

#GVH#Compliance#Influencer

The Hungarian Competition Authority has recently noted that in a number of cases relating to online content, and in particular, posts by so-called ‘influencers’, the fact that the publishers of these posts have received compensation for their publications has not been brought to the attention of readers. In this guidance document, the GVH aims to provide assistance on how this form of communication, in line with international case law and other guidelines, should be displayed. Furthermore, in addition to increasing awareness among the relevant group of consumers, the guidance document also aims to help shape future market practice.

The information provided in this guidance document should not be considered as amounting to either legal advice in any particular case or as the legal opinion of the GVH. Rather, it contains recommendations formulated at the date of its publication, in accordance with the provisions of Act XLVII of 2008 concerning the Prohibition of Unfair Commercial Practices against Consumers.

I. Why is it necessary to deal with these matters?

In promoting their products, services and brands, undertakings often employ well-known persons as intermediary channels of communication. Various forms of cooperation with so-called ‘influencers’ who are widely followed on social media are also becoming increasingly common. These influencers publish online content (e.g. supportive blogs, videos and vlog posts on Facebook, Twitter, Instagram, Snapchat and YouTube) to stimulate the use of the given product or service; publicising the given brand or image in return for some form of compensation.

This kind of activity is not contrary to the law provided that the direct economic interest — the existence of a business relationship between the advertiser and the person publicising the product — is obvious to consumers.

However, as consumers’ purchasing decisions are increasingly led by the influencers, via the fashion and consumption trends dictated by them and also by the growing number of blogs, vlogs and other online content, the impact of influencers on the behaviour of followers makes it especially important that these kinds of communications are carried out in a trustworthy, fair manner.

It needs to be emphasised that consumers should be able to distinguish between different purposes i.e. independent vs paid-for content on the given platform and the consumers must be properly informed that the influencer has received some form of compensation from the producer or distributor of the publicised product or service. In other words, it should be made known that the communication of the influencer does not primarily reflect the independent and neutral opinion, style or spontaneous reaction of the writer/publisher but it is driven by economic motivation. However, as the publication of such content can be regarded as a commercial activity, the commercial nature of the content must be clearly and unequivocally stated. A failure to make such a

disclosure must be considered as misleading and as amounting to an unfair commercial practice, given the fact that consumers need to be made aware of these facts if they are to make an informed purchasing decision based on real facts. The display of such content without a corresponding disclosure relating to its economic nature violates the legal provisions of the prohibition of unfair business-to-consumer commercial practices and may be the subject of a competition supervision proceeding of the GVH.

II. Who and what are targeted by this guidance document?

1. 'Influencer' in case of online content:

- A person who is capable of exercising dominant influence in the digital environment and shaping consumer opinion, and who, either as an ad hoc partner or dedicated brand ambassador publishes online content on his/her website, social media account or other online platform, irrespective of whether that content is his/her own or a guest post. In most cases, the influencer has a committed follower base.
- Influencers include both public figures and other – even underage – youtubers, bloggers, vloggers and persons who publish online content on platforms such as Facebook, Twitter, Instagram, YouTube and Snapchat.

2. Content:

- This 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, consumers' awareness raising articles, commentaries and explanations disseminated through optional mediums including online and various digital channels.

3. Compensation:

- 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) 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').

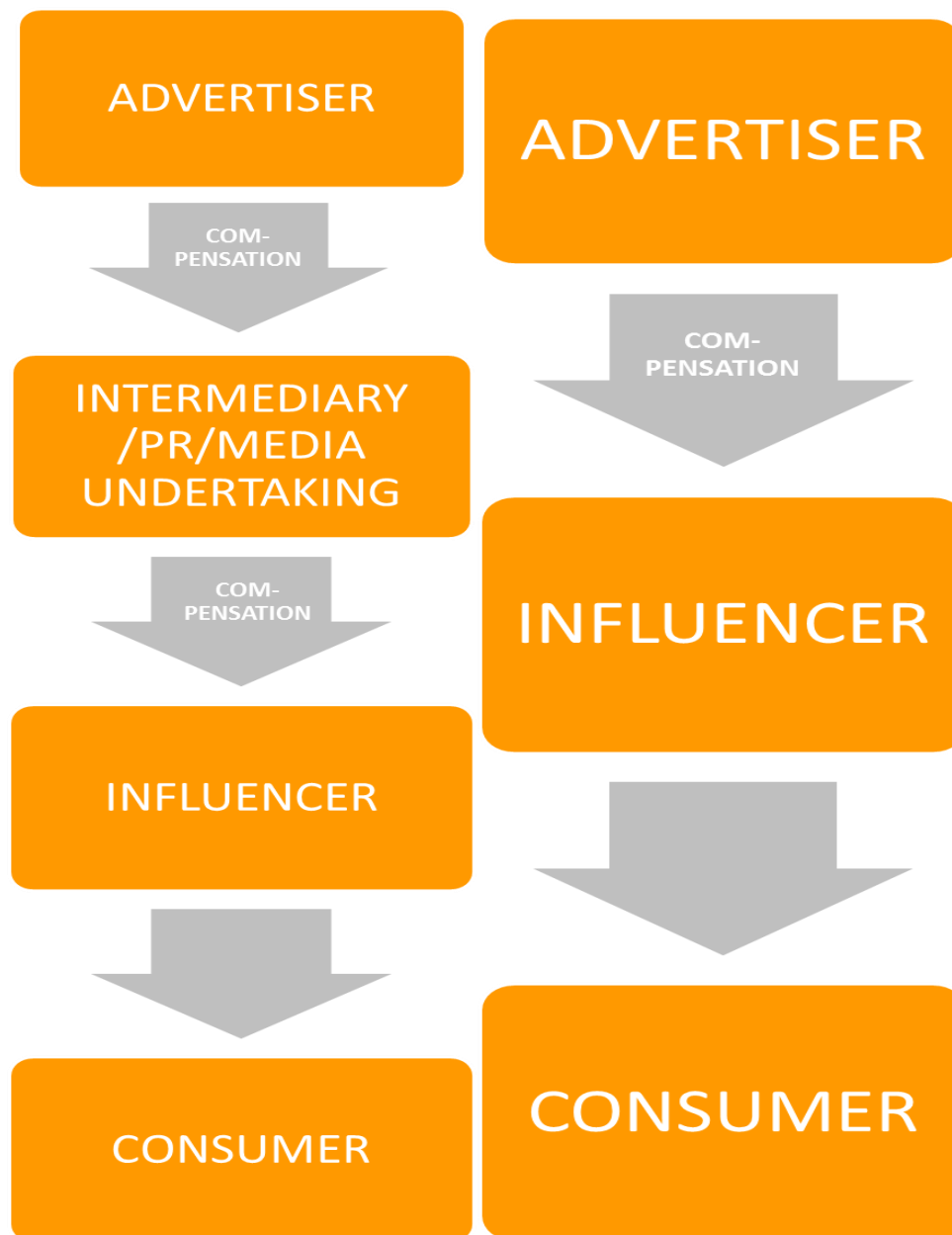
4. Commercial practice:

- This is legally determined and defined and includes all conduct directly related to the supply, service or sales promotion of products to consumers, as well as any 'information disclosure' directly related to the independent business or economic activity of an undertaking.

5. Liability – '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. In addition to the publishing influencer, the producers of the product, as well as distributors i.e. advertisers and contributing agencies and offices may also qualify as a responsible party.

The business relationship between the advertiser and the influencer may take the following forms:



III. What would be worth considering?

- Where a reward or other consideration was provided in return for the publication, 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 cooperation 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.

General principles and expectations – Do's...

While it would be difficult to formulate a practice that can be applied in each and every case, it can reasonably be presumed that 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. Based on experience to date, the following commercial practices and forms of display may be considered appropriate:

- The content needs to be simple and capable of clear interpretation by consumers.
- As far as possible, consumers should encounter consistent indicators of business relationships on the same platform.
- 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 'Next' button.
- 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.
- 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 tag' which is an advertisement tool on Facebook to mark such content, automatically indicates the sponsor and the supported nature of the post. It is worth noting that the advertising and other policies and regulations of the given platform do not merely serve the interests of consumers but also the rational, economic interests of the given platform. Consequently, in addition to following them it is also necessary to note the considerations formulated in this guidance document.

- When mainly pictorial elements, short text content and labelling (i.e. # hashtag sign) are used on a given social media platform (e.g. Instagram), a marking such as #Commercial# #Advertisement# #Paid content# or the name and logo of the relevant undertaking may be appropriate; furthermore, it may also be appropriate to use the mark #Sponsored content# where such cooperation is involved. However, if mainly textual content is typical on the given platform (e.g. Facebook), the use of '#' is optional beyond the requirements set out above. It is important that the reference to sponsored '#' is still readable in the first place it appears before further '#' labels are used.
- While the display of the given content may not require the indication of the exact name of the undertaking and how it entered in the register of companies, 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.
- To indicate the existence of some form of compensation, appropriate marks should refer to the commercial nature of the content (e.g. 'Commercial', 'Advertisement') and in certain cases of cooperation 'Supported' or 'Sponsored' content.

Practices to be avoided – Don'ts...

- The '#' sign serves only to sort and define topics but does not indicate paid content.
- Unclear or inaccurate marks or marks that cannot be unequivocally identified (e.g. 'Thank you', '#partner' or '#Promotion') are unlikely to make the nature of the business relationship clear to consumers.
- 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).
- A link pointing to a certain advertiser's website or some other indication of the company's name is insufficient to mark the sponsored or supported nature of the content.
- If a sign is difficult to find or if other elements of the sign divert the consumer's attention from the disclosure of the business relationship, it is unlikely to comply with the requirement of clear and unequivocal wording.
- If a business relationship is noted only at the end of a longer text content, the mark is unlikely to be noticed by consumers on the newsfeed when it appears there.

IV. How can you ensure compliance?

- It may be useful for advertisers (including agencies and professional intermediaries) to develop contracting terms, systems and programmes to ensure that influencers acting on their behalf or those who are associated with them understand the legal expectations relating to publication, as advertisers' liability can be established if they contribute to the formal or substantive creation of posted content.

- It is also recommended that a monitoring system and reporting process are established in order to ensure the compliance of published content and to support intervention when it necessary.¹

December 2017

¹ Please, note that this Guidance document has been drafted in Hungarian. The English version shall be deemed as reference only, and in case of any discrepancies the Hungarian version shall prevail.