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Expert Analysis Chapters

- 1** From #posts to #penalties: Understanding the Legal Framework for Social Media Influencers
Greg Lascelles & Demica Kaur Nettleford, Hausfeld
- 6** Compulsory Disclosure of Evidence Prior to Litigation in French Law
Patrice Grenier & Alexandre Pouray, Grenier Avocats
- 18** Forum Shopping and Selection: A Strategic Guide to Thai and International Courts and Arbitration
Krida Phoonwathu, Ittirote Klinboon, Rawi Meckvichai & Prat Naka, Rajah & Tann (Thailand) Limited
- 23** Challenges to International Arbitration: From Enforcement to Anti-Arbitration Perspectives
Ravi Singhania, Vikas Goel, Shilpa Shah & Harmanbir Singh Sandhu, Singhania & Partners LLP

Q&A Chapters

- 27** **Bermuda**
John Hindess & Terry-Lynn Griffiths,
Wakefield Quin Limited
- 35** **England & Wales**
Greg Lascelles & Demica Kaur Nettleford, Hausfeld
- 51** **France**
Olivier Laude, Benoit Renard & Camille Rigaud,
Laude & Associés
- 61** **Germany**
Matthias Schrader, Dr. Johannes Schmidt,
Dr. Harry Nettlau & Svenja Wachtel,
Willkie Farr & Gallagher LLP
- 69** **Guernsey**
Robin Gist, Charlotte Tomlinson, Alison Antill &
Glyn Davies, Ferbrache & Farrell LLP
- 76** **Hong Kong**
Paul Kwan & Andy Lam, Deacons
- 88** **India**
Shally Bhasin, Chaitanya Safaya, Prateek Gupta &
Udbhav Nanda, Shardul Amarchand Mangaldas & Co.
- 101** **Italy**
Alessandro Gravante & Rosanna Serraino,
Giambrone & Partners – Studio Legale Associato
- 109** **Japan**
Koki Yanagisawa & Hiroyuki Ebisawa,
Nagashima Ohno & Tsunematsu
- 118** **Lithuania**
Gediminas Dominas & Tomas Balčiūnas, WALLESS
- 126** **Luxembourg**
Clara Mara-Marhuenda & Sandrine Margetidis-Sigwalt,
Arendt & Medernach
- 134** **Mexico**
Armando Arenas Reyes & Eduardo Arana Ramírez,
OLIVARES
- 145** **Philippines**
Ramon G. Songco, Anthony W. Dee &
Jewelle Ann Lou P. Santos,
SyCip Salazar Hernandez & Gatmaitan
- 154** **Saudi Arabia**
Omar Alrasheed, Reed Runnels, Walid Al-Khalaf &
Nadir Hassan, Omar Alrasheed Law Firm
- 162** **Slovakia**
Jakub Kamenický & Adriana Pavlovičová,
Squire Patton Boggs
- 170** **Slovenia**
Rok Jerovšek, Peter Malis & Luka Jager,
Jerovšek Malis Law Firm
- 181** **Spain**
Sonia Gumpert Melgosa & Michael Fries,
Monereo Meyer Abogados
- 188** **Switzerland**
Sonja Stark-Traber & André Bloch,
Suter Howald Attorneys at Law
- 197** **Taiwan**
Winona Chen, Shih-I Wu & Yu-June Tseng,
Lee and Li Attorneys-at-Law
- 206** **Thailand**
Nathee Silacharoen, Sakolrat Srangsomwong,
Chonlawat Rojanaparpal & Wanchana Bunditkrisada,
Chandler Mori Hamada Limited
- 214** **USA – Delaware**
John A. Sensing, Carla M. Jones & Hannah L. Paxton,
Potter Anderson & Corroon LLP
- 223** **USA – New York**
Chris Paparella, Justin Ben-Asher & Jennie Askew,
Steptoe
- 233** **USA – Virginia**
Brian A. Hill & Scott M. Dinner, Nixon Peabody LLP
- 241** **USA – Washington, D.C.**
Brian A. Hill & Simon A. Poser, Nixon Peabody LLP

From #posts to #penalties: Understanding the Legal Framework for Social Media Influencers

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Introduction

Over the past decade, the rise of online influencers has reshaped the global marketing landscape. From YouTube creators in the early 2010s to today's mega influencers commanding millions of followers across platforms like Instagram, TikTok, YouTube and X, the influencer community has grown rapidly. This growth has also transformed how businesses approach advertising. Businesses are increasingly opting for influencer marketing as the primary way to promote their brands, products and services. From 2019 to 2023, spending on influencer marketing in the UK increased by more than £540 million,¹ highlighting its growing significance as a key component of brands' overall marketing strategy. This increase highlights how fundamental influencers have become in reaching and engaging consumers effectively.

The expansion of influencer marketing does bring with it complex legal and regulatory challenges. The close collaboration between influencers and brands blurs traditional lines between organic content and paid promotion, raising critical questions about transparency, accountability and compliance with existing laws. Several legal and regulatory frameworks have emerged to address these challenges and provide guidance for influencers and brands. In this chapter, we will explore how the legal and regulatory framework governing influencer marketing in the UK operates in practice, and consider whether the current legal frameworks adequately address the complexities of influencer marketing.

Advertising Standards and the CAP Code

In the UK, the Code of Non-broadcast Advertising and Direct & Promotional Marketing (the "CAP Code") is one of the key components of advertising regulation. Although the CAP Code is not legally binding, it carries significant weight in the marketing industry and breaching the Code can result in serious consequences imposed by the Advertising Standards Authority ("ASA"), including public rulings, ad removal/bans and referrals to other regulatory bodies such as Trading Standards and the Competition and Markets Authority ("CMA"), who have the ability to impose more serious sanctions such as fines.

Influencer's Guide to Making Clear That Ads Are Ads

The ASA's guide, *"Influencer's Guide to Making Clear That Ads Are Ads"*, which has been prepared in conjunction with the CMA, provides clear, actionable guidance for influencers and brands involved in social media marketing. The guide's

primary objective is to ensure that commercial content is clearly identified for the consumer and complies with advertising standards, to ensure that consumers always know when they are being advertised to and can make informed decisions. The guide outlines several rules for making ads transparent, including but not limited to the following:

- Any promotional content must include an upfront and clear disclosure. Terms such as "Ad", "Advert", "Advertisement" or "Paid Promotion" should be used, depending on the platform. The disclosure must be visible without requiring users to click "more" or scroll down.
- Influencers must not present paid promotions as their own independent opinions if they have received incentives like payment, free products or other perks.
- Disclosures should appear at the beginning of posts, not hidden in the middle or end of lengthy text, to help consumers immediately recognise the commercial nature of the content, regardless of how long the post is. The disclosure must be part of the main content, such as the first few lines of a social media post or video.

The guide also makes clear that both influencers and the brands they work with are responsible for ensuring that proper disclosures are made. This shared responsibility helps maintain compliance with both the ASA's guidelines and the CMA's consumer protection laws. Brands should provide influencers with clear guidelines on how to disclose ads, and influencers must comply by incorporating the disclosures correctly.

The ASA's Non-compliant Social Media Influencers List

The ASA has a track record of taking action against brands and influencers for breaching the CAP Code by publishing misleading or undisclosed promotional content through failing to clearly label paid partnerships. The ASA introduced its Non-compliant Social Media Influencers List in June 2021 to address repeated breaches of the CAP Code by influencers. The list names influencers who have consistently ignored warnings from the ASA and failed to label advertisements appropriately, misleading consumers about the commercial nature of their posts. Influencers are given an opportunity to rectify the issue, either by removing the post or editing it to add the appropriate hashtag to indicate that it is a paid promotion. Failure to comply with the warnings or to provide assurances to the ASA that future content will comply with advertising regulations will result in an influencer being added to the list. Actress Jacqueline Osborne and reality TV personality Scott Timlin are amongst the online influencers that have been named for neglecting to include clear labels on paid-for posts,

despite being contacted by the ASA. The list serves as both a public record of non-compliance and a deterrent for others in the industry. Being named on the list results in enhanced monitoring of the influencers' content and collaboration with social media platforms to enforce compliance, including the removal of offending posts. This proactive measure highlights the ASA's commitment to upholding transparency and fairness in influencer marketing to ensure that consumers can distinguish between authentic content and paid advertisements.

Rulings against influencers and brands

The ASA has also held brands accountable for non-compliance when working with influencers. In August 2024, the ASA issued rulings against the nutrition companies Huel and Zoe due to their failure to disclose key commercial relationships in influencer marketing campaigns featuring Steven Bartlett, a well-known entrepreneur and investor. Mr Bartlett, who is a director of Huel and an investor in Zoe, appeared in Facebook ads promoting both brands' products. As the ASA rulings explain, Mr Bartlett appeared in an ad for Zoe which contained an image of him with a patch on his arm which contained the text "Zoe" and an overlaid quote which stated "If you haven't tried ZOE yet, give it a shot. It might just change your life."² Mr Bartlett also appeared in two ads for Huel. The first ad "featured an image of Huel's Daily Greens drink with text that stated "This is Huel's best product' Steven Bartlett"³ and the second "showed two videos side-by-side; one showed Steven Bartlett and the other showed a person looking at their mobile phone. Superimposed text between the videos stated "Is Huel actually nice?". Bartlett stated, "This is the best product that Huel have released."⁴

Mr Bartlett did not make his financial connections with either of the companies clear in the promotional posts, which the ASA held violated transparency rules set by the CAP Code. The ASA found that, by not clearly disclosing these ties, the advertisements were misleading to consumers in breach of Rules 3.1⁵ and 3.3⁶ of the CAP Code. These consumers may have been influenced by Bartlett's endorsements without knowing about his financial interest in the companies. The ASA ruled that the ads were misleading and issued a ban on the content, instructing Huel and Zoe "to ensure that future ads did not misleadingly omit material information regarding commercial relationships".⁷

Legal developments across Europe also point to a growing trend toward brand accountability. In Germany, the courts have penalised brands for non-compliance in influencer marketing campaigns. Luisa-Maxime Huss, a fitness influencer, posted on Instagram to promote a raspberry jam brand by linking to the manufacturer's Instagram profile using a "tap tag", which led users to the product's website. Despite receiving compensation for this promotional post, it was not labelled as advertising. The Federal Court ruled that this was a violation of German competition law as the commercial intent of the post was not sufficiently disclosed. The court emphasised that the overall impression of the post, which presented the product positively without any critical distance, qualified it as a commercial practice. The post was required to be removed for not complying with transparency rules.

Similarly, the Italian Antitrust Authority, *Autorita' Garante della Concorrenza e del Mercato* ("AGCM"), has taken action against brands whose campaigns lacked adequate advertising disclosures. In 2020, the AGCM investigated whether Barilla and the micro-influencers it worked with to promote its "Pan di Stelle" chocolate cream were complying with rules regarding transparency in advertising. Although the AGCM did not impose sanctions, it did accept the commitments from Barilla

and the influencers to ensure better compliance in the future, including clear guidelines for influencers on using proper hashtags to disclose promotional content, such as #supplied-bybrand, #fornitodabrand or #advertisingbrand, to prevent misleading practices. Additionally, the AGCM recommended that brands include penalty clauses in contracts with influencers and agencies to enforce transparency in advertising.

In 2023, the AGCM fined Balocco and Chiara Ferragni (an influencer) for misleading consumers about a charity-related promotion. The promotion, which suggested that purchasing a co-branded "Pandoro Pink Christmas" would contribute to a charitable donation to a hospital, was found to be deceptive, as the donation had already been made months earlier. The AGCM fined the companies involved over €1 million for misleading commercial practices, as the campaign falsely led consumers to believe their purchases would directly impact the donation.

These cases serve as a reminder that both brands and influencers share the responsibility for complying with advertising regulations. Taking action against high-profile breaches sends a strong message that non-compliance not only risks reputational damage, but also regulatory or judicial intervention. These rulings highlight the growing importance of transparency and compliance in influencer marketing, particularly as social media platforms become central to advertising strategies.

The CAP Code and financial products

The Code provides specific guidance on marketing products and activities that can significantly affect consumers' health, safety and financial well-being. Financial products and advice fall under this category, with stricter regulations in place to deter breaches, which can lead to severe penalties. Financial influencers, or "finfluencers", are social media creators who share advice and insights on personal finance, investments and wealth management. In the UK, their activities face growing scrutiny, especially with the rising popularity of high-risk investments like cryptocurrencies. Recent regulatory updates include stricter rules for financial promotions under the FCA's guidance, effective October 2023, which require all crypto-asset promotions to be approved by FCA-authorised firms to ensure transparency and adequate risk disclosure.

Finfluencers must comply with both FCA rules and the Financial Services and Markets Act 2000 ("FSMA"), alongside the Code, when promoting financial products or services. Non-compliance can lead to serious consequences, as seen in a recent FCA case against nine finfluencers charged with promoting an unauthorised foreign exchange trading scheme on social media.⁸ They faced charges under Section 19 of FSMA⁹ for breaching the General Prohibition and/or Section 21 for communicating unauthorised financial promotions, both punishable by fines and/or up to two years' imprisonment. This case highlights the FCA's dedication to protecting consumers from misleading or unregulated advice while emphasising the need for financial promotions to be clear, fair and not misleading. In October 2024, the FCA confirmed that it was questioning, under caution, 20 finfluencers who may be illegally promoting financial products, and that it had issued 38 alerts against social media accounts operated by finfluencers which may contain unlawful promotions.¹⁰ This is yet another example of the FCA's ongoing efforts to address potentially unlawful and deceptive practices, particularly those that could harm young and vulnerable audiences. The regulatory framework aims to balance empowering consumers with financial literacy and safeguarding them from potential harm caused by unqualified practices.

The Consumer Protection from Unfair Trading Regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 (“CPRs”) is a key piece of legislation in the UK that aims to protect consumers from unfair, misleading and aggressive commercial practices. The CPRs were enacted to implement the Unfair Commercial Practices Directive (“UCPD”) (Directive 2005/29/EC), which prohibits misleading actions, omissions and coercive practices, and requires transparency in advertising. The CPRs assess the impact of marketing practices from the perspective of the average consumer, defined as someone who is reasonably informed, observant and cautious. However, there is no need to prove that actual consumers have been misled; it is sufficient to demonstrate that the practice was likely to have an effect. One of the most critical aspects of the CPRs for influencers is the requirement to disclose their commercial relationships. If influencers have received payment, gifts or other incentives to promote a product or service, they must make this clear to their audience. Transparency in these cases is essential to avoid misleading consumers about the nature of the endorsement.

The CPRs as originally enacted did not give consumers a private right of redress against those engaging in misleading practices. Following a review by the Law Commission and Scottish Law Commission in 2010, the need for a private enforcement mechanism for victims was addressed. In 2014, the CPRs were amended¹¹ to introduce a new Part 4A to the legislation, providing consumers direct rights of redress against those breaching the CPRs. Under Regulation 27J, a consumer has a right to recover damages if the consumer has:

- (a) incurred financial loss that the consumer would not have incurred if the prohibited practice in question had not taken place; or
- (b) suffered alarm, distress or physical inconvenience or discomfort that the consumer would not have suffered if the prohibited practice in question had not taken place.

It is important to note that the right to recover damages under Regulation 27J is only triggered if the following conditions set out in Regulation 27A are met:

- (a) the consumer enters into a contract with a trader for the sale or supply of a product or goods by the trader, or the consumer makes a payment to a trader for the supply of a product;
- (b) the trader must have engaged in a prohibited practice (a misleading action,¹² a misleading omission¹³ or an aggressive practice¹⁴); and
- (c) the prohibited practice is a significant factor in the consumer’s decision to enter into the contract or make the payment.

Regulation 27J was introduced to address the gaps left by existing remedies, like the Misrepresentation Act 1967, by enabling consumers to recover losses stemming from misleading or aggressive commercial practices. While it provides a route for seeking damages, its practical application faces significant barriers, including limited consumer awareness and challenges in proving a direct causal link between the unfair practice and the loss.

Consumers, in most cases, will look to the brand rather than the influencer for recourse (in particular as there is a question mark over whether “traders” would include influencers), and those brands are responsible for ensuring that their marketing, including influencer-led campaigns, adheres to the law. Where the influencer is at the origin of the prohibited practice, the consumer will firstly need to demonstrate that the influencer’s

actions under the brand’s direction caused specific harm or financial loss and, secondly, tie that to the brand’s involvement or approval. That may not be straightforward.

The Copyright, Designs and Patents Act 1988

The Copyright, Designs and Patents Act 1988 (“CDPA”) grants creators exclusive rights to protect their original works. These rights include the ability to decide how their work is used, reproduced or distributed, and to seek remedies if these rights are infringed. Copyright applies to a wide range of creative outputs, including literary, musical, artistic and film works, as well as sound recordings and broadcasts. Copyright infringement occurs when a protected work is used without the creator’s permission in a manner that violates their exclusive rights. Remedies for infringement under the CDPA may include injunctions, damages, or delivery up of infringing copies.

Influencer marketing often involves the use of music, images or video content, making copyright compliance a critical consideration. Common infringements include the unlicensed use of music tracks in promotional videos, using copyrighted images without permission, or “remixing” or “stitching” existing content without crediting or compensating the original creators. These practices can expose influencers and the brands they collaborate with to potential legal liability. For brands, the risk extends to vicarious liability, where they may be held accountable for copyright infringements committed by influencers acting on their behalf. This issue has been explored in recent cases in the US:

In the case of *Universal Music Group Recordings, Inc. v. Vital Pharmaceuticals, Inc.*,¹⁵ the music label UMG alleged that Vital Pharmaceuticals, the producer of “Bang” energy drinks, used UMG-owned music in its promotional campaigns without obtaining proper licences. These campaigns included influencer-created content shared on platforms like TikTok. UMG claimed that this unauthorised use constituted copyright infringement. The Court held that Vital Pharmaceuticals had exercised sufficient control over the social media influencers it partnered with (by directing the creation of promotional content and benefiting financially from the influencers’ posts), making the company potentially vicariously liable for copyright infringement.

A similar dispute arose in *Sony Music Entertainment v. Gymshark Limited*,¹⁶ where Sony alleged that Gymshark posted videos on platforms like Instagram and TikTok using music from Sony’s artists without permission. The complaint also implicated Gymshark’s collaborations with influencers, who created and posted videos featuring the music. These videos were later shared on Gymshark’s social media channels, often in exchange for compensation or free products. Although the case ultimately settled out of court, it underscores the risks brands face when using influencer-generated content that incorporates copyrighted materials.

These cases remind brands making use of influencer marketing of the potential legal pitfalls and the importance of proactive copyright compliance – brands and influencers can avoid costly disputes by obtaining proper licences and ensuring compliance with copyright law.

Conclusion

The rapid rise of influencer marketing has undoubtedly transformed advertising. While influencers are the visible face of campaigns, brands should also be mindful that they too can be scrutinised and penalised when promotional content fails to

comply with legal and ethical standards. In the UK, the ASA's rulings serve as a deterrent to businesses and influencers who may be tempted to flout the rules. Brands must recognise that these public rulings can lead to more than just financial losses. The naming and shaming of offenders in this manner harms their reputation in the market and forces consumers to reconsider whether the product or service being offered is one that can be trusted.

In addition to adhering to the CAP Code and CPRs, brands can ensure good practice in their influencer marketing strategy by adhering to the *Influencer Marketing Code of Conduct* (the "Code"), jointly published by the Incorporated Society of British Advertisers ("ISBA") and the Influencer Marketing Trade Body ("IMTB").¹⁷ The Code aims to "*raise standards of conduct in influencer marketing and advertising*" by setting out guidelines relating to disclosure and transparency for brands, agencies and influencers to follow when engaging in marketing campaigns. The latest version of the Code also introduces a section focused on protecting consumers from harm "*which might be caused by the content or placement of influencer ads*"; a clear recognition of the impact influencer-led marketing can have on consumers. The Code places the responsibility to prevent potential harm with both the brands and influencers jointly, and imposes a positive duty on all involved to "*take all reasonable steps to prevent harm which might arise from the content or placement of influencer marketing*".

Brands are uniquely positioned to act as gatekeepers in influencer marketing. They control campaign budgets, set objectives and provide final approvals for promotional content. This control gives them the leverage to enforce transparency by requiring influencers to label sponsored content clearly, ensuring disclosures are visible. Holding brands liable for violations incentivises them to exercise this leverage responsibly. For example, brands could implement stricter vetting and training for the influencers they work with, to ensure that they are aware of regulatory requirements, thereby reducing the risk of publishing misleading claims. Increasing brand liability also benefits consumers. Transparency enables fair competition and also aligns with broader regulatory efforts under frameworks like the Digital Services Act, which introduces new obligations for commercial transparency on digital platforms.

As influencer marketing continues to grow, brands will take greater responsibility for ensuring transparency in their campaigns. By embracing proactive oversight, enforcing clear contractual obligations and leveraging their gatekeeping role, brands can foster consumer trust and avoid regulatory penalties.

Endnotes

- 1 "Influencer advertising spending in the United Kingdom from 2019 to 2030", Statista 2024 (<https://www.statista.com/forecasts/1445521/influencer-advertising-spending-uk>).
- 2 <https://www.asa.org.uk/rulings/zoe-ltd-g24-1241850-zoe-ltd.html>
- 3 <https://www.asa.org.uk/rulings/huel-ltd-g24-1237493-huel-ltd.html>
- 4 <https://www.asa.org.uk/rulings/huel-ltd-g24-1237493-huel-ltd.html>
- 5 Rule 3.1 of the CAP Code: Marketing communications must not materially mislead or be likely to do so.
- 6 Rule 3.3 of the CAP Code: Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner. Material information is information that the consumer needs to make informed decisions in relation to a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium, and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means.
- 7 <https://www.asa.org.uk/rulings/zoe-ltd-g24-1241850-zoe-ltd.html>, <https://www.asa.org.uk/rulings/huel-ltd-g24-1237493-huel-ltd.html>
- 8 'Finfluencers' charged for promoting unauthorised trading scheme, FCA (<https://www.fca.org.uk/news/press-releases/finfluencers-charged-promoting-unauthorised-trading-scheme>).
- 9 "No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is— (a)an authorised person; or (b)an exempt person."
- 10 <https://www.fca.org.uk/news/press-releases/fca-cracks-down-illegal-finfluencers>
- 11 Amended by the Consumer Protection (Amendment) Regulations 2014.
- 12 Regulation 5.
- 13 Regulation 6.
- 14 Regulation 7.
- 15 2022 WL 2670339 (S.D. Fla. July 11, 2022).
- 16 Case 2:21-cv-05731.
- 17 The fourth version of the Code was published on 28 November 2024.



Greg Lascelles advises clients in high-stake matters covering complex international commercial litigation, arbitration, regulatory investigations and legislative hearings.

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