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## INFLUENCER MARKETING – DO WE NEED A NEW LAW OR A NEW APPROACH? FEW REMARKS FROM THE EUROPEAN AND POLISH PERSPECTIVE

by

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*Facebook, Instagram, TikTok - any social media is full of advertising. The history of celebrity endorsement of products is nothing really new, but Internet brought it to the extreme level. A wide range of global population has been relying on influencers for all sorts of information. It creates the great responsibility as influencer marketing may lead to faulty advertising and misinformation, especially among minors and people with low digital literacy. Until recently influencers and their activities were not the subject of particular legal interest. These issues are currently addressed through tailored legislation neither at EU level nor in national regulations. To compensate for it, the last few years have seen a proliferation of soft law (regulatory guidelines) and industry self-regulatory measures to provide greater transparency. But is soft law combined with case law enough to provide the desired standard of consumer protection in the whole Single Market? Since platforms and technologies change at fast pace are we able to create a regulation that will not lag behind the development of the market? The digital environment in which influencer marketing takes place, which can hardly be confined to one country, creates additional challenges for legislators. The objective of the article is twofold: firstly, to present the existing legal framework at the EU and Polish levels; and secondly, to identify potential weaknesses in these regulations in the context of influencer marketing.*

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## KEY WORDS

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## 1. INTRODUCTION

It is a common truth that the internet and social media are not the same as they were when they were first introduced. The social media market is changing dynamically, with new successful portals such as the video-sharing platform TikTok, launched in 2016, continuing to emerge. Most of today's largest and most popular platforms and sites were created in the early 2000s and the Internet itself has an even longer history.<sup>1</sup> Nevertheless, the emergence of Web 2.0 and the 'demotic turn' - as Turner terms it - associated with the provision of communication platforms that facilitated two-way interaction between individuals and large audiences is identified as a watershed moment.<sup>2</sup> Another turning point was the introduction of Web 3.0 - the facilitation of access to social media platforms via applications on mobile devices hugely increased the popularity of Facebook, Instagram, etc.<sup>3</sup>

The term 'social media' (understood as a marketing tool) originated in the 1990's and now primarily refers to profile-based everyday communication platforms, such as the aforementioned Facebook and Instagram.<sup>4</sup> The strategic use of influencer marketing (IM) as a marketing tactic has gained extreme popularity over the course of recent years. The global value of the IM market is estimated to have risen from 3 billion to 21,1 billion US dollars between 2017 and 2023.<sup>5</sup> The phenomenon of IM has been extensively discussed in the literature in recent years, with contributions from marketing, psychology and social science perspectives.<sup>6</sup> Despite this, there has been little

<sup>1</sup> The year 1969 is sometimes cited as the beginning of social media, when the US internet provider CompuServe offered the service, or 1979, when the UseNet newsgroup system was made available in the US - for further information, see, McIntyre, K. (2014). The evolution of social media from 1969 to 2013: A change in competition and a trend toward complementary, niche sites. *The Journal of Social Media in Society*, 3(2), p. 8.

<sup>2</sup> Turner, G. (2010). *Ordinary People and the Media: The Demotic Turn. Theory, Culture & Society*. London: SAGE Publications. Available from: <https://doi.org/10.4135/9781446269565> [Accessed 14 January 2024].

<sup>3</sup> Leung, F.F., Gu, F.F. and Palmatier, R.W. (2022). Online influencer marketing. *J. of the Acad. Mark. Sci.* 50, pp. 226-251. Available from: <https://doi.org/10.1007/s11747-021-00829-4> [Accessed 7 January 2024].

<sup>4</sup> Meikle, G. (2016). *Social Media: Communication, Sharing and Visibility*. [online] New York; London: Routledge, p. 5. Available from: [doi.org/10.4324/9781315884172](https://doi.org/10.4324/9781315884172) [Accessed 7 January 2024].

<sup>5</sup> Statista (2023). *Influencer marketing market size worldwide from 2016 to 2023*. Available from: <https://www.statista.com/statistics/1092819/global-influencer-market-size/> [Accessed 7 January 2024].

<sup>6</sup> See e.g., Fowler, K., Thomas, V. (2023). Influencer marketing: a scoping review and a look ahead, *Journal of Marketing Management*, 39:11-12, pp. 933-964. available from: [doi.org/10.1080/02756617.2023.2244444](https://doi.org/10.1080/02756617.2023.2244444).

academic research on current legal issues especially from the perspective of EU law<sup>7</sup>, whereas Polish approaches to influencer marketing have not yet been discussed in international journals at all. This article summarises the preliminary findings of a research project and addresses this gap. Presenting the Polish model in the light of European regulation can add value to understanding the complexity of the world of influencer marketing and the regulatory and enforcement strategies in different EU countries. It is a contribution to the wider European debate on consumer protection online, particularly in digital advertising.

The article firstly underscores the distinctiveness of influencer marketing in comparison to alternative forms of advertising. This is followed by an analysis of the relevant EU and Polish law and a discussion of their applicability to influencer marketing. The next section provides comments on the first Polish regulatory guidelines "Recommendations pertaining to the tagging of advertising content by influencers on social media" published on 26 September 2022. The article ends with a conclusion.

## 2. THE INFLUENCER MARKETING PHENOMENON

The traditional celebrity endorsement model understood as the use of celebrities to promote and endorse products or services is not really new.<sup>8</sup> Indeed, for more than a century actors or athletes have lent their image to promote various goods or services.<sup>9</sup> The Internet has not only taken this phenomenon to a whole new level, but it has also led to the emergence of influencers, a new group that is extremely attractive to advertisers. Leung, Gu and Palmatier define online influencers as "individuals, groups of individuals, or even virtual avatars who have built a network of followers on social media and are regarded as digital opinion leaders with significant

1080/0267257X.2022.2157038 [Accessed 20 November 2023] or Vrontis, D, Makrides, A, Christofi, M, Thrassou, A. (2021) Social media influencer marketing: A systematic review, integrative framework and future research agenda. *Int J Consum Stud.* 45, pp. 617-644. available from: doi.org/10.1111/ijcs.12647 [Accessed 14 January 2024].

<sup>7</sup> For general legal remarks see Goanta, C. and Ranchordas, S. (2020). *The Regulation of Social Media Influencers*. Northampton: Edward Elgar Publishing.

<sup>8</sup> For more detail, see e.g., Erdogan, B.Z. (1999). Celebrity Endorsement: A Literature Review, *Journal of Marketing Management*, 15:4, pp. 291-314, Available from: doi.org/10.1362/026725799784870379 [Accessed 14 January 2024] or Proctor, T., and Kitchen, P.J. (2019). Celebrity ambassador/celebrity endorsement - takes a licking but keeps on ticking, *Journal of Strategic Marketing*, 27:5, pp. 373-387, Available from: doi.org/10.1080/0965254X.2018.1430059 [Accessed 14 January 2024].

<sup>9</sup> Piehler, R., Schade, M., Sinnig, J., Burmann, C. (2022). Traditional or 'instafamous' celebrity? Role of origin of fame in social media influencer marketing, *Journal of Strategic Marketing*, 30(4), p. 409. Available from: doi.org/10.1080/0965254X.2021.1909107 [Accessed 6 January 2025].

social influence on their network of followers.”<sup>10</sup> The most significant difference between celebrities and influencers is in the source of their recognisability. Although there are exceptions, most influencers gain popularity and accumulate followers by creating and actively sharing content on social media that purports to represent their everyday lives and opinions.<sup>11</sup> This phenomenon is referred to as the so-called “original influencers.”<sup>12</sup>

An increasing number of Internet users search the web for information on any subject, facing both neutral content (information in the strict sense) and content that directly or indirectly encourages the purchase of specific goods or services. If this content is not properly labelled and, for example, profiled based on a person’s previous online activities, it is amazingly easy to disseminate misleading information to consumers. This is particularly evident when the content is presented by a person with whom the Internet user has a pre-existing relationship of some kind, as is often the case with influencers.

So-called original influencers are someone between a close friend and an admired celebrity for their social media audience.<sup>13</sup> On the one hand, they may have similar interests, values, or lifestyles, which can be reflected in the language they use, for example. On the other hand, like celebrities they develop their public image.<sup>14</sup> Because of their closer relationship with their audience, influencer content is often not perceived as marketing.<sup>15</sup> The most significant issue arises when the content published by the influencer gives the impression of a neutral sharing of lifestyle, information about products and services used etc. with the audience, whereas it is tailor-made and is a (sometimes essential) part of the marketing strategy. The absence of

<sup>10</sup> Leung, F.F., Gu, F.F. and Palmatier, R.W. (2022). *Op. cit.* p. 228.

<sup>11</sup> *Ibid.*

<sup>12</sup> Schouten, A. P., Janssen, L. and Verspaget M. (2020). Celebrity vs. Influencer endorsements in advertising: the role of identification, credibility, and Product-Endorser fit, *International Journal of Advertising*, 39(2), pp. 258-281, Available from: doi.org/10.1080/02650487.2019.1634898 [Accessed 14 January 2024].

<sup>13</sup> Balaban, D.C., Szabolics, J., Chiric, M. (2022) Parasocial relations and social media influencers’ persuasive power. Exploring the moderating role of product involvement. *Acta Psychologica* 230, 103731, pp.1-3, Available from: doi.org/10.1016/j.actpsy.2022.103731 [Accessed 6 January 2025].

<sup>14</sup> Belanche, D. et. al. (2021). Building influencers’ credibility on Instagram: Effects on followers’ attitudes and behavioural responses toward the influencer, *Journal of Retailing and Consumer Services*, 61, pp. 1-11, Available from: https://doi.org/10.1016/j.jretconser.2021.102585 [Accessed 7 January 2024].

<sup>15</sup> Farivar, S., Wang, F. and Yuan, Y. (2021), Opinion leadership vs. para-social relationship: Key factors in influencer marketing, *Journal of Retailing and Consumer Services*, 59, Available from: https://doi.org/10.1016/j.jretconser.2020.102371 [Accessed 14 January 2024].

proper labelling of such content, particularly when it is not clearly designated as advertising, can result in a misperception among the audience. This, in turn, can have a heightened impact on the recipients.<sup>16</sup> Consequently, such practices can result in the dissemination of deceptive and misleading advertising, and given the aforementioned factors, this risk is amplified in the context of IM relative to conventional advertising. This aspect should be duly considered in the legal regulations designed to safeguard consumers.

### 3. THE CURRENT LEGAL FRAMEWORK IN THE EU

Currently, there are no general regulations in either EU or Polish law that directly refer to influencers or their advertising activities. However, this obviously does not mean that influencers operate in a complete legal vacuum.

From a legal perspective, influencers can be considered as advertisers/traders and as sellers/producers. For the purposes of this article, the first of these roles is of particular interest. At least in theory, four pieces of EU legislation may apply to influencers: the Unfair Commercial Practices Directive (UCPD)<sup>17</sup>, the e-Commerce Directive<sup>18</sup>, the Audiovisual Media Services Directive (AVSMD)<sup>19</sup> and the Digital Services Act (DSA)<sup>20</sup>.

<sup>16</sup> Interestingly, recent research findings suggest that the provision of correct disclosures does not have a detrimental effect on the level of engagement exhibited by followers. See Bertaglia, T., Goanta, C., Spanakis, G., Iamnitci, A. (2025) Influencer self-disclosure practices on Instagram: A multi-country longitudinal study, *Online Social Networks and Media*, Volume 45, 100298, p.9-12. Available from: <https://doi.org/10.1016/j.osnem.2024.100298>. 1705267093852. [Accessed 6 January 2025].

<sup>17</sup> Directive 2005/29/EC of the European Parliament and of the Council 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 of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *Official Journal of the European Union* (2005/L 149) 11 June, pp. 22-39. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029> [Accessed 2 January 2024]

<sup>18</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *Official Journal of the European Union* (2000/L 178) 17 July, pp. 1-16. Available from: <https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:32000L0031&qid=1705267093852> [Accessed 2 January 2024]

<sup>19</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, *Official Journal of the European Union* (2018/L 303) 28 November, pp. 69-92. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808> [Accessed 2 January 2024].

<sup>20</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), *Official Journal of the European Union* (2022/L 277) 27 October. Available

### 3.1.THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The UCPD provides a legal framework within which misleading advertising and commercial practices are to be addressed. While the law itself does not regulate influencers directly, it should be interpreted in conjunction with the "The European guidance on the interpretation and application of the UCPD" (European Guidance) issued in 2021.<sup>21</sup>

According to the guidelines, the UCPD applies when an influencer acts as a trader, or, alternatively, as a person acting in the name or on behalf of a trader, regardless of the size of the influencer's audience. It is worth noting that the authors of the guidelines have accurately distinguished between the activities of influencers, who are paid to publish their opinions, and the 'ordinary' online expression of opinions about goods or services by consumers.<sup>22</sup> The European Guidance clearly indicates that the failure to properly identify advertising content in social media posts or other influencer practices (e.g., affiliate content, tagging the trader/brand) for which they are paid may constitute a misleading practice under Article 6 and 7 of the UCPD.<sup>23</sup> In addition, the failure to clearly disclose the promotional nature of the content published may violate Annex I, point 11 of the UCPD (prohibition of practices that do not make it clear that a trader has paid for the promotion of a product in editorial content) as well as Annex I, point 22 (prohibition of misrepresenting oneself as a consumer).

Although some influencers may find this counterintuitive, from a legal perspective, it is reasonable to consider the content to be of commercial character whenever the author receives any form of remuneration (discounts, partnership arrangements, percentage from affiliate links, free products - including unsolicited gifts, trips or event invitations etc.) that is not

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from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065> [Accessed 2 January 2024].

<sup>21</sup> Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), *Official Journal of the European Union* (2021/C 526) 29 December, p. 1-129. Available from: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(05)) [Accessed 2 January 2024]. For a comparison of how the UCPD was interpreted in the context of influencer marketing before the adoption of the European Guidance see Trzaskowski, J. (2018) Identifying the Commercial Nature of 'Influencer Marketing' on the Internet. *Scandinavian Studies in Law*, 65 ('50 Years of Law and IT'), SSRN, pp. 81-100, Available from: <https://ssrn.com/abstract=3324103> [Accessed 13 January 2024].

<sup>22</sup> 'The UCPD does not apply to consumers who provide information about their experience with products or services, unless they can be considered as acting "in the name of or on behalf of a trader" see European Guidance, *Op. cit.* p. 94.

<sup>23</sup> *Ibid.* p. 98.

necessarily a monetary payment.<sup>24</sup> In light of the distinctive character of the relationship between the influencer and his or her audience, as discussed in section 2 of the article, the mislabelling of content by the influencer can also be assessed from the perspective of an aggressive commercial practice through the use of undue influence.<sup>25</sup>

As is apparent from the European Guidance, there is a need for precise application of the UCPD to the sphere of influencer marketing. However, given the directive's requirement for implementation in EU countries, it would be advisable for the act itself to explicitly include any newly emerging forms of marketing. In its current state, there is potential for legal uncertainty regarding the application of the laws, possible gaps in protection in certain areas, and the need for additional guidelines.

### 3.2. THE E-COMMERCE DIRECTIVE

In accordance with stipulations set out in the e-Commerce Directive, the provision of commercial information, which constitutes an information society service or a part thereof, must be clearly identifiable as such. The Directive defines this term as any form of information designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in a commercial, business, craft or regulated profession in so far as it is not information relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, in particular where it is given without any financial consideration.<sup>26</sup>

Consequently, the content published by influencers as a result of paid advertising collaborations will be considered commercial information with all the legal consequences that this entails. In the context of influencer marketing, the following information obligations will be primarily relevant: the clear identification of commercial communication, the identifiability of the advertiser, and the clear and unambiguous presentation of the conditions of promotional offers, competitions, or games.<sup>27</sup> It is worth noting that the definition of commercial communication appears to be broad and, unlike the UCPD, includes all forms of 'indirect' advertising.

<sup>24</sup> European Guidance, *Op. cit.* p. 98.

<sup>25</sup> Prohibited by Articles 8-9 UCPD.

<sup>26</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). *Official Journal of the European Union* (2013/C-187/08) 8 June. Available from: <http://data.europa.eu/eli/dir/2000/31/2024-02-17>, Article 2(f)

<sup>27</sup> *Ibid.* Article 6

Nevertheless, it should be emphasized that the regulation adopted in the e-commerce directive is also not comprehensive leaving outside its scope the content published by influencers without remuneration or when it would not be considered an information society service

### 3.3.THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

The AVSMD, on the other hand, affects influencers who have 'editorial responsibility' over an 'on-demand audiovisual media service' in relation to user-generated videos disseminated through these platforms, and which may contain commercial communications. The Directive itself introduces specific new rules for 'video-sharing platform services' and regulates three forms of commercial communication (advertising, sponsorship, product placement).<sup>28</sup>

In general, advertising should be recognisable and distinguishable from editorial content and other commercial relationships with traders must not affect the editorial independence or give undue prominence to products.<sup>29</sup>

### 3.4.THE DIGITAL SERVICES ACT

According to the DSA, illegal content is 'any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law'.<sup>30</sup> Such unlawful content may be advertising disseminated by online intermediaries that is in breach of EU law or the law of a Member State. This results in the possibility to apply to those who publish illegal content, for example, the provisions on liability of intermediaries (Article 6 DSA) or obligation to act upon orders directed against illegal content (Article 9 DSA).<sup>31</sup>

The definition of advertising itself in the DSA differs significantly in scope from the definition of commercial information in the e-commerce Directive. Article 3(r) of the DSA defines advertising as 'information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and presented by an online platform on its online interface against remuneration specifically for promoting that information'. This means that advertising within the meaning

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<sup>28</sup> Article 9-11 of the AVSMD.

<sup>29</sup> Trzaskowski, J. (2018), *op.cit.*, p.90.

<sup>30</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). *Official Journal of the European Union* (2022/2065) 27 October, Article 3(h)

<sup>31</sup> Duivenvoorde, B. and Goanta, C. (2023). The regulation of digital advertising under the DSA: A critical assessment. *Computer Law & Security Review*, 51, p. 5. Available from: <https://doi.org/10.1016/j.clsr.2023.105870> [Accessed 15 December 2023].



of the DSA will also include, for example, promotional activities carried out by NGOs which are not intended to be commercial in nature.

However, this broad definition of advertising makes it difficult to apply to influencer marketing. Although influencers mostly use online platforms to publish their content (including marketing materials), the absence of any form of compensation to the platform for the promotion of this content poses a challenge in categorising such actions as advertising under the DSA.

Thus, problems of inappropriate (or non-existent) labelling of advertising content by influencers are not solved by the regulation in Article 26 of the DSA. It requires online platform providers to ensure, *inter alia*, that for each specific advertisement presented to each individual recipient, it is possible to identify, in a clear, concise and unambiguous manner and in real time, the following: the advertising nature of the content, the entity for which the advertisement is presented and the entity that paid for the advertisement.

These issues, among others, were already highlighted during the work and drafting of the DSA in the Report of the Committee on the Internal Market and Consumer Protection (IMCO) in 2021.<sup>32</sup> This document called for changes by adding content to the preamble with content explicitly covering influencers, broadening the definition of advertising and transparency reporting requirements for intermediary service providers.<sup>33</sup> Unfortunately, these proposals were not adopted. In addition, it should be emphasised that even if influencers were explicitly covered by the DSA as postulated by IMCO, influencers who publish advertising content, e.g., on blogs, that are not part of online platforms, would still remain outside the regulation. Meanwhile, the DSA should be considered to exclude influencer marketing from its material scope.<sup>34</sup>

#### **4. THE ROLE OF MEMBER STATES' LEGISLATION ON THE EXAMPLE OF THE POLISH EXPERIENCE**

While, as mentioned above, the general rules on advertising at EU level apply to some extent to influencer advertising, the scope of their application remains problematic. In 2024, the efficacy of the EU consumer law with regard to digital fairness was assessed as limited, primarily due to the existence of legal uncertainty and the risk of regulatory fragmentation

<sup>32</sup> Draft Report on the proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 - C9-0418/2020 - 2020/0361(COD)) (2021) 28 May. Available from: [https://www.europarl.europa.eu/doceo/document/IMCO-PR-693594\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/IMCO-PR-693594_EN.pdf) [Accessed 15 January 2024].

<sup>33</sup> Currently Article 15 DSA - Article 13 in the draft DSA referred to in the report.

<sup>34</sup> Duivenvoorde, B. and Goanta, C. (2023). *op. cit.* p. 13

resulting from divergent interpretations and implementations.<sup>35</sup> It is important to note that, with the exception of the DSA, all of the aforementioned EU legal acts are directives. Consequently, Member States retain the prerogative to implement their respective regulations concerning the marketing of influencers. . The European Economic and Social Committee (EESC) in its opinion of 2023 lists the following among the possible actions by Member States<sup>36</sup>:

- adopt specific legislation on influencers;
- implement existing consumer protection legislation;
- publish guides and codes of conduct to establish good practices;
- use digital control and enforcement tools;
- provide training and certification for influencers;
- raise awareness and support consumers;
- facilitate compliance on platforms through standardised dissemination tools.

From the perspective of Polish law, the failure to indicate advertising content or its incorrect marking may constitute a misleading omission under the Act of 23 August 2007 on Counteracting Unfair Market Practices.<sup>37</sup> A particularly common misleading omission, which has been observed to be particularly tempting for influencers, is the failure to disclose the commercial purpose of a practice<sup>38</sup>, if it is not clear from the circumstances and if it causes or is likely to cause the average consumer to take a contractual decision that he would not have taken otherwise<sup>39</sup> and surreptitious advertising<sup>40</sup>. On the other hand, surreptitious advertising may also constitute an act of unfair

<sup>35</sup> European Commission. (2024) *Staff Working Document Executive Summary of the Fitness Check of EU consumer law on digital fairness* (SWD(2024) 231 final). Available from: <https://ec.europa.eu/f45c3742-d4d5-461f-bfea-3ce3e6bb5d26> [Accessed 6 January 2025]

<sup>36</sup> Hernandez Bataller, B., and Palmieri, S. *Opinion European Economic and Social Committee. Advertising through influencers and its impact on consumers* [Exploratory opinion requested by the Spanish presidency]. INT/1026-EESC-2023-01-01-01658-00-01-AC-TRA. Adopted at plenary on 13 July 2023. Available from: <https://webapi2016.eesc.europa.eu/v1/documents/EESC-2023-01658-00-01-AC-TRA-EN.docx/content> [Accessed 10 January 2024].

<sup>37</sup> *Act of 23 August 2007 on Counteracting Unfair Market Practices (item 2070)*. Poland. Journal of Laws 2017. In: Polish

<sup>38</sup> This can manifest itself in a complete lack of labelling, insufficient labelling e.g., only "#co-operation" without further explanation, also in a way that is almost invisible to the consumer, or marking posts as advertising only a few days after publication of the material, when many viewers will no longer be familiar with the corrected material.

<sup>39</sup> Articles 6.1 and 6.3.2 Act of 23 August 2007 on Counteracting Unfair Market Practices. *Op. cit.*

<sup>40</sup> Article 7 Act of 23 August 2007 on Counteracting Unfair Market Practices. *Op. cit.*

competition in the field of advertising under the Act of 16 April 1993 on Combating Unfair Competition<sup>41</sup>, if it infringes the interests of entrepreneurs whose are activities in competition with those of the advertiser.<sup>42</sup>

In September 2022, in order to prevent inappropriate labelling that may have resulted from a lack of awareness among the influencers and other social media users, the President of the Polish Office for Competition and Consumer Protection (UOKiK) published *Recommendations of the President of UOKiK on the labelling of advertising content by influencers on social media*.<sup>43</sup> It has to be appreciated that the document next to the clearly explained legal background offers a number of practical tips to enable an influencer to determine whether a given collaboration should be assessed as commercial (especially if the influencer receives a material benefit of different kind instead of monetary remuneration). The correct assessment of the collaboration will determine the commercial nature of the publication and then determine the extent to which the content is correctly labelled. It seems particularly valuable to emphasise that content published by an influencer may also constitute advertising, even if the client has no impact on the content of the influencer's opinion.<sup>44</sup> For some influencers, it is not intuitive to classify such communication as commercial.

The forms of labelling recommended in the document differ significantly from those currently used by influencers to date. Among other things, it is recommended to use two levels of labelling (standard labelling of an advertisement provided by a social media platform and own description in the content of the material, e.g., in the description or in the photo).<sup>45</sup> Labelling should be clear, unambiguous, and comprehensible, e.g., it

<sup>41</sup> Act of 16 April 1993 on Combating Unfair Competition (item 1233). Journal of Laws 2022. In: Polish

<sup>42</sup> Article 16.1.4 Act of 16 April 1993 on Combating Unfair Competition. *Op. cit.*

<sup>43</sup> It is worth noting that the recommendations are part of a trend of similar documents - see Czech *Recommended Rules of Business Collaboration with Influencers* from 2020. (For more on the work on this document: Ortová, N., Hejlová, D. and Weiss, D. (2023) Creation of a Code of Ethics for Influencer Marketing: the Case of the Czech Republic, *Journal of Media Ethics*, 38(2), pp. 65-79, Available from [doi.org/10.1080/23736992.2023.2193958](https://doi.org/10.1080/23736992.2023.2193958), Accessed [13 January 2024] . For regulations in the Nordic countries introduced since 2016 see Abidin, C. et al. (2020) A review of formal and informal regulations in the Nordic influencer industry. *Nordic Journal of Media Studies*, 2, pp. 71-83. Available from <https://www.doi.org/10.2478/njms-2020-0007>. Accessed [13 January 2024], or UK (2020) *An Influencer's Guide to making clear that ads are ads*. [online] Available from: <https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf> Accessed [13 January 2024]

<sup>44</sup> Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social medias (2022) p.7. Available from <https://uokik.gov.pl/download.php?plik=26686>. Accessed [5 January 2024].

<sup>45</sup> Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social medias (2022), *op. cit.* p.16.

is not sufficient to include the hashtag #ad in the post or even a full description in a foreign language (e.g., #advertisement).<sup>46</sup> In the case of advertisements, the options for correct labelling include in Polish: "XYZ brand advertisement" ('reklama marki XYZ'), "#advertisement or [advertisement]" ('#reklama lub [reklama]'), "#AdvertisingMaterial or [advertising material]" ('#MateriałReklamowy lub [materiał reklamowy]'), "#PostSponsored or [sponsored post]" ('#PostSponsorowany lub [post sponsorowany]').<sup>47</sup>

## 5. CONCLUSION

Influencer marketing is a relatively new phenomenon that is characterised by significant diversity. However, there is no doubt that it is an issue that needs to be addressed from a legal perspective. Until recently, this phenomenon has not been the subject of much interest either at the EU level or in Poland, but this is changing. Nevertheless, it is still unclear to what extent the current general provisions of advertising law can be applied to the activities of influencers. In particular, the DSA has not made the expected breakthrough, as its definition of advertising, does not include influencer marketing in its material scope.

Given the risks to consumers that may arise from mislabelled content, it seems necessary to adopt a flexible approach right now and to apply consumer protection and unfair competition rules to influencer activities as far as possible. In the near future, it will probably be necessary to comprehensively review the advertising and consumer protection rules as a whole and, if not rewrite them, at least clarify them so that there is no doubt that they all apply in both the offline and online world.

The current regulations are dispersed across a variety of legislation, with their scopes not overlapping, a situation that is not favourable to legal certainty. Moreover, there is an absence of sufficient case law to assess their practical functioning. For instance, Polish courts have not yet had the opportunity to analyse unfair practices concerning influencer marketing. It appears that the responsibility for clarifying the regulations has been passively transferred to the Member States, which is likely to result in divergence and regulatory fragmentation. Regulatory guidelines, while valuable and adaptable instruments, should serve as a complement to, rather than a substitute for, the legal framework. As studies demonstrate, the existence of well-defined guidelines is associated with higher levels of

<sup>46</sup> Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social medias (2022), *op. cit.* p. 18.

<sup>47</sup> Recommendations of the President of UOKiK pertaining to the tagging of advertising content by influencers on social medias (2022), *op. cit.* p. 17.

compliance.<sup>48</sup> Therefore, Polish guidelines can serve as a valuable source of inspiration in the development of regulations at the EU level.

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<sup>48</sup> Bertaglia, T., Goanta, C., Spanakis, G., Iamnitchi, A., Influencer self-disclosure practices on Instagram: A multi-country longitudinal study, (2025) *Online Social Networks and Media*, Volume 45,100298, p.9-12

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