shall be considered misleading advertising". As the broad terminology under the Consumer Protection Law leaves the possibility for businesses who use influencers to be held directly responsible for advertisements relating to their products or services (as "Suppliers" of those), they should ensure that any influencers are aware of their obligations around the publication of misleading advertisements and make contractual commitments to comply with those.
- A general requirement to use Arabic in "[t]he data, advertisements, and contracts related to the Consumer", although other languages may be used in addition to Arabic. How strictly this will be applied in the context of influencer led advertisements is yet to be tested, so far as we are aware. With a largely expatriate population (and with English being the most commonly understood shared language) many advertisements on social media targeting the UAE market continue to be in English only.

## What labelling requirements do you need to be aware of?

Under the Advertising Guide, in the case of any content that contains, "directly or indirectly, the promotion, advertising or endorsement of a particular product or service", clear language must be used that leaves no ambiguity that the advertisement is an Advertisement and is being paid for.

### IT IS NECESSARY TO

- use a clear and legible font;
- put the disclosure in a conspicuous place for readers;
- make the disclosure at the beginning of the content or description;
- if the Advertisement is in the form of video, the disclosure must be stated verbally through the video (in addition to making it in writing within description of the video); and
- in case the Advertisement is made by using social media "stories" (whether still images or videos) that are published on a social media account, the disclosure should be published within the first or second still image (in the event that the Advertisement is made up of multiple still story posts) or, in the case of the video story post, at the beginning of the video.

### IT IS NOT ACCEPTABLE TO

- use hashtag "#ad" or "#paid\_ad" phrase clearly accompanied with many other hash tags in such a way that they are hard to see;
- use the words "thank you for ... the advertiser" or "in cooperation with ..." are not sufficient to disclose whether the advertisement is paid for or not;
- use very small font that is unreadable or that has a colour that is similar to the background colour, making it hard to read; or
- place the disclosure in a place that requires users to move to another page or content (e.g., the disclosure may not be placed under a "Read More" link).



It is not mandatory to use the Arabic language when labelling, it is sufficient to only include English terms.

ACCEPTABLE LABELS	UNACCEPTABLE LABELS
#paid_ad within the post description without any other hashtags	#paid_ad with numerous other hashtags within the post description, thereby obscuring the message
Stating at the beginning of an Instagram video that “the following video was sponsored by [brand]”	Thank you to @[brand] for my new product
Putting a clear and legible statement within a Instagram picture which states that the post was “paid for by [brand]”	Use of illegible fonts

### Describe specific laws, regulations or guidance aimed at influencers in the UAE

In a bid to regulate the social media marketing industry, since 1 June 2018 the UAE has made licences for commercialised influencers in the UAE mandatory. Whilst the NMC Advertising Guide and the Electronic Media Regulations each identify this requirement as applicable to “UAE Citizens”, it is our understanding that the requirement also applies to **residents** of the UAE. Approximately 1,700 licences had been issued in the UAE as of July 2019. Those licences are priced at AED15,000 (approximately USD4,000).

Applicants for such a licence **must**:

- be at least 25 years old (although exceptions may be granted by NMC, depending upon the specific nature of the business activities which the influencer is promoting);
- be of good reputation and decent conduct;
- not have been convicted of any crime “*involving a breach of honour or public trust, unless rehabilitation has occurred and the individual has been issued a pardon by the appropriate authorities*”;
- hold a high academic qualification from a college, institute or an accredited university (although an exemption for this requirement may be granted by the NMC);
- not have “*any licence that has already been suspended or cancelled*” or any “*company that has been shut down or closed*”, or “*already been prevented from carrying out a certain media activity*” unless the related reasons for issuance of the decision or judgment have been remedied or removed as the case may be;
- not owe any financial dues to the NMC at the date of application; and
- abide by the instructions and regulations set for carrying out media activities.



### What are the consequences for influencers if advertising content is not clearly labelled?

A fine of AED5,000 (approximately USD1,300) is payable in the event that paid-for content (therefore constituting an Advertisement) is not labelled in accordance with the requirements set out under section 4 above.

That fine must be paid within five working days from the date of the violation, or from the date of issuance of a decision ordering the payment of such a fine. It is however not apparent under what circumstances an individual issued with such a fine would ever wish to pay a fine for a violation without there being a decision of the NMC being made against them that such a violation had occurred.

Where the fine is not paid within five working days, a fine of AED100 (approximately USD27) is charged for each day, up to a maximum of AED5,000 (approximately USD1,300).

In addition, the amount of the fine may be doubled when the same violation is repeated within one year from the date of committing the previous offence, provided that it shall not exceed AED20,000 (approximately USD5,000) in total.

In addition, the NMC may order the removal of the infringing social media post until it is rectified and a compliant disclosure is included.

A failure to comply with the Consumer Protection Law carries serious consequences, with custodial sentences of up to two years and potential fines of up to AED2million (approximately USD545,000).

### What legal risks apply when cooperating with influencers in the UAE?

As well as the Advertising Guide and the potential for liability under that guide (as described under section 6 above), there are a patchwork of other laws and regulations within the UAE which may be used to place liability upon a brand which instructs an influencer to post content on social media, as well as upon the influencer herself/himself. Examples include:





In addition, it is possible that a third-party intellectual property claim may be brought against the brand in the event that an influencer making a post on a social media site which includes content which was not original and which he or she did not have a licence to include.

Aside from the legal risks, there is of course the reputational risk which a brand may suffer in the event that an individual with whom it has aligned itself does something which is not in line with its own values, or those of the general public at the time at which a post is made.

In light of the above, we recommend that any brand which is commissioning an influencer to post any content on its behalf has in place a written agreement before proceeding with the partnership. As well as clearly defining the commercial position and the specific promotional obligations which apply to the influencer, such an agreement it should also contain provisions which:

- give the brand the right to review content before it is posted to review it from a legal and compliance standpoint;
- give the brand the right to instruct the influencer to immediately remove any content in the event that there is an infringement or risk of reputational harm;

- seek a commitment from influencer that any content will be posted in compliance with all applicable laws and regulations. A particularly prudent advertiser may wish to extract the requirements cited at section 3 above, as well as those cited within section 4, to ensure that the influencer is absolutely clear on his or her obligations;
- seek a commitment from influencer that all content will be original and will not infringe third-party intellectual property rights; and
- give the brand the right to terminate, and possibly even impose some sort of financial penalty, in the event that the influencer is not complying with the provisions of the contract or any applicable laws.

Brands may also look to introduce region specific influencer guidelines which they require their influencers to sign up to, as well as conducting spot checks on the content being posted to ensure that the influencers are complying with the relevant requirements.



## Key contacts



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## United Kingdom (UK)

Risk and enforcement level: Robust

# United Kingdom (UK)

## What qualifies as advertising under English law?

The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (“**CAP Code**”) sets out the rules for non-broadcast advertisements in the UK. The Advertising Standards Authority (“**ASA**”), which is the UK’s advertising regulator, applies the rules set out in the CAP Code to marketing communications that fall within its scope. There are three key types of online content that fall within scope and which will qualify as “advertising” under the CAP Code:

- a. **“Paid-for” ad space online** – This means any type of online space that is normally sold for the placement of ads, including banner ads, pop-ups, pre-roll videos, sponsored search results and “promoted” posts on social media platforms. Where an advertiser has “donated” ad space for free, it will still be considered to be “paid-for” if it is otherwise normally sold as ad space.
- b. **“Directly connected”** – This means any online content that is “directly connected” to the sale of something on an individual/company’s own websites or other non-paid-for space online under that individual/company’s control (e.g. social media) where that individual/company has a direct commercial interest in the supply or sale of that thing (which includes “goods, services, opportunities and gifts”). This definition also applies to “affiliate” ads (see Section 2).
- c. **“Advertorials”** – This means any feature, announcement or promotion, the content of which is controlled by the marketer and not the publisher, and which is disseminated in exchange for a payment or other reciprocal arrangement (i.e. where there is payment + control – see below).

So when a brand gives an influencer a “payment” and also has editorial control over the content, the content is deemed to be advertising/a marketing communication, and the CAP Code will apply.

The extent to which content is deemed to be advertising and regulated by the ASA therefore depends on whether there is “payment” and “editorial control”. These are defined as follows:

- a. **Payment** – This includes any form of monetary payment, free loan of a product/service, any incentive and/or commission or where a product/service has been given free. It does not matter whether the product/service was requested by the influencer/ marketer, or voluntarily sent by the brand (i.e. as a “freebie”).
- b. **Editorial Control** – The content is controlled by the brand. Whether a brand has “control” over the content will usually depend on the agreement in place between the brand and marketer/ influencer. The general rule is that any limitation on a marketer/ influencer’s ability to create and post content is likely to indicate some level of “control” by the brand. For example, the brand may:
  - tell the marketer/influencer what to say (e.g. include particular words, phrases, themes or key messages, or specified hashtags);
  - tell the marketer/influencer what to include in visual content (e.g. certain products, specific actions);
  - specify the type of content the marketer/influencer has to produce (e.g. an “unboxing” video); and
  - specify the number of posts, or the date or time that the content should be posted.



The brand's ability to change or withhold marketer/influencer content is also likely to indicate control. For example, the brand may:

- reserve the right to check or approve content before it is posted; and/ or
- request changes to content, which marketer/influencer must make before it is posted.

The Competition and Markets Authority ("**CMA**"), which is the UK's competition and consumer authority, has a broader jurisdiction than the ASA and a wider range of "content" falls within its remit. Whereas the CAP Code (and therefore the ASA's remit) is limited to advertising/marketing communications, the CMA's remit extends to commercial practices more generally, so it does not distinguish between an advert (where the brand controls the outcome) and paid-for editorial coverage (where the influencer has taken payment but created the content independently, e.g. in a sponsorship context). As such, some content which is not deemed to be advertising within the scope of the CAP Code may nonetheless be subject to regulation under UK consumer protection legislation as enforced by the CMA ("**Consumer Protection Laws**"), including labelling requirements for paid content (see Sections 3 and 4).

### What are typical influencer practices in the UK and in which cases are they considered advertising?

There is no threshold (in terms of numbers of followers or occupation) for a social media user to be considered an "influencer". The ASA defines an "influencer" as anyone who has been paid by a brand to advertise a product on their own social media as a result of that individual's social media influence. The CMA does not make any distinction, as the Consumer Protection Laws will apply to any commercial practice that is misleading to consumers. It requires anyone endorsing a product or service on social media to disclose clearly and prominently when they have received any payment (see Section 1 – "What qualifies as advertising").

With this in mind, the following "influencer" practices may be classified as advertising:





## Which legal obligations apply?

Both the ASA and CMA focus on ensuring that the relevant content is open, up-front and honest with audiences. There are many specific obligations under the CAP Code which apply to all content which is deemed to be “advertising”. The following are key obligations which are particularly relevant in the context of influencer marketing:

### RECOGNITION OF MARKETING COMMUNICATIONS

The CAP Code states that marketing communications must be obviously identifiable as such (rule 2.1). This means that it should be obvious to a consumer viewing the content that they are looking at an ad.

The CMA also requires it to be obvious to a consumer that the content is promotional. The use of paid-for editorial content to promote a product is prohibited where the promoter fails to make clear to the consumer that it is a paid-for promotion.

### DISCLOSURE OBLIGATION

The CAP Code states that marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession; and marketing communications must make clear their commercial intent, if that is not obvious from the context (rule 2.3).



Similar obligations apply in practice under the Consumer Protection Laws, which require anyone endorsing a product or service to disclose clearly and prominently that they have received a “payment” and not to give the impression that the individual has personally purchased the product or service. The following are also considered to be prohibited practices under Consumer Protection Laws:

- falsely claiming or giving the impression that an individual is acting outside of their business purposes or falsely representing themselves as a consumer;
- failing to identify a commercial intent behind a social media post; and
- omitting or hiding ‘material’ information (e.g. that an individual is an ambassador for a brand whose product the individual has posted about).

If only some of the links or content relate to the promoted product, it must be made clear which parts of the content are an ad.

#### **LABELLING REQUIREMENT**

Marketers and publishers must make clear that advertorials are marketing communications (CAP rule 2.4). If it is not directly apparent from the circumstances that an ad is an ad, its commercial nature must be made clear by labelling it as advertising.

The CMA and ASA have jointly published guidance on labelling requirements (see Section 4 “What are the labelling requirements”).

#### **REQUIREMENT NOT TO MISLEAD CONSUMERS**

Any content that qualifies as advertising (see Section 1 – “What qualifies as advertising”) will be within the remit of the ASA and must comply with the CAP Code in its entirety. It should not therefore materially mislead consumers.

Similarly, the CMA is concerned with the protection of consumers, and any ads that comply with the above requirements (a) to (c) but are otherwise misleading will be in breach of the Consumer Protection Laws in respect of which the CMA might take action.

#### **What labelling requirements do you need to be aware of?**

##### **GENERAL RULE**

All commercial relationships must be disclosed. This means that consumers must see and immediately understand the disclosure before they start to view or read any content. Usually, this will be done by way of labels, and the CMA and ASA have issued joint guidance in respect of such labels.

However, both the ASA and CMA make clear that there cannot be a definitive list of labels or a set way of labelling endorsements, due to the changing nature of platforms and influencer marketing. As such, the guidance is to review content from a consumer point of view before posting, to determine whether consumers will understand that the influencer has received “payment” (even if some time before), and if the post discloses the commercial relationship in a way that is clear, prominent and upfront.



### PLACEMENT OF LABELS

Labels need to make it obvious that content is advertising/promotional. As set out above, the ASA and CMA have issued guidance stating that labels (or other identifier wording) must be:

- a. Upfront** – The label should be visible before consumers click on anything or otherwise engage with, or watch, the content. Where the content is in image with a caption, the label should be at the beginning of that caption.
- b. Prominent** – The label should be easily noticed by the consumer. For example, burying the label in a list of hashtags, putting it in a colour that contrasts poorly with the background or placing it “under the fold” (requiring consumers to click “See More” before reading the label) will not be sufficient. The ASA recommends as best practice that influencers use visually striking features (such as use of colour, font and shape) that make it distinctive from other content.
- c. Appropriate for the channel** – The placement of labels should conform with requirements as to prominence and visibility, notwithstanding any limitations or technical specifications of the platform that is used by the influencer (e.g. character limits, “below the fold” cut-offs and limitations on non-alphanumeric characters) (see below).
- d. Suitable for all the different types of devices on which content might be viewed** – The label must be clear on mobile devices and in apps, and with different viewing settings. For example, if a video includes a label in accompanying text which is visible on a desktop device, but that accompanying text is not visible when viewing the video on a mobile device, it will not be considered sufficient to comply with the labelling requirement.
- e. Easily understood by the audience** – The influencer should use clear and simple language that consumers are likely to be familiar with, and avoid abbreviations or “industry jargon” that are unlikely to be understood by the consumer.

The ASA suggests the following as best practice:

- a. Logos** – influencers include brand logos to support greater recognition of ads.
- b. Consistency** – standardisation within the industry to help consumers identify ads and distinguish from other influencer/social media content.

An influencer may use the “paid partnership” tool on Instagram and Facebook, or equivalents on other platforms. However, use of platform labelling alone may not be considered enough to enable consumers to identify an advertisement. As above, an influencer should always consider whether the tools and labels used in respect of their content is sufficient to meet the general requirement that the ad is clearly understandable to consumers as such.

Finally, content must be identifiable as an ad without consumers requiring prior knowledge of the influencer’s existing or previous commercial relationships. For example, it will not be considered sufficient to include a label in an influencer’s “bio” on social media platforms (e.g. that an influencer is an ambassador for a particular brand), as “bios” are not always visible alongside posts; posts must make clear where the content is an ad. Similarly, an influencer should not rely on disclosure or labelling in previous posts to make clear to a consumer that content is an ad, as posts can appear in search results and viewed in isolation.



**EXAMPLES OF LABELS**

The assessment of whether a specific label is sufficient in part depends on the nature of the relationship between the brand and influencer, and more specifically whether the brand has “editorial control”:



ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
"Ad"	"Affiliate/aff"
"Advert"	"Spon/sp"
"Advertising"	#client
"Advertisement"	#collab
"Advertisement Feature"	#BrandAmbassador
	Adding #ad directly after the name of the brand or business (e.g. #[brand] ad)
	Any other abbreviation or words that consumers are unlikely to be familiar with

There are some labels that have to be deemed “risky”, such as “Supported by”/“Funded by”, “In association with”, “Thanks to [brand] for making this possible”, “@ [brand],” “Gifted” or “Sponsorship”/“Sponsored”. Those labels may in some limited circumstances be sufficient (depending on the commercial relationship as set out above and the context of the post which may include other labels or identifier wording) but should generally be avoided by influencers and brands in favour of the clearer labels “Ad” and “Advert” etc.

Note that all of the above labels can be used with or without a #, but that it may be necessary to highlight the label in some other way if not using a hashtag, to ensure that it is noticeable to a consumer (e.g. by putting the label in brackets or adding an asterisk either side).

As above, it is not feasible to provide definitive guidance for all possible labels or disclosures. However, the ASA and CMA have issued guidance in which they list labels which are *likely* to be deemed acceptable or unacceptable:



### USE OF LABELS ON SPECIFIC PLATFORMS

The placement of labels should confirm with the above requirements notwithstanding any limitations or technical specifications of the platform that is used by the influencer (e.g. character limits, “below the fold” cut-offs and limitations on non-alphanumeric characters). The ASA has commented on the use of labels for the following platforms:



The labels should not be different for these platforms or for specific types of content (e.g. videos), but should follow the same guidance above. For example, a video cannot use the label “thanks to [brand],” and should generally include “Ad” (or equivalent above) in the content.

### USE OF LABELS AND DISCLOSURE OBLIGATION WHERE MARKETING IS TARGETED AT CHILDREN

Where an influencer’s content directly targets children (under 12), particular care must be taken to make clear that the content is an ad. The ASA has provided the following recommendations:

- a. Prominence** – the label should be large and colourful enough to stand out;
- b. Timing** – the label should appear before (if possible) or as the ad is activated; and
- c. Identity of marketer** – this must be made clear in the disclosure.



## Describe specific laws, regulations or guidance aimed at influencers in the UK

The ASA and CMA have issued joint guidance targeted at influencers (*"Influencers' guide to making clear that ads are ads"*).

The ASA and CMA have also each independently published guidance for influencers, which is available on their respective websites and blogs. This guidance covers the above obligations, as well as issues around online reviews and endorsements.

Industry bodies have also provided guidance relevant to influencer marketing. For example:

- The International Consumer Protection Enforcement Network (ICPEN) has produced guidelines on online reviews and endorsements (**"ICPEN Guidelines for Digital Influencers"**);
- The Internet Advertising Bureau (IAB) UK, which is the UK trade association for digital advertising, has created good practice guidelines (**"Content & Native Disclosure Good Practice"**); and
- The Incorporated Society of British Advertisers (ISBA), which is an organizing representing major brands, has created a set of resources that influencers and brands can use (**"Influencer Marketing: Management Resources"**).

## What are the consequences for influencers if advertising content is not clearly labelled?

### SCOPE OF LIABILITY FOR BRANDS

The ASA and CMA will hold both the influencer and the advertiser jointly responsible for any breaches.

### SANCTIONS APPLIED BY REGULATORY AUTHORITIES

#### Enforcement by ASA and CAP

The ASA can take action of its own volition, or take action in response to a complaint that it receives in respect of an ad. The ASA accepts complaints from both the public (i.e. consumers) and industry (i.e. including competitors – though a competitor will have to be named unlike a consumer complainant who can remain anonymous).

If a complaint is upheld by the ASA following further investigation, the ASA can require the withdrawal or amendment of the offending ad. The ASA can name the influencer and the brand and detail the non-compliance in published rulings on the ASA website, which may result in adverse publicity for the influencer. The ASA also has other sanctions at its disposal that may be applied in particular cases (including publicising their non-compliance through the ASA's own targeted paid search ads, and working directly with the platforms and the CMA on further enforcement action), but cannot fine parties.

The ASA has also launched a non-compliance webpage that will name influencers who have broken ASA rules ([asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html](https://asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html)). The names of influencers who have broken ASA rules will be on the webpage for three months and the influencers will be subject to a period of enhanced monitoring spot checks, and may then be the subject of further enforcement action should they continue to breach the rules.



### Enforcement by the CMA

The CMA will investigate and may take legal action to stop breaches of the Consumer Protection Laws. For example, the enforcement action taken by the CMA in 2019 resulted in warning letters being sent to a number of influencers and the CMA also secured formal commitments from a number of high profile influencers to change the way in which posts are labelled.

Ultimately, the CMA and Trading Standards have the ability to bring criminal prosecutions against advertisers and/or influencers under the Consumer Protection Laws, in appropriate circumstances. With regard to influencer marketing, the CMA has to date generally taken the approach of education and guidance rather than formal enforcement.

### What legal risks apply when cooperating with influencers in the UK?

#### SCOPE OF LIABILITY FOR BRANDS

Brands should be aware that they can therefore be held jointly responsible for breaching the CAP Code and/ or Consumer Protection Laws as a result of the acts of their influencers (even without the brand having any specific participation in or knowledge of the content resulting in the breach).

Brands should also be aware that, as well as being liable for influencer posts not being properly identified as advertising:

- Any content that qualifies as advertising will be within the broader remit of the ASA, and must comply with the CAP Code in its entirety. The Code includes obligations not to materially mislead consumers or cause widespread offence or harm; there are also sector-specific rules for particular product types, e.g. alcohol, gambling products, foods. The brand may face regulatory action where the relevant posts do not comply with any rules in the CAP Code.
- They could potentially also be held liable for other infringements by the influencer, e.g. for breach of third party intellectual property rights.

For these reasons, careful consideration should be given not just to the contractual terms with influencers, but also to influencer selection, initial and ongoing training/guidance given to influencers, and monitoring (or review) and policing/correction of influencer content.

Brands (and influencers) should also be mindful of the fact that influencer marketing has been and continues to be a high priority for investigation and enforcement by the UK advertising regulators, such that breaches of the advertising rules around influencers are more likely to be formally investigated than many other rules breaches.



## Key contacts





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## United States (US)

Risk and enforcement level: Robust



## United States (US)

### What qualifies as advertising under the laws of the United States?

“Advertising” is not clearly defined on a nationwide basis in the United States. The Federal Trade Commission has authority to enforce false advertising laws against “unfair or deceptive acts or practices in or affecting commerce”. The federal Lanham Act provides remedies for use “in commerce” of false or misleading descriptions or fact or representations which, (A) are likely to cause confusion, or cause mistake or to deceive as to affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics qualities or geographic origin of his or her or another person’s goods, services or commercial activities. There are similar state laws.

The Federal Trade Commission views an endorsement as any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, finding, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

### What are typical influencer practices in the United States and in which cases are they considered advertising?

There are various influencer practices which can be classified as advertising.





### Which legal obligations apply?

The influencer must make it obvious when they have a relationship with the brand they are endorsing, such as a personal, family, or employment relationship, or a financial relationship such as the brand paying the influencer money or providing free or discounted products or services. The influencer’s statements must be truthful and not misleading and based on personal experience. The influencer cannot make claims about the product or service that would require proof that the brand does not have (for example, that a product can treat a health condition). An influencer’s statements about their experience with a product should reflect typical results of use of such product or they must disclose those typical results in the ad. If it is not otherwise clear from context that content is a commercial advertisement, it must be made clear that it is an ad through clear and conspicuous disclosures.

### What labelling requirements do you need to be aware of?

Pursuant to guidance from the Federal Trade Commission:

ACCEPTABLE LABEL EXAMPLES	UNACCEPTABLE LABELS
“Thanks to Acme brand for the free product”	“Thanks” (standalone term)
“Ad”	“Collab”
“Sponsored”	“Spon”
“Acme Partner” or “Acme Ambassador” (on space limited platforms like Twitter)	“Ambassador” (standalone term)

Disclosures must be “clear and conspicuous” and care must be taken when determining their placement and appearance. Pursuant to the Federal Trade Commission’s November 2019 guidance, “[Disclosures 101 for Social Media Influencers](#)”, the disclosures should be hard to miss, placed with the endorsement message itself, and not mixed within a group of hashtags or links. When an endorsement is a picture, the disclosure should be superimposed on the picture and appear there for long enough for a viewer to notice and read. When a disclosure is in a video, it should be in the video (not just in the description uploaded with the video), and is more likely to be noticed if it appears in both audio and video format. Video and streaming disclosures may need to be placed periodically for viewers who only see part of the video or stream.



### Describe specific laws, regulations or guidance aimed at influencers in the United States

The Federal Trade Commission conducts investigations and brings cases involving endorsements made on behalf of an advertiser under Section 5 of the FTC Act, which generally prohibits deceptive advertising. In September 2009, the Federal Trade Commission updated its “Endorsement Guides” to cover scenarios specific to influencers, and how Section 5 might apply to those activities. The Federal Trade Commission has since issued various guidance documents directed to businesses and influencers, for example, the 2013 “.com Disclosures: How to Make Effective Disclosures in Digital Advertising” and the 2019 “Disclosures 101 for Social Media Influencers”. These guides provide insight into what the FTC thinks about various marketing activities involving endorsements.

### What are the consequences for influencers if advertising content is not clearly labelled?

The Federal Trade Commission, states’ Attorneys General or other public officials may undertake an investigation, send a demand letter, and/or file a lawsuit seeking injunctive relief against misleading ads and/or monetary compensation on behalf of the public.

Business competitors may send a demand letter, file a lawsuit seeking injunctive relief against misleading ads and/or monetary compensation under federal and state unfair competition laws.

Consumers may bring a private action (individual or class action) seeking injunctive relief against misleading ads and monetary compensation under federal and state false advertising and consumer protection laws.

Both competitors and consumers may file a claim with the National Advertising Division (“NAD”) of the Better Business Bureau, which initiates an industry self-regulatory dispute proceeding, where non-compliance with a determination by the NAD may result in a referral of the case to the Federal Trade Commission.

### What legal risks apply when cooperating with influencers in the United States?

The liability described in the answer to question 6 regarding influencers generally also applies here. Companies may be held liable for the acts of their agencies and the influencers advertising their products. Advertising agencies and other intermediaries may also be liable for an influencer’s actions or statements. In addition, companies may be liable for other violations of law by the influencer, e.g., infringement of third party copyrights or trademarks. Therefore, when engaging with influencers, it is very important for companies to set up controls (through contracts, policies, and training), to monitor influencer activities, and to address any issues if and as they arise.



## Key contacts

 Click on the country or the 3-letter country abbreviation on the right to return to country section.

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# Key contacts











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