

Hidden advertising: state of play for influencers



Ms. Ine Letten

Associate

ine.letten@hoyngrokh.com

Online influencers have become an increasingly popular marketing tool. Especially micro-influencers, i.e. influencers with between 5,000 and 100,000 followers focusing on one or more specific topics, are known to have an impact on their loyal followers. However, such loyalty may be misguided if the influencer is being paid to endorse a certain product. To protect consumers, measures are being taken in Belgium, as well as other countries.

In Belgium, Book VI of the Code of Economic Law ('CEL') puts forward several rules regarding advertising, including a prohibition on the use of editorial content in the media [social media included] to promote a product when a company has paid for the promotion without this being made clear in the content. This is in line with the Unfair Commercial Practices Directive¹ of the European Union. Influencers are however only subject to Book VI of the CEL if they are considered a 'company' within the meaning of Book VI, i.e. a "natural or legal person that pursues an economic purpose in a consistent manner" (Art. 1.8, 39° CEL). Some influencers will fall into this category, others however may not. The latter will thus not have to comply with Book VI of the CEL.

In order to create some further clarity, the Council of Advertisement recently published guidelines² to protect consumers and enhance legal certainty. These guidelines target all influencers alike (including micro-influencers) and therefore offers a wider scope of protection compared to Book VI of the CEL.

These guidelines define influencer marketing as an advertisement where: (i) the influencer receives some sort of compensation (monetary or in kind) and (ii) the advertising company has control over the content of the message. This means that influencers who receive free products from companies that hope for a positive review but have no control over it, fall outside the scope. In contrast, influencers who receive gifts from a company with which they have some sort of understanding concerning the content of the communication, must comply with the guidelines.

In that case, two simple rules must be followed: (i) the commercial communication should be clearly recognizable as such, either explicitly or implicitly (it is recommended to use words or hashtags such as #spon #adv #paid #prom) and (ii) the message may not be misleading or encourage children to pressure their parents or guardians into buying products.

The guidelines furthermore clarify that both the influencer and the advertising company are responsible for compliance with the rules and that the Jury for Ethical Practices regarding advertisement ('JEP')³ will enforce the rules.

Similar guidelines were published in The Netherlands as early as 2014. The Advertisement Code on Social Media⁴ specifically targets bloggers, vloggers and online content creators. If an influencer benefits from compensation (monetary or in kind) and if this compensation can affect the credibility of their post, the influencer must explicitly or implicitly divulge their relationship with the advertising company. The Code gives several examples as to how influencers can communicate, depending on the format of the post. The Dutch Code is therefore slightly stricter than the Belgian guidelines as it does not require that the advertising company is exercising control over the content of the message; a benefit affecting the credibility of the post suffices. The Code also includes some similar rules regarding misleading advertisement and advertisements targeting children.

This trend of increasingly regulating online influencers is also present in other countries, such as the United Kingdom, where the Advertising Standards Authority (ASA) recently published the new Influencer's Guide⁵; the United States, where the Federal Trade Commission (FTC) recently published Guides Concerning the Use of Endorsements and Testimonials in Advertising⁶; or Sweden, where the Patent and Market Court ruled that the famous Swedish influencer Kissie (or rather: her company) was responsible for misleading social media marketing last year⁷.

However, it remains to be seen whether these measures will pay off and effectively deter online influencers from posting hidden advertisements. After all, enforcement of the abovementioned rules is not easy as the number of influencers nowadays is sky high. Furthermore, it may not always be clear whether the advertising company indeed has control over the message. Finally, to render things even more difficult, some influencers today already use #ad's to pretend that they are getting paid, when they are not, since this makes them seem more popular than they really are. Nonetheless, there are definitely growing concerns about influencers' practices so that regulators need to continue their efforts to respond to them.

1 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004, *OJ* 2005 L 149/22.

2 Available at

https://www.jep.be/sites/default/files/rule_recommendation/aanbevelingen_van_de_raad_voor_de_reclame_online_in (last visited 12 April 2019).²⁶

3 Self-regulating organ of the Belgian advertisement sector, see www.jep.be.

4 Available at <https://www.reclamecode.nl/nrc/reclamecode-social-media-rsm/> (last visited 12 April 2019).

5 Available at <https://www.asa.org.uk/uploads/assets/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf> (last visited 12 April 2019).

6 Available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> (last visited 12 April 2019).²⁷

7 Judgment of 31 January 2018, *Konsumentombudsmannen v. Alexandra Media Sweden & Tourn Media*, PMT 11949-16, available at <https://www.konsumentverket.se/globalassets/artikel/pagaende-mal-domar-och-forelagganden/domar/dom-kissie-konsumentverket.pdf> (last visited 12 April 2019).²⁸