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THE USE OF INFLUENCER MARKETING SERVICES FOR UNFAIR COMMERCIAL PRACTICE IN THE EU AND LATVIA

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Abstract. Recent years have seen a growing global demand for influencer marketing services despite those having both advantages and disadvantages. Specifically, through influencer marketing campaigns brands operating under fierce competition aim to instil in consumers a more positive attitude towards their product, promote buying decisions, and implement a dialogue approach in marketing communication and feedback generation so as to establish a much closer link with their consumers. However, there are also major disadvantages about influencer marketing, such as the yield of influencer marketing campaigns and the lack of regulatory framework in respect of liability for unfair commercial practice and breach of confidentiality.

The goal of the study is to develop recommendations for avoiding liability for unfair commercial practice in Latvia based on the theoretical aspects and the use of influencer marketing services in marketing campaigns in EU.

The methods of research used are monographic, secondary data analysis, comparison, grouping, graphic, descriptive, as well as qualitative data analysis, case study, the analytical, inductive and deductive method.

The results of the study show that, while the global demand for influencer marketing activities has been rapidly growing over the recent years, it also becomes increasingly important for businesses building long-term partnerships with influencers to thoroughly consider the influencers' values, beliefs, life style and conduct on social media as well as to seek to include in the contract a confidentiality clause prohibiting disclosure of information on the marketing strategy, customer behaviour etc. when providing services to other partners and avoiding conflicts of interest in providing services to competing businesses.

Keywords: influencer marketing, content marketing, consumer behaviour, marketing communication, marketing law, confidentiality principle.

JEL code: M31, K20

Introduction

Recent years have seen an increased global use of influencer services. There is a monetary battle fought among companies, agencies and brands for establishing a partnership with the desired influencers, which shows the importance of influencers in the marketing and advertising market and in the development of brands. There is also an increased blurring of boundaries between social and traditional media where, in light of changes in the consumers' behavioural habits and use of social media, influencers use different tools and communication channels (including media) to address consumers.

However, there are also major disadvantages about influencer marketing, such as the yield of influencer marketing campaigns and the lack of regulatory framework in respect of liability for unfair commercial practice and breach of confidentiality, the risk of data manipulation, reputational risks to companies, the uncertainty of legal relationship between companies and influencers, the lack of legal certainty, the measurement of effectiveness etc.

The goal of the study is to develop recommendations for avoiding liability for unfair commercial practice and conflicts of interest in providing services to competing businesses based on the theoretical aspects and the use of influencer marketing services in marketing campaigns.

The methods of research used are monographic, secondary data analysis, comparison, grouping, graphic, descriptive, as well as qualitative data analysis, case study, the analytical, inductive and deductive method.

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Research results and discussion

Role of influencer marketing in business. In 2021, the total value of influencer marketing provisionally increased by 4.1 billion US dollars against 2020, reaching 13.8 billion US dollars. 2021 was a particularly intense year in the Baltic countries as well, with a literal monetary battle among agencies and brands for establishing a partnership with the desired influencers. (Benchmark Report, 2021) Quite recently, the Terminology Commission of the Latvian Academy of Sciences approved the term "digitala satura autors" (Latvian for "influencer"), defining it as a person who develops, creates and delivers content in textual and audio-visual form to social media users (LZA, 2021). This shows the importance of influencers in the marketing and advertising market and in the development of brands. There is also an increased blurring of boundaries between social and traditional media, with influencers becoming, for example, television faces.

According to data as at February 2022 Latvia had 699,500 *Instagram* users (37.9% of its entire population) and 1,251,800 *Facebook* users (67.8% of its entire population). The majority of them are women – 58.6% on *Instagram* and 56% on *Facebook*. The biggest age group of *Instagram* and *Facebook* users are those aged between 25 and 34 – 216,500 on *Instagram* and 305,800 on *Facebook*. On *Instagram*, the highest difference between men and women occurs within people aged 35 to 44 where women lead by 32,300. On *Facebook*, the highest difference between men and women occurs within people aged 55 to 64 where women lead by 40,700 (NapoleonCat, 2022).

Businesses and brands operating under fierce competition opt for influencer services to influence consumers' buying decisions in marketing communication. The objective is predominantly a dialogue approach, the creation of an interactive feedback based on common values, the persuasion of followers to buy products or services. An influencer is defined as *an individual with a substantial number of followers on social media who is paid by businesses and/or brands for promoting and advertising products or services to his/her followers on social media using free products, trips, gifts, samples etc. as well as in cash or remunerated otherwise for each campaign, post, story etc. under an oral or written agreement.* Depending on the target audience, product or service, businesses choose an influencer active on one or several social media platforms. The most popular are *Instagram, Facebook,* but *Snapchat, YouTube, TikTok, Twitter, LinkedIn* etc. are also used in communication. Partnerships may also be established via marketing agencies. Importantly, influencers can be divided into several categories – publicly known persons, industry experts, journalists, authorities, bloggers and content creators, micro-influencers (Kubelakova, A., Sugrova, M., 2017). Influencers can also be high-level executives who make decisions at companies, institutions and organisations, including politicians (Farmer, N., 2017). Influencers can also work as social media account administrators without using their own social media account. This involves risks associated with business secret and strategy.

Businesses deliver messages to their potential buyers in a credible way – through influencers who possess high credibility or a high number of followers (Cooley, D., Parks-Yancy, R., 2019). Specifically, in order to reach new customers, communicate with the existing ones and deliver current information via video, pictures, text or otherwise, they use the services of influencers and the advantages brought by communication channels (Bormane, S., 2021).

The communication primarily focuses not on the promoted product itself but rather on the problem that the use of the product solves, for instance, by discussing how important it is to use the product, how it improves one's everyday life etc. The content is continuously updated and consistently delivered in adherence with the following preconditions: 1) strategic, based on a plan; 2) relevant and topical, creating value for the audience; 3) aimed at a specific target audience; 4) a consistent, continuous, regular process, possibly on a specific day at a specific time; 5) has the purpose of provoking a certain action (Solomon, L., 2016).

In order to achieve the desired result, influencers use the different tools and technological facilities offered by the different social media platforms. In the era of information abundance, it is primarily kept in mind that: 1) people often do not need facts, especially if they choose to believe authorities; 2) moving is remembered better than still, so the video format – *Live, IGTV, Reels, Stories* etc. – is increasingly used to entertain, inspire and arouse emotions in the audience. It is also important to keep in mind that the content needs to be genuine, authentic and true, focused and relevant to the designed target audience, timely – one that ends up in the right place at the right time (Jefferson, S., Tanton, S., 2015). Social media as a communication channel is in demand because of its functional advantages: 1) reaches the audience at any time and in any place (at home, in public transport etc.); 2) entertaining, amusing interesting etc.; 3) provides an opportunity to express oneself, share one's opinion, communicate, belong to a specific social group etc.

As a result, those following influencers interact with information by, for instance, rating, commenting, sharing, saving, forwarding etc. These actions are a variable called *involvement* and are measured to determine the effectiveness or yield of a given campaign, post etc. (Hughes, C., Swaminathan, V., Brooks, G., 2019). Research has proved that micro-influencers (up to 5,000 followers) have more effective campaigns promoting products or services because of a more intimate form of communication which means higher follower loyalty than for those with over 10,000 followers (Dinesh, D., 2017). Overall, measurements of effectiveness of influencer campaigns are complicated. For instance, one study using multi-factor analysis found the reliability of male influencers and the attractiveness and expertise of female influencers to be factors in increasing consumers' willingness to pay. From the consumers' point of view, working with male influencers with high expertise and female influencers with high attractiveness can contribute to obtaining higher benefits from marketing activities (Yildiz, S. Y., 2021).

It is generally difficult to ascertain the direct impact of influencers' activities upon buying, as there are also other factors contributing to product and/or service purchases, such as the advantages of an online store, in-store attendance, assortment, pricing policy etc. Thus, it is difficult for a business to control feedback from its influencer's activities, i.e., whether the effectiveness – the number of consumer responses (likes, comments, shares) or the number of clicks – results specifically from the influencer's efforts or from other marketing tools. It follows from the above that a major role in the partnership is played by the arrangement of effectiveness measurements over a specific time period and the criteria that monitoring is based on.

For instance, the order of content in the *Instagram* flow is determined by six factors: 1) the user's interest in content. *Instagram* will show the highest-rated post that is important to the user based on the previous behaviour with similar content, also analysing the content of the post; 2) the user's relationship with the content creator, how closely and how much they have interacted before, commented on each other's posts, and whether they have been tagged together in photos; 3) topicality: when it was shared, prioritising a recently published post over one that is weeks old; 4) how frequently the user opens *Instagram*. *Instagram* tries to show the best posts since the last visit; 5) the user's follower count – if someone follows many people, *Instagram* does not show every single post published by those people. Lastly, the user's activity on the platform (Constine, J., 2018).

There are also a number of negative aspects about using influencer marketing, one of them being reputational risk – mismatches of values between influencers and clients. Businesses therefore need to:

1) conduct a very thorough analysis when choosing an influencer for partnership; 2) cover the key matters in the contract, envisaging the potential reputational threats that may cause issues in terminating the partnership. Influencers, in turn, should keep in mind that popularity comes with obligations or a kind of code of conduct, as with public persons or officials who have to behave properly beyond their working hours and whose professional opinion can hardly be separated from the private one if at all.

In the context of corporate social responsibility, a company's responsibility may involve: 1) philanthropic duties – promotion of donations, attraction of sponsors to sustainable measures, support for and promotion of the volunteer movement; 2) ethical duties – support for producers and distributors of "green" and ecological products – investing, purchase of products or use of services, advertising measures; 3) legal duties – compliance with laws and regulations; 4) economic duties – profits of businesses benefit the society – for instance, businesses pay taxes, the funds end up in the state budget and are subsequently spent towards public wellbeing (Wagner-Tsukamoto, S., 2019).

One of the key aspects faced by businesses in the context of corporate social responsibility is the difficulty of linking the national legal framework with the international one due to the lack of knowledge and standards. This brings to the forefront a number of important ethical and legal components of influencers' activities.

Regulatory framework of influencer marketing in Latvia and the European Union. Influencer marketing raises a number of important questions in respect of its ethics and legal framework not only in Latvia but also in the European Union. For instance, in 2021 there were violations found in 49% of influencer accounts on *Instagram* (Benchmark Report, 2022). Hence, it is about time for the research of developmental trends in influencer marketing to focus on the legal framework challenges in this domain.

The range of legal and ethical issues in the digital environment is rather broad and includes unfair conduct by influencers, such as creating content on non-existent partnerships to draw real partners, non-disclosure of sponsored deals on social media, the division of liability between the business and the influencer in the event of violation, uncertainties over the business model, the creation of fake followers, the manipulation of digital platform algorithms, the legal consequences of disconnecting an influencer from a social media platform etc. The legal framework also encompasses the protection of digital content consumers and such matters as medical service or product advertising that may pose health risks, alcohol and tobacco advertising or product placement, and advertising for kids. There is no common opinion as to whether influencers and social media platforms may be applied the same advertising restrictions as, for instance, television or radio. In a broader legal context, it is not clear how to define the relationship between an influencer, or a group thereof, and their leader or the organisation who gives directions about the digital content, the time and place of its publishing and whose approval triggers the publishing of the digital content. There is no clear answer whether such relationship should be viewed in the context of labour law or from the perspective of a cooperation agreement.

Importantly in the context of ethics, while influencers are social media professionals, they are not subject to the obligation of due care in choosing partners or advertising products or services. Nor is there any regulatory framework in respect of possible conflicts of interest and the need to disclose them to digital content consumers. This has a direct bearing on influencer marketing. As the number of influencers grows, there is a risk of unethical methods – such as pictures of young children – being used to attract a large number of digital content consumers (Goanta, C., Ranchordas, S., 2020). Although the Latvian Association of Bloggers and Influencers has adopted and published a Code of Conduct, its practical impact is difficult to tell. Among other things, the Code of Conduct obliges influencers to provide information that is true and as verified as possible, use references to other authors' works, and indicate advertisements with partnership. Under the ethics provisions, influencers have to choose partnerships that conform to their ethical principles to avoid intentionally misleading their followers. Although the Code of Conduct is merely recommendatory, it represents a positive move towards the development of influencer marketing in Latvia, as it both directly and indirectly points to the responsibility of influencers towards digital content consumers. The authors believe that it is the range of recommendatory tools that should be supplemented by including the responsibility of businesses in establishing partnerships with influencers because from the viewpoint of businesses it is one of the marketing communication channels included in the ecosystem of corporate social responsibility.

In Latvia, the consumers' rights to true and clear information and its separation from advertising is monitored by the Consumer Rights Protection Centre (CRPC). When publishing information, influencers have to comply with the Advertising Law, including restrictions on advertising specific goods and services (such as the ban on advertising food supplements not registered in Latvia), as well as the Unfair Commercial Practice Prohibition Law since it also applies to natural persons. These legal provisions are also binding to influencers' partners. The obligation for influencers to expressly state in commercial posts that it is an advertorial also follows from the judgment of the EU Court of Justice in Case C-371/20 (Peek & Cloppenburg KG, 2021). A failure to do so constitutes unfair commercial practice. Since the Latvian regulatory framework does not specify the hashtags to indicate the commercial nature of digital content, in 2019 the CRPC developed guidelines to be followed by influencers when doing marketing on social media. Influencers are allowed to use hashtags referring to the commercial nature of their content in both Latvian and English. A similar practice is followed in Italy (IAP Digital Chart, 2018), but in Spain (Directive 2005/29/EC, 2020) and Germany (Guideline of the Media Authorities, 2021) influencers may only refer to commercial content in the state language. The CRPC has clearly stipulated that influencers have to indicate an advertisement or a partnership if they receive a material benefit from the brand or business in question. In contrast, the German guidelines to influencers do not specify remuneration as a precondition for the content to be defined as advertising if based on a partnership. The rules as to the form of disclaimer vary from country to country. For Latvia, the CRPC explains that, if an influencer, for instance, shows a gift received or tells about an event attended, such content has to be indicated orally or with a hashtag. In Italy, the use of a hashtag in such cases is mandatory – an oral statement does not suffice. In Spain, the form of commercial content disclaimer depends on the social media platform where the content is published (Directive 2005/29/EC, 2020). Interestingly, the French, German, Spanish and Italian regulatory frameworks also hold the advertised businesses responsible for informing consumers of the commercial nature of the content, and they are required to inform their influencers of the advertising requirements on social media. This means an obligation of transparency for both partners – the business and the influencer – and in Italy both are also held liable for violations of advertising rules. It can be concluded that not only the regulatory framework differs among countries but also the division of responsibility between the business and the influencer. This indicates differences in approaches and a lack of harmonisation in the common EU market.

Importantly, influencers in Latvia are not subject to the Electronic Mass Media Law which governs product placement. There is no clear opinion as to whether influencers are under an obligation to indicate that the content includes product placement if there have been products or services or their trademarks, or references to such products, services or their trademarks included for money or other remuneration. In practice, this might pose a risk of threat to the legal interests of digital content consumers on social media, as one cannot distinguish between cases when product placement has been paid for or otherwise remunerated and cases where it has not.

Nor is there an explicit regulatory framework covering influencer marketing on a European Union scale, but there are legal provisions of consumer protection and prohibition of unfair commercial practice applicable. The European Commission guidance of December 29, 2021 on the interpretation and application of the Unfair Commercial Practices Directive (Directive 2005/29/EC, 2021) shed clarity regarding the role of influencers. The guidance qualifies an influencer as a trader or a person acting for the benefit of a trader in the context of prohibition of unfair commercial practice, thus dispelling doubts over the liability of influencers. The Directive on Electronic Trading (Directive 2000/31/EC, 2000), in turn, obliges influencers to disclose commercial communication and the persons of partnership. In general, the EU countries tend to self-regulate when it comes to influencer marketing and have developed "the good practice" which explains the application of the national regulatory framework in this domain.

Overall, the legal aspects of influencer marketing cover a broad scope, including consumer rights protection, the legal relationship between influencers and organisations, the separation between advertising and opinion, and the ethics of tampering with algorithms on digital platforms. The legal framework of influencer marketing is a special field that requires an inter-disciplinary approach and a more extensive application of "soft tools". The digital environment is changing rapidly and the regulatory framework is not sufficiently flexible to catch up with the changes, which is why recommendatory legal tools, such as guidelines and recommendations, have a key role. The development of influencer marketing hinges not on the improvement of regulatory base but on a strategic action within the existing regulatory framework. International practice shows development of guidelines and rules of conduct as more important in promoting good practice in influencer marketing. Furthermore, rules of conduct also apply to businesses as part of the promotion of corporate social responsibility. In order to ensure the development and proper use of influencer marketing, it is necessary to promote better understanding among consumers, influencers and organisations alike. The possible tools may be support for consumers, various educational events for consumers and influencers. In Germany, for instance, media and digital education lectures and seminars are available already at school to promote better awareness of these matters and protect from the risks of unfair practice in the digital environment. Legal certainty would also be facilitated by developing criteria and implementing an influencer certification process to bring in some control and quality and thus eliminate the legal risks. The digital content platforms, for their part, could provide standardised tools that signal the commercial nature of digital content. The supervisory authorities in charge of compliance with the regulatory framework, too, need to seek digital solutions on social media. An effective control or supervision is part of ensuring justice. The development of the legal environment of influencers, as a whole, requires a comprehensive cooperation and an extensive social dialogue among stakeholders.

Conclusions, proposals, recommendations in Latvia

1) Businesses therefore need to conduct a very thorough analysis when choosing an influencer for partnership and cover the key matters in the contract, envisaging the potential reputational threats that may cause issues in terminating the partnership. Influencers, in turn, should keep in mind that popularity comes with obligations or a kind of code of conduct, as with public persons or officials who have to behave properly beyond their working hours and whose professional opinion can hardly be separated from the private one if at all.
2) When entering into a contact, the business and the influencer need to commit not to disclose any information about the other party, its business activity, addresses, working arrangements, pricing, unless it is expressly related to the performance of the contractual obligations or requested by competent public authorities. Observance of confidentiality means that the influencer does not disclose

any information about the company's products, marketing strategy and types, marketing statistics, and customer behaviour. The influencer also commits not to provide marketing services and not to promote products and/or services of other companies of the same business model, avoiding a conflict of interest in providing services to competing businesses. If the influencer breaches the confidentiality provisions, he/she compensates for all losses inflicted on the business through the breach or pays a contractual penalty.

3) When entering into a contract, the parties need to agree upon all persons involved in the partnership, choosing – depending on the form of business run by the influencer – whether the persons will be treated as employees in the context of employment relationship or as service providers. The applicable tax regulations, too, depend on the form of partnership.

4) Legal certainty would be enhanced by the inclusion of influencers in the classification of occupations and the implementation of a certification process, thus bringing in certain control and quality and eliminating the legal risks. The certification process needs to envisage the option of recertification based on work experience (for instance, the number of hours worked, the service contract amounts, a fixed / accounted gift value etc.). It could be implemented as influencer monitoring, listing the projects completed, the clients, the deadlines, and the role or duties under the specific contract or partnership over a certain time period.

5) The implementation of a register of influencers would make the process more transparent in the context of corporate social responsibility. Specifically, businesses and influencers would have to register free products, trips, gifts, samples etc., cash payments and other remuneration for each campaign, post, story etc., thus ensuring fair competition.

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