**#INF-LAW-ENCER**

**THE LAW OF INFLUENCERS**

**Rules and tools to protect your social media business**

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This document is intended to act as an essential “survival kit” for young Influencers who have just taken their first steps in the industry, as well as for more experienced Influencers who cannot count on specialized legal counsel operating in this field yet.

To this end, it is important to make some final observations. The legal field is ever faced with new realities related to the use of new technologies. This document will also serve as an informational piece for lawyers looking to gain a better understanding of Influencer Marketing.

*This book would not have been possible without the help of Lucia Maggi, Nicole Monte, Giulia Suigo and Carolina Teruggi.*

**Foreword**

**By Guido Scorza**

Once upon a time, there was traditional advertising.

On one hand a brand, product, service, maybe even a celebrity acting as their ambassador, placing their notoriety at the service of advertisers. On the other hand a huge, heterogenous audience, made up of tens or even hundreds of millions of people the ads were targeted to, in the hopes of breaking through to even a small percentage of them, in order to convince them to buy that product or service or to simply retain their loyalty to an already famous brand.

Street signs, newspapers, radio and TV were the main channels for this form of advertising, its mass vehicles. They were able to make the same advertising message accessible to a diverse and unsegmented audience.

Then came the Internet and everything – or at least a lot - changed.

The goal of promotional communication is of course still the same: to influence purchasing behaviors of users and consumers, inducing them to buy the advertisers’ products and services.

However, the tools at their disposal and at that of the advertising industry have evolved extraordinarily.

The impact of the Internet and, in general, of the digital world on advertising has likely been more significant than their impact on any other field.

Generalized advertising is now a thing of the past - messages targeting all users and consumers indistinctly in the hopes of gaining the interest of a small percentage of buyers do not work anymore. In its place, targeted advertising is now more successful, as is profiling: ad-hoc messaging for specific groups of users and consumers.

Advertisers no longer consider what would work on the average consumer for the promotion of a coffee brand, and they no longer promote coffee to those who only consume tea or barley.

Nowadays, in order to promote a product or services, it is essential to choose forms, content and people that can catch the attention of a more specific target of consumers; different messages, different ambassadors, different language registers are all used for the same product or service.

Before sharing a promotional message, it is therefore essential to get to know the end user and consumer individually, profiling them to better understand the key elements that guide their purchasing behaviors. It is even important to learn about their weaknesses, the areas where they can be more easily influenced and their purchasing behaviors are more pliable – although it is unlikely that advertisers would talk about their activities in these terms.

Everything has changed.

Until only a few decades ago, the industry was controlled by a few experts in market research, a select few creative geniuses and well known – or even extremely well known – faces. Now, it is firmly in the hands of an incredibly small number of digital platforms with significant IT content; tens of thousands of mathematicians, physicists, data scientists, philosophers and psychologists as well as a large, potentially infinite army of Influencers. They are the main characters in this book: new ambassadors that are extremely different from their predecessors in terms of their profiles and their characteristics.

You could check Google Trend – Google’s service that helps record and tally all searches performed by users from across the world – for the word “Influencer”.

Up until mid 2016, you will notice the trendline is as flat as a lake, then it reports a sharp increase, like the tallest mountain.

It is clear that this is an extraordinary global phenomenon, which is perhaps less transient than many other phenomena that have occurred within the digital world.

And who are these Influencers?

Why are they so significantly at the core of the advertising industry?

How have they managed to usurp the celebrities of the past, or at least most of them, except perhaps for those who were quick enough to transform into Influencers?

This book will paint the profile of this new profession – even though not all Influencers necessarily do it professionally, several of the main ones certainly do.

This is one of the main positives of this book.

It does not take anything for granted, either when analyzing and describing the phenomenon or when describing its regulatory framework of reference.

The book is useful both for those who simply want to learn more about this relatively new phenomenon, which is certainly significant within the digital ecosystem of Influencer marketing, as well as for those who want to understand their legislative profile and rules.

Its purpose is to serve as an introduction to the topic, as well as at the same time, to compile useful notions for those who are eager to learn more about the phenomenon and its regulation.

It is a simple book, which of course does not mean simplistic or devoid of content – it is simply made accessible and clear to all users.

This is likely one of its most precious added values.

There are thousands of legal texts about advertising, surreptitious advertising, rights of personal portrayal (especially in the case of celebrities), unfair competition or trademark protection. They represent an invaluable knowledge resource, often authored by the most talented jurists in the country. This book does not intend to replace such a source, but rather to add to it.

There are only a few books about a phenomenon that is so new, both from a financial, social and legal standpoint. Such a book cannot aim to become a guide, because there are no absolute truths to tell, explain, or put at the center of a scientific dialogue. However there are indeed several thoughts to share, business practices to highlight, approaches for old problems now taking new guises to suggest.

So whether you are an Influencer or aspire to become one, or you are their agent, a lawyer practicing in advertising or in the digital world, or working within a marketing company, the authors believe this book will benefit you regardless.

**Introduction**

“*At first, marketing was similar to a catalog listing product functions. Once the press was introduced, the focus was exclusively on newspapers. Then, in the era of radio, companies were creating and investing in proper radio shows, such as “brought by Procter & Gamble”. Television was an explosive innovation, as companies were attracted to its significant visual component. Now we have integrated communication, but I think that none of the “old” media should be foregone. It is simply important to find the right media mix balance and yes – today, this means giving way to the digital realm.”*[[1]](#footnote-1)

Philip Kolter’s words taught us the idea of “old media” and “new media”, with the latter now mainly consisting of online platforms, social networks, blogs and apps as well as, more in general, the digital world.

It is important to consider that new media mainly represent a comprehensive overview of all previous iterations – press, radio and TV – and that digital content represents a form of communication that is more immediate, but also more difficult to protect.

The Internet taking off made it possible for digital works to be shared more quickly, which in turn allowed for significant savings in both time and money.

Nowadays, products and services are mainly promoted online.

We are now seeing new business models and new forms of marketing communication, which influence consumer choices. These go hand in hand with new forms of advertising, such as social media posts.

Advertising and brand endorsements by entertainment and sports celebrities represent a significant competitive advantage for the owners of those brands, as they can help build and develop consumer trust and appreciation. Nowadays, consumers tend to consider other consumers’ product reviews more reliable than more traditional advertising channels.

This phenomenon first arose in the USA, but it subsequently spread globally - it is known as Celebrity Marketing, which peaked through the development of an information society.

The definition of information society includes all the technological innovations that significantly changed the way we communicate or learn information, based on a few key concepts:

- *ease of replication.* The technology used to create, view and use digital works allows for the reproduction of an infinite number of identical copies of the original;

- *ease of transmission and multiple use.* IT networks potentially allow users to copy and plagiarize those works, developing fast and massive distribution.

- *plasticity of digital media.* Through digital formats, users can easily edit or adapt works by using any technological tools available (a large portion of social media content is now created on smartphones);

- *equivalence of works in digital form*. All works use the same IT language, therefore it is quite easy to assemble digital works and create new works by collating and editing existing ones;

- *compactness of works in digital form*. For example, this allows for an entire collection of works to fit on a USB drive, or in immaterial cloud space, as well as on easily accessible digital platforms such as social media;

- *new search and link capabilities*. The online space facilitates connections between websites, social media and digital platforms, supporting information exchange and allowing users to carry out in-depth searches in a reasonably short time.

It is interesting to note that the concept of information society, which was developed in the 70s, keeps changing.

The rapid development of the digital world and social media has revolutionized our way of life, allowing us to always be “connected”.

According to research by Global Digital, while in 2004 we would check our phones 9 times per hour, now we do so 15 times, meaning once every 3-4 minutes.

According to further research, we spend about 6 hours and 8 minutes browsing the Internet every day, of which almost 2 hours on social media alone. That is exactly twice as much as we used to do in previous years.

We should also note that the number of Internet-connected users is now over 4.5 billion (about 60% of the total world population) and that 3.8 billion people regularly use social media.

**Chapter One**

**1) THE INFLUENCER MARKETING PHENOMENON**

**1.1 The success of Influencer Marketing**

How important is credibility on social media? Very much so.

Influencers nowadays aren’t only public personalities supported by their followers, but actual marketing vehicles bridging the gap between consumers and companies.

And they are the fastest and most powerful vehicle at that. That is why being credible is important: to be “influential”, Influencers must first and foremost be credible.

But let us start at the beginning.

Social media contributed to eliminating physical barriers between people, allowing everyone to immediately interact with everyone else from across the world; however, they also revolutionized the relationship between people and companies.

You might call them Influencers, Content Creators or Talent, but nonetheless, they are individuals who indirectly influence other people’s choices in a very real way, using their experience and direct endorsement of the product or service they are sponsoring to sway their audience.

With the evolution of pop culture, the phenomenon of Influencer Marketing began developing alongside Celebrity Marketing, making its way with brand new rules and opportunities.

The concept of what an Influencer is or does is flexible, and it evolves as social and economic dynamics change; Influencers are a very heterogeneous category and they respond to market demands in different ways.

Influencer Marketing can be defined as a form of marketing based on the influence common people who gained web notoriety have in certain industries, mainly through social media.

Currently, Italian law doesn’t provide a proper legal definition of Influencer Marketing, nor of Influencer.

The Self-Regulatory Institute for Advertising (Istituto di Autodisciplina Pubblicitaria, IAP) defines Influencers as “subjects who are able to influence consumers in their choice of a product or their opinion of a brand.”

The Italian Antitrust Authority (Autorità Garante per la Concorrenza e del Mercato, AGCM) also provides its own definition of the Influencer Marketing phenomenon, which consists in the “posting on blogs, vlogs and social media platforms (such as Facebook, Instagram, Twitter, YouTube, Snapchat, Myspace) of photos, videos and comments by bloggers and Influencers (i.e. well-known online personalities, who have large numbers of followers), sharing their support or endorsement of specific brands, in turn generating an advertising effect, without clearly and unequivocally disclosing to consumers the marketing purpose of their communication.”

However, it is important to specify that not all Influencers have the same influence on consumer choices. That is to say that having an open social media profile, creating content and self-identifying as an Influencer is not enough to truly affect other people’s choices.

In general, as the word itself would suggest, these individuals can “move the masses”, meaning they have the ability to influence their audience of reference (i.e. their followers) in their purchasing decisions and opinion of a brand over another. That is possible because of the trust Influencers build with their followers, which in turn then transfers to the products and services the former endorse to their audience. This is a wider version of word of mouth, because it targets an entire audience of users, which can often be very large.

Users choose to follow a specific profile not because of the brands each Influencer sponsors, but because of the stories they share, which make everything real and compelling.

Influencers often integrate advertising within their content, which ranges from excerpts of their daily lives to singing reels, training, recipes and much more. Each Content Creator chooses their own style, their own way of communicating and the main theme their storytelling will revolve around; this allows them to organically gain followers who also represent a specific niche of consumers.

We could compare followers to diligent viewers of a specific TV show which employs traditional product placement. These are sponsored products, which are placed within the existing narrative structure (movie, TV show, music video, etc.) in an apparently natural way, in exchange for compensation.

For instance, we could mention several examples of Gucci, Prada, Dolce&Gabbana, Fendi and Manolo Blahnik products being shown in the famous TV series *Sex and the City*, or the ever-present Coca Cola can in *Breaking Bad*, or *Forrest Gump*’s Nike shoes and so on.

Surely, many aspiring runners will have thought about buying a pair of Nike shoes based on the famous character. And many women will have bought Fendi’s baguette bag, inspired by Carrie from *Sex and the City*.

The same process, or a similar one, is put in place between Influencers and their followers. This is actually much more powerful, because Content Creators and followers develop a “virtual bond” that fosters follower loyalty, converting them into potential buyers of all the brands the Influencer chooses to endorse.

In order not to trivialize this important concept, we have to highlight that the Influencer macro category includes different types of subjects, which are ideally and conventionally grouped in the following categories:

- MEGA INFLUENCERS, i.e. celebrities that are well-known and beloved worldwide, whose social profiles have millions of followers and who sign contracts with well-established companies that already have a presence on the market - usually leaders in their industry.

- MACRO INFLUENCERS, i.e. accomplished professionals in their reference industry, whose social profiles have more than 100,000 followers, who create and share high-quality content related to their specific industry;

- MICRO INFLUENCERS, i.e. individuals whose social profiles showcase a specific market niche, and who have more than 10,000 followers;

- NANO INFLUENCERS, i.e. individuals whose profiles have more than 1,000 followers.

However, it’s important to highlight that a profile’s number of followers is certainly relevant, but the most crucial benchmark is represented by its engagement rate, i.e. the percentage ratio between the number of interactions on each post and the number of views of that post. A large fan base is representative of a profile’s potential to reach many people, but it would not constitute a guarantee of its actual reach.

When considering sponsorships and endorsements, conversion rates are even more important, i.e. the number of users who see the sponsored content and make the action which was pre-determined as the parameter that would be used to assess the return on investment; for instance, they purchase the sponsored product through an affiliate link included in the post (which on Instagram would be the so-called “swipe-up link”).

By this measure, an Influencer with millions of followers might not have a high conversion rate and vice-versa. Conversion rates depend on the level of trust the followers have in the Influencer they follow. Therefore, some Micro Influencers might have a higher conversion rate because they are more effective in communicating with their followers, or more outspoken about a specific topic.

**1.2 Endorsements**

The concept of endorsement pertains to the phenomenon of Influencer Marketing.

In politics, an endorsement is the explicit support expressed in favor of a person, a policy or a law, a stance that is communicated through an official statement to the press and media.

In the field of digital marketing communication, endorsements represent a form of accreditation of a product, brand or service, by subjects that are able to influence the purchasing behaviors of consumers, both in terms of their choice of products and of their positive opinion of a brand.

The term “endorsement” is used to indicate the exclusive contractual relationship between a particularly famous professional who is well-known within a specific industry (endorser) and the products sold by a specific company (endorsee).

Endorser and endorsee enter into an exclusive endorsement agreement, through which the former commits to solely using the latter’s products within their professional activity, by providing a license for use of their image for the purposes of promotion of such products.

In order for the contract to fulfil its purpose, the promoted product needs to be part of the same industry the endorser operates in, which represents the industry in which the Influencer has found popularity among their followers.

The endorsement will be more effective the wider the endorser’s audience, i.e. the more able the Influencer is to increase the visibility of the products and services they are supporting. This ties back to our statements about credibility. The more credible the Influencer is in their daily activities on social media, the more intense and profitable the endorsement.

Examples of endorsers might be professional sportspeople promoting activewear, chefs promoting kitchen tools and musicians promoting musical instruments, microphones, speakers, etc.

Such contractual relationship, which is new and one of its kind, is not explicitly mentioned or regulated by Italian law; it represents an “atypical contract” as defined by lawyers in accordance with Article 132 of the Italian Civil Code.[[2]](#footnote-2)

This means that, within the terms set forth by law, Company and Influencer will be free to decide on the contents of the agreement.

The atypical nature of the relationship is advantageous as it allows for a customized contractual relationship to be tailored to each specific case according to the related individual needs; it also allows for ample margins for negotiation of the agreement’s contents.

If we may adapt a famous quote to our example, we could say “With great freedom comes great responsibility” – i.e. the freedom to operate as one pleases, and the lack of strict rules to operate within, requires that close attention is paid to the contents of a contract.

Essentially, it is important to carefully think through each contract clause and assess all the elements at play as well as their consequences, taking into account all interests as to establish a balanced contractual relationship between the parties.

One of the clauses endorsees often request is exclusivity, i.e. the Influencer’s commitment not to use products or services of a competitor brand for a set period of time, which is also negotiated by the parties, and which can be equal to or greater than the duration of the contract.

Within the contract itself, ancillary provisions are often added to the main ones, such as the endorser’s participation in one or more events planned by the company to promote the brand and the sharing of promotional posts on the endorser’s social channels, which must comply with the transparency regulations and the advertising campaign transparency we will discuss further in following chapters.

The endorsement contract therefore represents a form of sponsorship, which presents the above-described characteristics.

Such sponsorship - also an atypical contract - represents the macro category which includes endorsement contracts and in general, the promotion of products and services that might belong to different sectors than the ones the Influencer operates professionally within. We might for instance name the case of a soccer player sponsoring a fashion brand, or a Content Creator sponsoring a car and a marketing consultant sponsoring a line of jewelry – the examples are many and varied.

Following are some essential elements that should be considered when negotiating a sponsoring contract and, in particular, an endorsement contract between the Influencer and the owner of the brand subject of the promotion.

The final contract will establish a legal relationship, created ad hoc for the specific situation, as well as balance the sometimes contrasting interests of Influencer and brand owner. Such elements are:

⇒ OBJECT: an indication of products and the brand to be advertised, and of the type and quantity of content to share. It is important to set the desired requirements exactly, i.e. the types of services and activities required by the endorser, the content to post, the channels used, etc.

⇒ DURATION: the start and end dates of the contract, or the period of validity of the contract, as well as the indication of the project’s timeline and related deadlines; in general, any relevant date for the project (such as the shoot or event date, the content approval deadline for the brand, the content posting day for the Influencer, etc.)

⇒ MODE OF PERFORMANCE OF THE CONTRACT: indication of the potential power of review and approval of the material produced before publication by the brand, as well as definition of the criteria for assessing the campaign performance.

⇒ RIGHTS OF PERSONAL PORTRAYAL: concession by the Influencer of the rights of personal portrayal for the promotion of the brand, as well as definition of the geographical scope for the duration of the contract (the scope of concession of such rights will depend on each specific case.)

⇒ EXCLUSIVE (potential): indication of the time, geographical and merchandising limitations and any blacklisting of competitor brands with which the Influencer is not allowed to enter into contracts.

⇒ INTELLECTUAL PROPERTY RIGHTS: indication by the owner of such rights over the branded content subject to the contract.

⇒ COMPENSATION: financial compensation, which is set or subject to royalties, which the brand will pay the Influencer, with an indication of the payment modes and terms, or a simple provision of products needed for the creation of content.

⇒ ADDITIONAL INFLUENCER OBLIGATIONS: for instance a commitment to complying with the rules set by the IAP and the application of advertising regulations, including but not limited to the hashtags needed to disclose the promotional nature of the relevant content (the Company is required to choose commercial hashtags and/or official tags and captions the endorser will have to include in each post at the time of sharing); the contractual need to adhere to guidelines set by communication regulatory authorities, such as AGCM, and the Influencer’s liability in the instance of non-fulfilment; acceptance of the code of conduct set by the brand owner.

⇒ PRIVACY: prohibition from divulging the contents of the contract and private information discovered during the course and performance of the contract itself.

⇒ EXPRESS TERMINATION CLAUSE: clause which provides for the automatic termination of the contract in the instance that one of the parties fails to fulfil any specific provisions of the clause itself (regulated by Article 1456 of the Italian Civil Code[[3]](#footnote-3)).

⇒ PENAL CLAUSE: conventional ex-ante quantification of the compensation for damage owed by the unfulfilling party to the other party, without the need for the latter to prove the exact amount of the damage; it can refer to one or more obligations provided for by the contract.

⇒ PERSONAL DATA PROTECTION: statement by the brand owner of their intention to comply with national (Legislative Decree No. 96/2003) and European (EU Regulation No. 679/2016) regulations concerning the Influencer’s personal data protection. Such regulations apply as the Influencer is a natural person with the right to receive their data protection policy, even in the instance they are represented by an agency. The topic of privacy is very important for this industry and paying close attention to its regulation is essential, even as it applies between the agency and the brand.

The contract parties, in performing the advertising operation, will be required to not only adhere to the provisions of the agreed-upon contractual clauses, but also to the so-called “protection obligations”, which include the principles of fairness and good faith provided for by Articles 1175 and 1375 of the Italian Civil Code.[[4]](#footnote-4)

Once the main characteristics of the endorsement contract are outlined, it is important to highlight that this phenomenon is constantly evolving.

“All of us are someone’s Influencer” – and this is how the concept of endorsement has expanded from its original areas of Celebrity Marketing and Influencer Marketing. In particular, its new frontier is represented by users and consumers operating on the web, who share their own experience about a specific product/service, contributing through word of mouth to improving its related brand awareness and brand reputation.

This can happen either spontaneously – in which case this would not be a contractually-binding endorsement – or through campaigns launched by Influencers within specific endorsement contracts, which for instance require them to share content using campaign and brand hashtags.

Not all forms of expression related to a product or brand represent examples of marketing communication or endorsement. In the first instance, all personal opinions, spontaneous comments and suggestions published by Bloggers and Influencers represent a form of free expression and thought, which is protected by Article 21 of the Italian Constitution[[5]](#footnote-5).

The second instance, however, does fall within the area of endorsements, but a specific law regulating such evolution of the phenomenon does not exist yet; in light of the fast and exponential development of such modes of communication and advertising, we hope that unified and accessible regulations will be implemented nationally and internationally.

**1.3. The contract between TikTok and Influencers**

A specific example of an endorsement agreement between a Company and an Influencer is the case of TikTok.

Currently, this is one of the most downloaded apps. According to the “Digital 2021” report, active monthly users on the app amount to 5.4 million in Italy, and over 689 million worldwide.

Furthermore, a billion videos are viewed daily on the app, with users spending an average of 52 minutes on the app. These data certainly show that it is worth carefully considering the contracts binding successful TikTokers and the platform.

It is interesting to analyze the contents of the agreements binding Influencers and the multi-million platform, in order to understand the rights that are subject to protection and the ways relationships among the parties are regulated.

Such contracts do not only regulate the rights of personal portrayal, but also the platform’s own use of materials uploaded by users.

Following, we will list the key elements that are included in each contract with TikTok, provided that each individual Influencer can of course also request ad hoc provisions.

The contract must firstly include the start date of the contractual relationship, the duration of the license – i.e. the period within which TikTok can use the Talent’s content – and the indication of any specific fees payable to the Talent.

It must be specified that copyrights over the content posted are owned by the TikToker, but the platform does reserve the right to use such content, even partially or with different editing. For instance, TikTok is allowed to use single frames of each video, export audio or video segments and combine them with content produced by other Content Creators, superimpose text, images, videos, audio fragments or tracks to the content, create memes, etc.

The only limitation the platform must adhere to is its inability to render the TikToker’s content unrecognizable or to change it in a manner that violates the Talent’s image, name, honor and identity.

The TikToker and the platform will subsequently set the time and space scope of such free use of the content by TikTok – for instance, they might agree on “worldwide” use of the content, but for a limited period of 2 years.

It is important to note that TikTok has no obligation to use such content, but it does have the right to do so; therefore TikTok will be able to decide at their own discretion whether to use it or not.

Furthermore, TikTokers guarantee the platform that they legitimately own their accounts and they exclusively own the copyright over the entirety of contents covered by the endorsement contract, without any need for third-party approval before entering into such contract. TikTokers also guarantee the platform that such content does not violate third party rights, whether concerning trademarks, copyright or confidential information.

By adhering to best practices, especially in the international context, through the agreement the parties must select both the applicable law and the court with jurisdiction in case of a legal dispute.

Usually, the platform recommends the use of USA law as applicable law and international arbitration headquartered in the USA as a means of settling international disputes. Such aspects should not be overlooked as in the instance of a dispute, such as due to a breach of contract by one of the parties, foreign TikTokers will have to resort to arbitration in the USA, and face all related consequences (choice of an American defense team, use of English in all acts related to the legal proceedings, significant related costs, etc.). In order to ensure contractual balance, it is indeed preferable to negotiate a clause providing for alternatives to the applicable law and court with jurisdiction suggested by the platform.

Another element that should not be overlooked is the protection of the TikToker’s personal data, as they relate to a natural person. Should they be established or resident in Italy, EU Regulation No. 679/2016 applies, despite TikTok’s headquarters being located outside the EU. As the Data Owner for all intents and purposes, TikTok is subject to several obligations, including but not limited to reporting obligations, towards the data subject.

Last but not least, it is important to consider that not all contracts with TikTok are easily negotiable and therefore, seeking legal advice from a trusted advisor is essential for the protection of one’s own rights and creative content.

**Influencers and Privacy**

**Enforcement of personal data processing regulations in Influencer Marketing**

The main legal themes in the field of Influencer Marketing are certainly intellectual data protection rights and adherence to transparency and fairness in marketing communication.

However, it is important to highlight another relevant topic: personal data processing, which is often overlooked and underestimated.

The GDPR (General Data Protection Regulation – EU Regulation 2016/679), which went into effect on 25/05/2016, changed the personal data processing paradigm that had been outlined in the previous Directive 95/46/EU. In an increasingly globalized and “connected” society, it represented the regulatory evolution that arose from the need to protect an individual’s privacy as their prerogative. This progressively involved more general interests as well, by attributing a central role to personal data protection[1].

The GDPR[2] was transposed into Italian law through Legislative Decree 101/2018, which integrated and updated the previous Privacy Code (Legislative Decree 196/2003). This outlines the basic principles to adhere to for personal data processing[3]. It is also important to mention the measures and guidelines issued by the Watchdog Authority for the Protection of Personal Data, which provide general rules for the correct application of the principles outlined in the regulations.

The GDPR scope of application extends to all subjects handing European citizens’ personal data. For this reason, organizations and companies – even those that are headquartered outside European Union territory – processing data of subjects in the EU in order to offer goods or services or to monitor their behavior, must comply with GDPR regulations.

It seems therefore fair to conclude that Influencers and Content Creators must also comply with European regulations for personal data processing, in the instance that their profiles and pages collect other users’ personal data.

First and foremost, it is important to understand the definition of personal data, which is all information relating to a person that is either identified or identifiable, either directly or indirectly, such as: name, surname, phone number, address and related information, online ID, or any details that might provide information on their habits, lifestyle, personal relationships, financial situation.[4]

Among personal data, Article 9 of the GDPR defines the so-called special categories of personal data, which are entitled to a more significant regulatory protection. This category includes all information that might reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, as well as data concerning health or a natural person’s sex life or sexual orientation.[5]

It is clear that through social media, a very significant volume of personal data is circulating, which belongs to the users of each individual platform, including Influencers and Content Creators. By signing up, they agree to share their data and to adhere to the conditions outlined by the policies of each platform. The classification of such personal data, based on what is outlined in the GDPR, might not always be so simple.

Just consider that social media are immense dashboards of accessible names, surnames, nicknames, images and geolocations, and much more. Through comments, photos, videos, posts, sharing and likes of content that is accessible to all, users can provide any kind of information, as well as express their point of view on specific issues. Some of these issues might be particularly relevant in terms of privacy, such as for example membership to a specific political party or sharing a specific disease or, more commonly, a food allergy. Does all this information fall within the GDPR provisions? If the answer is yes, it is important to understand who is affected by the regulation and who isn’t, but especially which data is protected and according to which standards.

It is interesting and especially useful to understand the privacy framework for Influencers and companies signing endorsement and sponsorship contracts, as they must pay attention within their operations in order to adhere to applicable personal data protection regulations.

The Privacy Code provisions apply any time personal data must be processed, and this processing is defined in the regulation as any operation or set of operations which is performed with personal data or sets of personal data, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure.[6]

The personal data processing regulation’s applicability and the classification of privacy roles seem particularly relevant if we consider sanctions introduced with the GDPR. Depending on the type of infringement, Article 83, Paragraphs 4 and 5 outline administrative fines up to 10 or 20 million Euros – or up 2% or 4% of total worldwide annual turnover for companies, whichever is higher. We mention this because in the instance of Privacy Watchdog checks, the consequences can be relevant in terms of fines, as well as adherence to provisions that would certainly be required.

**Influencers as Data Controllers**

Data protection regulations apply to Influencers, and it requires them to adhere to it as soon as they are not acting as normal users using others’ personal data for exclusively personal activities, instead carrying out further processing of personal data, such as that of their followers. That is, when they start using their followers’ information, regardless of it being provided spontaneously, for additional activities with different purposes, and in particular this relates to business processing.

That is the case of Content Creators collecting their followers’ personal data in order to promote their subscription newsletters for marketing purposes, or the case of future Brand Ambassadors who want to share such data with the sponsored brand owner.

There are more complicated cases for Influencers and Content Creators whose content is not the subject of a sponsorship contract or more in general of digital marketing activities, but it is the representation of their freedom of expression, which in some cases can translate to freedom of speech and reporting. If it’s true that freedom of expression is a fundamental right protected by the Constitution, it’s also true that content is significant in order to attract followers or users on one’s overall profile or page: so-called flames clearly represent examples of content that can become popular in the digital world. Consider delicate topics that might even contain healthcare or legal data: does sharing a photo from a celebrity’s recent arrest constitute personal legal data processing? And what about sharing an anti-vaxxer post without permission, if it states disapproval of the vaccine – does that constitute personal healthcare data processing? The topic is perhaps more relevant in terms of legal repercussions rather than in terms of privacy compliance regardless of data processing.

Regardless of such doubts and debates, it is still possible to consider that every time an Influencer sheds their natural person hat, processing data for merely personal activities, and wears that of an individual operating within the digital marketing field, sharing content for professional purposes, they become a Data Controller in terms of the privacy framework.

In order for one to be a Data Controller, they don’t need to be a company or a registered sole trader, but they simply must be a subject – a natural or legal person, a public authority, service or body – determining, either individually or with others, the purposes and means of the personal data processing and processing them for purposes other than personal or domestic ones.[7]

As a Data Controller, the Influencer must adhere to the essential principles that apply to any processing: lawfulness, fairness, transparency, limitations of purposes and preservation, data minimization, accuracy, integrity, confidentiality and accountability.

Application of these principles provides for a number of obligations for the Data Controller, among which the obligation to provide individuals to whom the data refers with a clear and transparent data processing policy.

The individuals to whom the data refers – be they followers, newsletter subscribers, subscribers to a reserved section of a website – are called Data Subjects.

The information that must be provided to Data Subjects is categorically listed in Article 13 of the GDPR as follows:

the identity and the contact details of the Controller;

the contact details of the Data Protection Officer, where applicable;

the purposes as well as the legal basis of the processing;

the recipients of the personal data, if any;

the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

where applicable, the fact that the Controller intends to transfer personal data to a non-EU country or international organization;

the rights of Data Subjects and their respective applications (among which the right of access, to rectification, to update, to limit processing, to opposition, to data portability, to erasure and to object to the Watchdog Authority for the Protection of Personal Data);

the existence of automated decision-making, including profiling.

Drafting of the policy must be extremely careful. In addition to pinpointing all data fluxes and existing processing, it is important to set each processing’s purposes and legal basis, which cannot always be consent.

Such consent comes to light when no other legal basis is applicable, such as for instance entering into a contract with the Data Subject or adopting pre-contractual measures upon request, compliance with a legal obligation or exercising a legitimate interest.

Article 4 defines consent as any freely given, specific, informed and unambiguous indication of the Data Subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her. Article 7 outlines the conditions for consent, and it specifies that the Data Subject must be able to demonstrate that the Data Subject has consented to processing of his or her personal data, further explaining that if the Data Subject’s consent is given in the context of a written declaration, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language.

It being understood that each case needs to be assessed individually, in general there are three cases in which Influencers need the Data Subject’s consent in order to proceed with the processing:

when the data is processed for marketing purposes, such as in the case of marketing communications for updates on certain content being uploaded on the page;

when the purpose of personal data processing is profiling, such as when one’s fanbase needs to be categorized on the basis of age or geographic origin;

when disclosing personal data with third parties, which happens very frequently when Influencers / Creators want to monetize the personal data of users visiting their pages or profiles by sharing them with companies and organizations (that are not sponsors or brands for specific contents).

As owners of the brand the Influencer is advertising, the Data Subject’s consent constitutes the legal basis for marketing purposes. In short, this needs to express free, specific, informed and unequivocable freedom expressed through positive statement or action.[8] Consent will need to be provided as many time as it is needed as the processing’s legal basis; any pre-checked boxes or implicit consent should be avoided. Furthermore, if consent represents the legal basis, the Data Controller must be able to prove they have received such consent. The Data Subject has a right to withdraw consent at any time, without prejudice to the lawfulness of the processing carried out before such withdrawal. This requires the need to implement a solution that might save and preserve the consent given by users, as a sort of consent database. If it’s not possible to develop one’s own database, consent solutions exist on the market, which can be easily configured.

**Privacy obligations for Influencers and companies**

Should the Influencer’s work be more structured, there are a number of privacy obligations they will need to comply with, specifically:

appointment of a Data Protection Officer under GDPR Article 28

appointment of a Processor under GDPR Article 29

maintenance of Records of processing activities under GDPR Article 30.

Data Protection Officers will process personal data on behalf of the Data Controller for specific purposes, and they will be instructed by the Data Controller about such purposes. Consider for example a company providing the software used to analyze fluxes on the Influencer’s page, which also allows for follower aggregation by gender, age and origin - such company can access the data for maintenance and periodic updating. Or consider a marketing agency providing a consultation service using followers’ open data. In both cases, the Influencer must enter into a contract with such subjects (which is also called an appointment or DPA) for data processing under GDPR Article 28.

That is not all. In the instance that the Influencer chooses to employ associates, they will need to be authorized for data processing, as they represent subjects processing personal data on behalf of the Data Controller – in performing their activities, they process follower data. This might happen for instance when one or more collaborators are in charge of answering follower requests and comments or of handling a newsletter’s mailing list.

The Data Controller will be required to appoint managers and authorized individuals, but they will also be required to provide specific instructions on methods of processing.

Finally, only more structured companies need to fill out the Records of processing activities carried out by the Data Controller (the Influencer) under GDPR Article 30. These Records outline the processing activities carried out under the Controller’s responsibility, and it includes: the Controller’s information, the purposes of each processing, a description of Data Subject categories, categories of third parties to which the personal data have been or will be communicated, whether any data is being transferred abroad and – where possible – the terms of erasure and safety measures applied.

In a private setting, the subjects that must fill out the Records are as follows[9]:

companies or organizations with at least 250 employees;

any Data Controllers and representatives (including companies or organizations with fewer than 250 employees) processing data that might pose a risk – even a moderate risk – for the Data Subject’s rights and freedoms;

any Data Controllers and representatives (including companies or organizations with fewer than 250 employees) processing data not occasionally;

any Data Controllers and representatives (including companies or organizations with fewer than 250 employees) processing special categories of data as outlined by GDPR Article 9 Paragraph 1, or personal data related to criminal convictions and offences as outlined by GDPR Article 10.

Such Records, as the result of the mapping of different types of processing carried out within an organization, are not a requirement in the instance of a small number of processing cases or in the instance of processing not related to special categories of personal data.

In short, we can conclude that privacy policies that are compliant with regulations are all but trivial, and it is important to be aware of the laws in order to outline efficient and effective personal data processing, as it seems that regulatory compliance cannot be an obstacle to daily activities.

**Influencers as Personal Data Subjects**

We have so far outlined legal requirements that Influencers – as Data Controllers – must carry out in compliance with personal data protection laws.

It is important to remember that, as a natural person, in some situations Influencers are also Data Subjects.

Consider for instance brand endorsements and sponsorships. In such cases, brand owners are often big companies, and they are in charge of the Influencer’s personal data processing.

This represents therefore a change of perspective from what was so far outlined.

In contractual relationships with brands, brand owners are also Data Controllers and hired Influencers are Data Subjects.

Therefore, brands must provide the related policy regarding the Influencer’s personal data processing, and Influencers will benefit from all rights existing for the protection of natural persons in relation to personal data processing.

For these reasons, it is important not to underestimate contractual clauses relating to personal data protection, as well as to assess the implementation of a data processing policy.

As for brand owners, they must pay attention to the comprehensiveness of the policy, to the correct pinpointing of the processing purposes and the related legal bases, as well as any data transfer to extra-EU countries and the period of data storage.

Influencers must read the policy carefully, to understand what personal data will be processed by the brand and for how long, as well as to assess consent carefully.

Despite it being second in order of importance compared to intellectual property and marketing communication, privacy is very important for those who are responsible for data processing, as well as for those whose data is the subject of an increasing number of processing instances.

[1] F. Pizzetti, La protezione dei dati personali, dalla direttiva al nuovo regolamento: una sfida per le Autorità di controllo e una difesa per le libertà dei moderni, in Riv. Dir. Media, 2018, 1, 10

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data .

[3] Legislative Decree 196/2003 and subsequent amendments and additions, “Personal data protection code”.

[4] Article 4 Paragraph 1, Item 1, EU Regulation 679/2016.

[5] Article 9 Paragraph 1, EU Regulation 679/2016.

[6] Article 4 Paragraph 1, Item 2, EU Regulation 679/2016.

[7] Article 4 Paragraph 1, Item 7, EU Regulation 679/2016 (GDPR).

[8] Article 4 Paragraph 1, Item 11, EU Regulation 679/2016.

[9] See the FAQs on the Records of processing activities[[6]](#footnote-6) on www.garanteprivacy.it[[7]](#footnote-7)

**Chapter Two**

**2. INFLUENCERS AND INTELLECTUAL PROPERTY RIGHTS**

**2.1 Copyright over content published on social media**

Currently, Influencers are increasingly creating content to which copyright laws naturally apply.

Regardless of their number of followers, the type of themes covered and the brands sponsored, Influencers must firstly be aware of the opportunities such laws present.

The importance of copyright is twofold. Being aware of these elements allows to better protect one’s content, as well as ensures that other subjects’ rights are not violated – even unwittingly.

As regards better protection, videos and photographs created by Digital Content Creators are covered as works as they express the point of view, feelings and creativity of their author.

Such protection is granted at the moment of creation of the work itself, without the need for additional fulfilments.

There are two main types of rights granted by copyright laws: moral rights and rights of economic exploitation of the work.

In light of this, the Content Creator’s moral rights to be recognized as the author and to claim authorship of the work, their moral rights over the unreleased work, over the work’s integrity and to withdraw are inalienable, undeniable and imprescriptible.

Conversely, property rights, including the right to publish, to reproduce, to communicate, to divulge, etc. can be transferred to other subjects.

In general, both types of rights are held by the author but, sometimes, the law provides that economic exploitation rights are held by a different subject, such as in the instance of works created by employees within the terms of their employment. In this instance, such rights shall directly be held by the employer.

Another hypothesis to be considered is the instance of Content Creators contractually disposing of such rights over their content. For example, this is the case of endorsement contracts according to which the company might request the transfer of property rights over content created for the purposes of the contract itself.

This highlights once again the importance of carefully reading contractual formats proposed by brands and of understanding the content of clauses relating to intellectual property. Setting out such specific clauses is an excellent tool both for companies and Influencers in order to clearly outline the economic exploitation rights covering content created by Influencers.

Not all photographs, however, are subject to such wide protection. They might not meet the necessary requisites in order for them to be considered works.

According to copyright laws, so-called “simple photographs” are still subject to protection – albeit limited.[[8]](#footnote-8)

Videos and photographs produced and shared by Content Creators are protected under Copyright Law, and therefore cannot be freely used, shared, edited and distributed without the author’s agreement and specific indication, as was stated by a recent judgement by the Rome Court related to photographs shared on social media.[[9]](#footnote-9)

“Don’t do unto others what you don’t want done unto you.” The other side of the coin is the need to be extremely careful so as not to violate the rights of other Content Creators. It is important not to underestimate the actions leading to the appropriation of content shared on social media and its sharing as if of one’s own, especially for commercial and advertising purposes.

It would certainly be unpleasant to have to face disputes and controversies following a careless breach of such rights.

**2.2 Brands and domain names**

Influencers are often Content Creators, but also much more.

If we take into account a holistic view of their role, it is easy to realize that Influencers are also so much more: in many cases, they are living and breathing brands.

For this, Italian intellectual property law offers an additional important regulatory tool: brands.

In order to be considered an actual brand, the Influencer must firstly feature a distinctive trait: the ability to attract the attention of their audience, to be recognized and be different from other Influencers, who are considered true competitors within the digital content market.

However, brand protection is only recognized once all legal requirements are met, specifically originality, lawfulness, distinctiveness and legitimacy.

Once it appears clear that one’s name, nickname, avatar, specific tagline etc. meet such requirements, it is advisable to immediately proceed with registering this distinctive trademark.

By registering a trademark, its owner has the exclusive right to use it within the market and, as a consequence, the right to prohibit commercial use by any other parties of identical or similar marks. This applies for 10 years, with the option to request potentially infinite renewals of the same duration.

We have to consider two elements at this point, before proceeding with the trademark application: the territorial scope of the protection for which one intends to apply and the type of products and services for which one intends to use the trademark.

In terms of territorial scope, it is possible to register a national, European or international trademark, as well as to choose preferred countries. The amount of tax required will of course vary in each situation.

In light of the size of the audience that can be reached through social media – an international platform that can reach people anywhere in the world – it is essential to choose such countries carefully.

In the countries where trademark protection is obtained, the Influencer will be able to avail themself both of counterfeiting laws and unfair competition laws. They will also be able to put in place a number of practices related to detection, prevention and repression of illegal behavior by third parties violating their trademark rights.

Once the countries are selected, the next elements to assess before moving forward with the trademark application are the so-called product and service classes for registration – a total of 45.

It is important to only choose the classes where one actually intends to use the trademark – if the trademark is not used for 5 consecutive years even within one specific individual class, it will lapse for that class, i.e. the registration in that particular class will be revoked. Furthermore, the amount of registration tax depends on the number of classes within which the trademark application is made.

Trademark use is a key topic in the work of any Influencer, included in the instance that Influencers are not the trademark owners.

We can consider for instance the brand owner companies with which they enter into endorsement and sponsorship contracts. It is a well-established practice to include specific clauses relating to the approved uses of a brand.

Influencers must pay the utmost attention to the content they create to promote each brand.

They must not only adhere to the guidelines companies often set, but also ensure that the content does not feature different or additional trademarks, especially in the instance that these can damage the brand reputation of the sponsored brand.

As the brands avail themselves of Influencer endorsements in order to at least increase brand awareness, a promotional initiative could indeed cause a negative boomerang effect on the brand’s reputation if its every aspect is not planned and regulated. This might happen both in the instance that the guidelines on trademark use provided by its owner are not followed, and in the instance of behavior contrasting with the brand’s values.

More in general, with the exception of content merely representing daily life moments, the Influencer should always be careful to ensure that their content does not feature other trademarks and that subsequent to such inclusion of other trademarks, to the scene represented or the message communicated, no damage is caused to the sponsored brand’s owner.

It is even more important to pay attention to the use of another brand for explicitly or implicitly commercial purposes, even in the instance that such use is not regulated by a contract. In such cases, the brand owner’s consent is always required. A significant court ruling in this matter was the Ferrari-Philipp Plein case.[[10]](#footnote-10)

Without any specific agreement with the popular automotive company, the German designer had shared two videos on his Instagram account: the first featured a pair of Philipp Plein shoes, resting on the hood of a green Ferrari belonging to the designer, whose brand was clearly showcased; the second video featured scantily clad women washing the aforementioned car with the aforementioned shoes resting on its hood. Once the legal proceedings were resolved, it was observed that the shoe placement on the Ferrari car of the same color was sufficient to indicate an association between the two brands, which in turn had unduly benefited the designer brand and damaged the Ferrari brand. In this instance, circumstances were clarified which, when met, indicate that the use of another brand by an Influencer has commercial purposes rather than simply being descriptive of an individual’s daily life.

For an accurate analysis of such measures, please refer to Chapter 4 – Case History.

Even though it is natural for an Influencer to share details of their daily lives and, consequently, to show their own possessions which often feature brands – often popular brands – it is important to distinguish between lawful and unlawful uses.

Lawful uses are defined as those authorized by the brand owner or those that do not have any commercial or advertising purposes or those that are merely descriptive of the Influencer’s daily life.

It would be unlikely for an Influencer to be prevented from sharing content relating to their daily life – for example, in which they wear an iconic branded item of clothing that they have bought as a regular client.

Conversely, unlawful uses are those that have commercial and advertising purposes and are created without the brand owner’s consent. This, especially in the instance of such use within the context of a non-narrative post, often featuring promotional captions.

It is important to also carefully consider the mention of other brands not within each post but in the related hashtags.

Hashtags are a crucial aspect of digital communication because, by their own nature, they are key words that can capture and hold the attention of the audience to a trending topic.

Last but not least, Italian law, as well as more generally, European regulations, provide for the principle of unitarity of identification elements.

This is an underlying principle, which prohibits the use as a denomination or trading name, domain name or shop sign of elements that are identical or similar to other brands, which might confuse consumers or lead them to think that there is a connection with the brand owner.

It is therefore important to carefully consider social media usage of the brand, as well as its more general online use.

Such use becomes even more relevant when the brand trades through an e-commerce store.

It is not uncommon for Influencers to decide to invest in e-commerce stores for products – which are generally gadgets and merchandising – targeted at their community, so as to foster an increased sense of community and increase the general level of engagement.

Successful e-commerce stores also often generate additional business opportunities.

We might for instance consider co-branding initiatives establishing true partnerships between brands owned by renowned Influencers and industry-leading companies.

Such partnerships allow Influencers to begin operating in new sectors and to attract new target consumers, as well as to reduce production and advertising costs through sharing.

However, the symbolic and emotional messages communicated are often more important than the financial aspects: when the values of both brands are combined, brand reputation can only increase*.*

**2.3 Unfair competition within digital communication law**

The web’s positive force consisted in digitalizing distribution chains, by deeply changing the reference scenario.

Influencers carry out their activities in a stable and ongoing manner, therefore they can be considered as entrepreneurs for all intents and purposes. To quote celebrated Influencer Chiara Ferragni, we might say that Influencers are true “digital entrepreneurs”, whose work consists in interacting with their audience and sponsoring products and events.

Therefore, contrarily to what was believed in the past, when some people would claim that there were “no rules to follow online”, it has become much more important for companies and Influencers to be aware of the rules of the game.

The digital market operates within the same rules as the physical market. One thing is for sure: in the same way as “physical” entrepreneurs, financial stakeholders operating online need to compete while closely adhering to the rules of the free market.

The overall set of rules regulating the role of Influencers is represented by Article 2598 and following of the Italian Civil Code, the Consumer Code (Legislative Decree 206/2005), rules relating to protecting false and misleading advertising (Legislative Decree 145/2007), and the Voluntary Code of Marketing Communication Self-Regulation created by IAP.

In order to understand how the aforementioned laws intertwine, it is important to start from the legislative basis of our legal system.

We firstly must highlight that – as provided for by Article 41 of the Italian Constitution – freedom of commerce grants ample leeway for entrepreneurs to carry out their business operations.

Such leeway is however regulated by law, specifically by Articles 2598 and following of the Italian Civil Code, which sanction any so-called unfair competition.

What is unfair competition within the physical market and how does it translate to the online realm?

The principle at the basis of unfair competition states that, while carrying out competition between competing entrepreneurs, taking advantage of means that do not conform to the principles of professional fairness is prohibited.

When speaking about unfair competition, we are not only referring to the protection of entrepreneurs’ interest not to have their market opportunities altered because of their competitors’ unfair behaviors, but also to consumer protection, as they must not be deceived.

Article 2598 of the Italian Civil Code outlines acts of unfair competition that might exist on the market:

* Using names or identification elements that might be confused with those used by other entrepreneurs or slavish imitation of other entrepreneurs’ products;
* Sharing of news discrediting the activities or products of a competitor;
* Damaging another entrepreneur with any means that do not adhere to the principle of professional fairness.

Without further discussing legal regulations, it is interesting to understand how they might apply to the digital world and, more specifically, to Influencer Marketing.

While it is true that entrepreneurs operating on the physical market might put in place a number of considerations in order to act fairly and transparently, Influencers must do the same on social media platforms, carefully considering what they post and how they do so.

For example, on the topic of negative advertising, in the past Influencers have often shared on social media negative comments or reviews of a competitor’s products, damaging them as a consequence. Such behavior clearly constitutes unfair competition, which is subject to penalties in favor of the damaged entrepreneur.

Furthermore, fake news is prevalent across the web, and it is particularly popular on social media. Influencers’ sharing of fake news damaging another entrepreneur certainly constitutes unlawful behavior, which is punishable.

We might take the example of an Influencer with a small following using the identification elements of another Influencer who has a larger following, in order to deceive people into believing they are associated with them.

The main issue concerning Influencers relates to the promotional nature of some of their content. Often, consumers are not able to recognize promotional content when they see it. This happens partially because Influencers are not fully aware of (or do not fully comply with) the rules of transparency and fairness, but partially also because the company and the Influencer do not agree beforehand on the advertising modes by adhering to competition laws.

Understanding the difference between promotional and personal use of a brand, which constitutes the free expression of thought under Article 21 of the Italian Constitution, is essential in order to know which subjects must be more careful with their content.

For instance, if a famous or unknown user shares on Instagram a photograph of themselves wearing a specific pair of fashionable shoes, they do so in order to promote themselves, by choosing to share their own preferences and routine with their followers. Such user has freely bought the shoes, chosen to wear them, taken a photograph and posted it on social media, simply because they like the shoes. The post is not aimed at promoting the shoes, but simply at expressing their appreciation of the product.

In other words: expressing a preference does not necessarily constitute a promotional message, but rather it is within each subject’s freedom of expression rights.

It is however different to write a post about a product in return for payment (which might not necessarily be given in the form of money, but might also be a simple gift) by the brand owner; this example constitutes an advertisement.

Companies and all subjects involved in marketing communication, including Influencers, must adhere to fairness and transparency rules for promotional messages targeted to their audience. It is essential for the advertisement to always be clearly recognizable since any kind of surreptitious advertising is prohibited[[11]](#footnote-11).

The message must have truthful contents, but it also must not omit information that, if included, would change its meaning.

In conclusion, it is possible to carry out marketing activities on social media, and this has become the easiest, most effective and fastest route for many.

A well-made post, produced by the right Influencer and to the right audience, can be much more penetrating than a prime time national TV advertisement – but it’s important to follow the rules!

**Chapter Three**

**3. SURREPTITIOUS PROMOTIONAL COMMUNICATION IN INFLUENCER MARKETING**

**3.1 National laws protecting consumers**

Influencers have a true network of followers, who have their own identities and are chosen ad hoc by companies in order to advertise a specific product.

Average age, gender, fashion and sports preferences, nationality, days and times of highest engagement – these are only a few of the parameters used by social media to target followers. These are the reasons companies trading in products and services are interested in pinpointing a target audience, in order to publicize their products.

This represents a unique opportunity for financial stakeholders, as with just a few clicks they can choose exactly the audience they want to advertise their promotional campaign to.

In light of these considerations, followers are simply consumers. For this reason, the Consumer Code represents one of the main sources Influencers should take into account, as well as companies using such promotional tool.

The Consumer Code was published through Legislative Decree No. 206 of 6 September 2005, relating to changes in existing laws regulating consumer protection, which include most of the customer protection provisions set out by the European Union over the previous 25 years.

The document contains 170 articles, which balance and reorder laws related to the many events involving consumers as active or passive subjects, such as:

* consumer information
* commercial advertising
* agreements signed by companies with consumers
* sales outside business premises
* distance contracts (by phone, fax, Internet)
* e-commerce
* product safety and quality
* manufacturer responsibility
* etc....

As regards the digital realm and, more specifically, Influencer Marketing, Title III of the Code, recorded as “Commercial practices, advertising and other marketing communication” is the area we are interested in.

In terms of promotional communication, the Code sets out the ban on unfair commercial practices carried out through false advertising.

In particular, Article 20 specifies that “unfair” means “any act, omission, course of conduct or representation, marketing communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

The Code cites “any act”, but what impact would such an act need to have on the consumer in order for it to qualify as false advertising?

Article 18 specifies that such unfair practices must significantly impair the consumer’s freedom of choice, causing them to make a transactional decision they would not have made otherwise.

The scope of application of such advertising laws and their goal to protect consumers was initially only aimed at traditional communication; however, it was later extended to include new forms of advertising as well, such as social media.

Currently consumers – or followers within the social media context – are not able to distinguish between spontaneous and sponsored content, without specific indications provided by Influencers.

Indeed, Influencers need to pay significant attention and distinguish content that is subject to sponsorship agreements and content that only aims at (at least apparently) sharing, spontaneously and without interests, one’s daily life. When sharing sponsored content within their presentation of their own daily life, Influencers must ensure to include all relevant disclosures of the promotional nature of the content.

To do so, they should simply employ specific hashtags, which represent a symbolic “warning sign” for followers/consumers viewing the sponsored content.

Hashtags used by Influencers to identify promotional content simply represent the digital evolution of the so-called “commercial break announcements”, which warned TV viewers of the *Maurizio Costanzo Show* that they were about to be shown advertisements.

They might use #ad, #advertising, #sponsor, #sponsored, #sponsorizzato, among others. Hashtags must be included in a visible position, i.e. from the beginning of the sponsored content.

Brand owners can also contractually outline the modes with which to disclose the promotional nature of each post and of any content relating to the promotional message, explicitly regulating every single aspect of the campaign with the Influencer, in order to avoid any breach of the law.

The Italian Antitrust Authority (Autorità Garante della Concorrenza e del Mercato , AGCM) outlined specific ad hoc guidelines for subjects, including Influencers, who decide to launch promotional campaigns on social media.

AGCM is an administrative independent authority founded in October 1990, which deals with the application of laws issued for competition and market protection.

Firstly, AGCM regulates entrepreneurial behavior, to ensure it does not damage other competitors through unfair practices.

AGCM also safeguards agreements signed with consumers and, in general, all unfair commercial practices carried out by companies towards consumers, including promotional ones.

In particular, ACGM has highlighted the need for specific regulations regarding advertising on social media.

ACGM is often required to intervene to investigate unfair advertising behaviors on social media and sanction them as needed.

Through such activities, ACGM must remind users that advertisements need to be clearly recognizable as such, and they often underline the general scope of the disguised advertising ban – therefore, it must be applied even with reference to social media communication, as Influencers must not lead their followers to believe they are acting spontaneously and without interest, when in fact they are promoting a brand within the scope of a sponsorship agreement. In order to encourage maximum transparency and clarity in terms of the promotional content of posts published by some Influencers, in July 2017 ACGM had sent moral suasion letters both to Influencers and to 11 well-known brands, in reference to content shared on Instagram. Recent measures taken by AGCM within the Ferretti – Alitalia[[12]](#footnote-12) and Barilla “Pan di Stelle”[[13]](#footnote-13) cases were very significant, and we will address them more in-depth in Chapter 4 – Case History.

Essentially, current online activities are very different from the past. The developing digital realm requires users to always keep up with industry laws, which are currently not enough to guarantee full protection in this area.

However, we are glad to report that over the past few years, positive and significant initiatives have taken place, specifically within industry organizations and associations, aimed at ad hoc bridging the gap of lacking national regulations with erga omnes effectiveness.

**3.2 Code of Marketing Communication Self-Regulation and the eDigital Chart**

The Consumer Code overall regulates relationships between companies and consumers.

AGCM is in charge of ensuring its correct application, even concerning promotional activities carried out by Influencers.

The relationships between Influencers, companies and consumers (followers) are also regulated by the Code of Marketing Communication Self-Regulation, as well as by the Digital Chart.

What do they regulate? When are they applicable? And what happens in the instance of a breach?

These are only a few of the questions we will address here.

The Code of Marketing Communication Self-Regulation, now in its 68th iteration, was issued on 9 February 2021 and is a code of conduct adopted by the Self-Regulatory Institute for Advertising (Istituto di Autodisciplina Pubblicitaria, IAP).

Such codes of conduct, as outlined by the Consumer Code, can be implemented by business and professional associations and organizations, “in relation to one or more commercial practices or one or more specific business sectors”[[14]](#footnote-14) and they define companies’ and professionals’ behaviors, who in turn commit to adhering to them.

This clarifies that codes of conduct are implemented voluntarily.

In general, the IAP’s Code of Self-Regulation applies to all users, agencies, advertising and marketing consultants, managers of any promotional tools and anybody who “has accepted the Code directly or by membership of an association, or through an agreement to execute marketing communication […]”[[15]](#footnote-15).

IAP’s Code of Self-Regulation applies within Influencer Marketing to all associated companies which, in turn, request that Influencers adhere through sponsorship and endorsement contracts to the Code, Self-Regulation Regulations, decisions made by the Jury and injunctions by the Review Board.

In terms of content, Title I of the Code of Self-Regulation sets out the code of conduct to implement. The main rules are as follows:

* honest, truthful and fair marketing communication, which should never be deceitful, ambiguous or misleading for consumers;
* mention of technical and scientific evidence and presentation of statistical data with limited validity;
* explicit communication of the promotional nature of testimonials and other forms of accreditation of a product with such aim;
* authenticity of testimonials and forms of accreditation of a promotional nature;
* communication of compulsory guarantees with such modes that do not present their content as increased or different;
* upon request from the Jury or the Review Board, ability to prove the truthfulness of facts, of descriptions, statements, illustrations and the consistency of testimonials used;
* detectability of marketing communication as such through the adoption of the points set out in the Digital Chart as regards the Internet;
* prohibition from sharing indecent, vulgar and violent messages;
* prohibition from offending moral, civil and religious convictions;
* respect of an individual’s dignity and prohibition of any forms of discrimination, including based on gender;
* particular attention to messages targeted to children and teenagers;
* greenwashing ban;
* prohibition of slavish imitation of others’ communication, even when relating to non-competitor products;
* prohibition from discrediting others’ product, activity or brand;
* loyalty and non-misleading comparison with other products;
* prohibition from causing the risk of confusion, discredit or denigration or to unduly benefit from others’ notoriety;
* principle of lawfulness variability as related to marketing communication based on the product it refers to.

68 might seem like a high number of versions for the Code of Self-Regulation, especially considering that these have all been issued within the past 55 years. This data shows the value of such a tool: adapting and changing rules based on societal evolution and technological progress.

To this end, Article 7 of the Code of Self-Regulation refers to the need for marketing communication to be detectable and it has since 2019 included the Digital Chart, which was issued in 2016 and updated in 2017.

The Digital Chart is a litmus test indicating the appropriate modes of digital communication, particularly as it refers to Influencer Marketing, in order to ensure that the commercial purposes of communications carried out on social media are clear and recognizable.

Following, we enumerate the key points of the Digital Chart Regulation. Firstly, it reiterates that online marketing communication must ensure its promotional purposes are made clear through relevant measures.

It also outlines specific guidelines for individual cases of marketing communication, such as:

* ENDORSEMENT

Clearly visible inclusion of one of the following options: “Pubblicitá/Advertising”, “Promosso da/Promoted by (brand)”, “Sponsorizzato da/Sponsored by (brand)”, “In collaborazione/In partnership with (brand)” within the first three hashtags related to a post and in each story;

* GIFT

Clearly visible inclusion of disclaimers such as “product gifted by brand” in each post and story;

* VIDEO

Inclusion of written disclaimers within the description and in the first scenes, in order to ensure the promotional purposes are made clear;

In the instance of streaming videos, disclaimers can also be expressed by voice, but they must be repeated at the beginning and at the end of the broadcast, as well as when products are shown;

* INVITATION TO ATTEND EVENTS

Disclosure of the invitation by the promoting brand to an event in each post and story mentioning a product or the brand in relation to such event;

* USER-GENERATED CONTENT

Adherence to all aforementioned guidelines;

* EDITORIAL CONTENT

Clear and visible inclusion of disclaimers such as “Pubblicitá/Advertising”, “Promosso da/Promoted by (brand)”, “Sponsorizzato da/Sponsored by (brand)”, “Contenuto sponsorizzato/Sponsored content”, “Post sponsorizzato/Sponsored Post”, “Presentato da/Presented by (brand)”, even in conjunction with specific graphic tools, such as frames, text highlighting and shading;

* SPONSORED CONTENT

Distinction, even with graphic means, from organic content and visible and clear inclusion of disclaimers explicitly informing users that the content is promotional in nature (e.g. “Pubblicitá/Advertising”), placed close to the sponsored search result;

* RECOMMENDED CONTENT

Use of one of the following measures: indication that the box includes sponsored content, or indication of the brand name/logo next to each piece of content, with disclosure of the sponsored nature of the content;

In the instance of content developed by the party who created the widget, mention of the provider’s name in addition to the aforementioned guidelines;

* IN-APP ADVERTISING

Sponsorship disclosure to app users;

* ADVERGAME

Inclusion – at the beginning or the end of the game – of wording such as “Promosso da/Promoted by (brand)”, “Sponsorizzato da/Sponsored by (brand)”;

It is important to highlight that in order to ensure their own exemption from liability in the instance that Influencers do not follow such regulations, brand owners will need to ensure they have instructed Influencers on the rules they need to follow, such as by providing a specific indication of the hashtags they will need to use. This applies both to sponsorships and endorsements, as well as to gifts.

Now that we are aware of the rules set by IAP to regulate both Influencer and brand behavior, who is in charge of assessing that these are actually followed?

IAP consists of two main bodies: the Review Board, which guarantees consumers’ general interests, and the Jury, which is in charge of assessing marketing communication submitted for review and of expressing an opinion based on the Code of Self-Regulation.

The Jury review procedure has two main advantages: members of its bodies are highly competent, and all relevant measures are implemented speedily.

**3.3 Trade association guidelines**

Fashion brands tend to work with Influencers the most, in order to direct their marketing activities. For this reason, and considering the specific nature of the industry, the National Chamber for Italian Fashion (Camera Nazionale della Moda Italiana, CNMI), which is the most significant body representing Italian fashion brands, published “Guidelines and Interpretative Rules for Influencers”.

CNMI explicitly notes that such guidelines are neither binding nor does their application ensure that users are exempt from disputes or sanctions by relevant authorities. At the same time, they note that such guidelines might be a useful tool to “adopt or improve internal policies with a view to support the brand’s good faith and to mitigate liability in the instance of investigations”.

The document sets out four good practices to be implemented:

1) Policy drafting.

Brand owners are invited to draft policies with specific codes of conduct for Influencers, regulating disclosure and hashtag positioning requirements.

2) Contract signing with the Influencer.

Brands are invited to sign agreements with Influencers or with the agencies handling their image in order to ensure the use of hashtags and the policy’s code of conduct are binding.

3) Reference to the policy.

Even in the instance that it is not included in the contract, brands are invited to have the Influencer sign a document providing for their acceptance of the company policy.

4) Influencer gifts.

In this case, brands are invited to include a Thank You card referring once again to the policy, in order to ask the Influencer to include a disclaimer in all gift-related content, explicitly stating “Thank you [brand] for the gift of the [product]”.

**Chapter Four**

**4. CASE HISTORY**

In the previous chapters, we analyzed the scope within which to operate and highlighted guidelines to follow in order to avoid any sanctions.

For this, it is essential to consider measures issued in the area of Influencer Marketing, which express the authorities’ thoughts on the subject and offer valuable advice for the future.

**4.1 Injunctions issued by the Review Board and pronunciations issued by the Jury**

The number of cases heard by the IAP’s Review Board and Jury is increasingly higher, particularly those relating to social media marketing communication. Among these, we find Instagram communications violating Articles 2 and 7 of the Code of Self-Regulation, which prohibit misleading and non-transparent communications respectively.

Key examples are provided hereinafter.

**4.1.1 The Wycon Case**

On 30 May 2019, the Review Board ruled in the case of Clarissa Marchese *(*Influencer) & Wycon (brand) following communications published on Instagram, within which the Influencer invited her followers to visit Wycon’s Instagram page and website, explicitly stating that they would be able to find “many nice things, many surprises, things that have to do with my wedding.”[[16]](#footnote-16)

Subsequent Instagram stories also showed Ms Marchese promoting Wycon products during her bachelorette party and wedding make-up sessions.

Such communications were ruled as manifestly contrary to Article 7 of the Code of Self-Regulation, as a simple mention of the brand’s webpage was not sufficient to disclose its promotional intent.

The ruling cited: “Such communications feature the clear promotion of products and of the brand mentioned, however they are not sufficiently explicit and therefore immediately recognizable as such by the audience. A simple mention of the @wycon\_cosmetics page cannot be considered as sufficiently and unequivocally identifying such content as arising from a commercial agreement with the advertiser. Such promotion is furthermore evidenced by the Influencer’s entirely-dedicated page on the Wycon website, featuring both her and her wedding. The Digital Chart Regulation, which is explicitly mentioned in the Code, outlines all appropriate measures to be adopted for online endorsements, so as to meet the requirements for detectability of any promotional content. The principle of transparency in advertising communications is aimed at ensuring the distinction – both of form and substance – between promotional and other content, so as to ensure that advertisements are explicit and clearly recognizable by the audience as promotional messages, without the need for additional interpretations. These messages must be recognized as being the expression of biased points of view and of the business interests of the company whose products or services are shared or mentioned.”

**4.1.2 The Falconeri Case**

More recently on 20 October 2020, the Review Board ruled on the following message: “Sunday in pink with @falconeriofficial; Soft and cozy with @falconeriofficial cashmere; Autumn palette with @falconeriofficial” used to share promotional content concerning the famous brand’s cashmere garments*.*[[17]](#footnote-17)

The case addressed an Influencer’s sharing of three Instagram posts on 10, 15 and 18 October 2020 respectively.

Once again, this constituted a breach of Article 7 of the Code of Self-Regulation, as the promotional nature of the three posts was not sufficiently explicit and immediately recognizable by the audience, therefore requiring further interpretation.

The injunction stated: “The Review Board maintains that a simple mention of the @falconeriofficial page and hashtags #falconeri, #falconeridream and #superiorcashmere cannot be considered as sufficiently and unequivocally identifying such content as arising from a commercial agreement with the advertiser.”

The time elapsed between the post publication and the injunction – only 2 days from the most recent piece of content – shows the efficacy and great value of IAP’s procedures and rulings.

**4.1.3 The Miamo Skin Care Case**

In another case, a popular Influencer was involved in IAP proceedings after sharing promotional content on Instagram by the Miamo Skin Care brand on 19 July 2019, disguising it as unbiased advice. She referred to the @miamoskincare page and used hashtags #10dayschallenge, #miamoskincare and #iomiamoetu.[[18]](#footnote-18)

However, the Review Board did not consider such measures “as sufficiently and unequivocally identifying such content as arising from a commercial agreement with the advertiser” and the posts were ruled as being in breach of Article 7 of the Code of Marketing Communication Self-Regulation.

The ruling stated: “The Digital Chart Regulation, to which Article 7 of the Code explicitly refers, outlines all appropriate measures to be adopted for online endorsements, so as to meet the requirements for the detectability of promotional content. The principle of transparency in advertising communications is aimed at ensuring the distinction – both of form and substance – between promotional and other content, so as to ensure that advertisements are explicit and clearly recognizable by the audience as promotional messages, without the need for additional interpretations. These messages must be recognized as being the expression of biased points of view and of the business interests of the company whose products or services are shared or mentioned.”

**4.1.4 The Bottega Verde Case**

The same ruling was faced by another Influencer, who had used a post on his Instagram account to share marketing communications related to the Bottega Verde Aloe Line, which depicted the professional in his bathroom with several products perched on a shelf next to the sink. Looking into the camera, he was holding a Sorbetto 24h face cream from the Aloe Line. Furthermore, the post stated: “Sorbetto 24h face cream – instantly hydrates my skin. Aloe vera was my second partner in taking care of my skin this summer. I chose the @bottegaverde line for its high % aloe content.”[[19]](#footnote-19)

The Review Board ruled that the instance constituted a breach of Article 7 of the Code of Self-Regulation: “Although the contents are shared in the form of a private story in line with Instagram’s style, the message features the clear promotion of products and the brand mentioned, however this is not made explicit and therefore immediately recognizable as such by the audience. The Review Board maintains that a simple tagging of the @bottegaverde page cannot be considered as sufficiently and unequivocally identifying such content as arising from a commercial agreement with the advertiser.”

**4.1.5 The Clinique Case**

In another case, the Review Board did not believe that the use of hashtags unequivocally identified the communication as arising from a commercial agreement.[[20]](#footnote-20)

The case involved the Clinique brand and messages shared through an Instagram post where the Influencer filmed some cosmetics and noted: “With my new personalized Clinique cream! I chose the hydrating lotion and combined it with the active concentrate for pores and uneven skin texture. You too can get your personalized cream based on your skin type and problem area. It features three different bases and five active concentrates, and each one has a different color. Mine is blue. Choose now, combine them and start taking care of your skin.”

The post linked to the @cliniqueitalia page and, despite the use of hashtags #Clinique, #CliniqueiD, #sharemyclinique, #OctolyFamily, the Review Board deemed the communication to be non-transparent and therefore in breach of Article 7 of the Code of Self-Regulation.

**4.1.6 The Sunsilk Case**

The Sunsilk case, in which famous Influencer Chiara Nasti shared an Instagram post (where she showed her hair under a sign that read “Sunsilk’s sparks of light”), also featured a link to the @sunsilkitalia page and hashtags #sunsilk and #oggibrilloio. The injunction stated that such measures were “not considered as sufficiently and unequivocally identifying such content as arising from a commercial agreement between the blogger and the brand. Specifically, each individual message must in itself comprehensively state its commercial nature, as it might be used and quoted through links and sharing, which might be completely independent from other content on the account. One of the well-established principles of the Code of Marketing Communication Self-Regulation - which is reiterated and expressed by the Digital Chart guidelines as regards digital forms of marketing communication - provides that marketing communication “should always be recognizable as such” (cf. Article 7 of the Code).[[21]](#footnote-21) This principle is essential in order to protect transparency in promotional communications, so as to ensure the distinction – both of form and substance – between promotional and other content, thereby guaranteeing that advertisements are explicit and clearly recognizable by the audience as promotional messages, without the need for additional interpretations. This, based on their own promotional nature as the expression of biased points of view and of the business interests of the company whose products or services are shared or mentioned.”

**4.1.7 The Guerlain Case**

An interesting case worth noting is the one ruled by the Jury in relation to two posts shared on Instagram and featuring Guerlain cosmetics.[[22]](#footnote-22)

According to the Review Board, the posts constituted promotional communications for the product and the brand mentioned, without relevant and sufficient disclosures. Therefore, they were found to be in breach of Article 7 of the Code of Self-Regulation. Specifically, the mention of the @guerlain page and hashtags #guerlain and #guerlainmakeup did not qualify as sufficient.

The case was brought to the Jury because the brand owner claimed that the first post contained the hashtag #ad next to the brand advertised, as well as the brand itself. They also claimed that they had not commissioned the Influencer to publish the second post – on her own accord, she had captured a scene from her daily life, featuring some Guerlain make-up products and jewels from other brands, all of which she was using personally rather than for brand promotion. Furthermore, the company noted that some of the featured products were not available on the market anymore and therefore, Guerlain would not have benefited from a financial investment for their promotion.

However, the Jury ruled that the posts were in breach of the principle of transparency of marketing communication, provided for by Article 7 of the Code of Self-Regulation and reiterated by the Digital Chart online communication guidelines, on the basis of the following grounds: “without evidence of the non-contractual conduct of the Influencer in relation to a post shared on 30 May 2018, both posts are considered to be the subject of a working relationship and are not sufficiently explicit, as they do not feature relevant indications of the promotional nature of the content, as provided by article 7 of the Code.”

The measure applies “on account of the case-law established by the Jury according to which Article 7 of the Code applies to any messages having the same objective characteristics and the same effects of an advertising communication, even in the instance that the subjective intentions of the parties involved are not promotional in nature, and even in the instance that no working relationship exists with the advertiser” so that in such cases, the existence of a working relationship is assumed. The brand must provide sufficient evidence as to overcome the assumption of a commercial relationship existing between the Influencer and the owner of the advertised brand; should the evidence not be deemed sufficient, the brand owner will be liable.

**4.1.8 The Fedez – Peugeot Case**

In this case, the decision was made by the Jury, one of the bodies provided for by the Code of Marketing Communication Self-Regulation”.[[23]](#footnote-23)

The facts at the basis of the legal proceedings took place during the International Tennis Tournament in Rome - which was sponsored by the automotive brand - where the famous artist and Influencer had filmed some clips at the Peugeot booth. Specifically, he filmed the brand and himself in a car, talking about its features – and then shared such clips through Instagram Stories.

“They are showing me all the new Peugeot cars that are about to come out and I’m going to show you them too, one by one” – this is the sentence the Influencer stated while filming the brand and then again, after getting in the car, he said “see, you come to the International Tennis Tournament, you lock yourself in a car on display, you turn on the seat’s massage function and you are set.”

This, without disclosing the promotional nature of his content to the audience.

The Jury stated in its ruling: “Although the messages are shared in the form of a private story by the celebrity, they feature the clear promotion of products, which is however not immediately recognizable as such by the audience. No relevant measures have been put in place to identify such content as arising from a commercial agreement between the celebrity and the brand.”

It is worth noting that in its defense, the automotive brand stated that this was Fedez’ own initiative and that he had not previously shared such content with the brand for approval, despite such obligation being outlined in their agreement. Therefore, the brand claimed they had not been put in the position to preemptively be in control of the content.

However, the Jury disagreed and confirmed Peugeot’s liability for their breach of Article 7 of the Code of Marketing Communication Self-Regulation “due to the significant relationship existing between the advertiser and the author of the communications, as well as the necessary casual nature existing between the production of the aforementioned Instagram Stories and the sponsored activity of the advertiser in the execution of a contract between the parties. The Jury maintains that the unlawful act arising from a breach of Article 7 of the Code is attributable to the advertiser imposing vicarious liability for the aforementioned act.”

It is also noted that the story taking place in the 3008 SUV was subject to an agreement between Fedez and Peugeot and that one of such stories was created by enlisting the automotive brand’s staff working at the booth, who were filmed by Fedez. Therefore, it appears clear that Peugeot would have been able to intervene in order to ensure the posted content was accurate and to stop its posting.

Furthermore, it is also mentioned that Fedez’ initial video featured a tag linking to Peugeot’s Instagram page, which then subsequently shared on their own Instagram page “content featuring the artist as an episode of the #DriveToTennis campaign”, furthering the audience’s memory of the campaign significantly after the 24 hours in which Instagram Stories are visible, and expressing their approval of the artist’s actions, who therefore appears to have acted as an auxiliary.”

Through another passage of the ruling, highlighting the fact that the content of such communications was positive, did not feature competitor brands and the videos equated to the contents of an advertising agreement, the decision claims that this is sufficient to determine a material connection between advertiser and artist. Since no measures were taken in order to “disclose the promotional nature of the endorsement, which was not otherwise distinguishable for the average consumer” the following ruling was issued: “Having assessed the acts and heard the parties, and ruling exclusively against Peugeot Automobili Italia S.p.A., the Jury maintains that the aforementioned message has a promotional nature and intent, which is in breach of Article 7 of the Code of Self-Regulation. Its reproduction with any means is therefore prohibited.”

**4.2 AGCM and Trial Court measures**

ACGM and the Trial Court, Chamber Specialized in Business Matters, have often been involved in significant decisions relating to social media advertising.

Specifically over the past few years, ACGM was among the stakeholders most involved in raising awareness about the need for official regulations over Influencer Marketing. They were also active in working to contrast disguised advertising.

Promoting a brand on social media without disclosing the commercial relationship – maybe even concealing it behind apparently spontaneous and unbiased actions - constitutes a severe breach of Articles 22 and 23 of the Consumer Code and Article 7 of the Code of Marketing Communication Self-Regulation, which prohibit omissions and misleading commercial practices.

**4.2.1 The Ferretti – Alitalia Case**

AGCM had the opportunity to outline best practices to protect consumers from disguised advertising during the proceedings which arose from the National Consumer Union (Unione Nazionale Consumatori)’s reporting of Aeffe and Alitalia, as well as of 13 well-known Influencers. They had shared on their Instagram profiles posts disproportionally (as they were not justified by a promotional intent) featuring the Alitalia brand on garments by the famous fashion house Alberta Ferretti, which the Influencers were wearing*.*[[24]](#footnote-24)

It is worth noting the Authority’s passage addressing the case in question: “It is assumed that direct and indirect featuring of the Alitalia and Aeffe brands, without the inclusion of the relevant disclaimers, could represent the characteristics of promotional advertising, taking advantage of the “narrative-expressive” structure of the celebrity’s daily life, shared with fans/followers through the Influencer’s Instagram profile. It is also important to note that the digital world is increasingly expanding, and posts, tweets, photographs and videos shared on social media constitute tools that are often used to share one’s world, emotionally engaging the audience of such stories. Thereby stems the need to make the consumers aware of the promotional nature of the messages they are seeing, especially in the instance in which this is commissioned by the sponsored brand to the celebrity. Consumers need to be aware that what they are seeing is not a spontaneous and unbiased sharing of the celebrity’s daily life.”

The significant complexity of hidden messages is also addressed: “In this industry, it is essential to ensure consumers are granted the utmost transparency and clarity about any promotional content featured in communications shared on social media, especially considering that hidden marketing is particularly insidious as it removes any natural defense provided to the audience by appropriate advertising disclosures.”

It is important to highlight that AGCM did not adopt disciplinary provisions. However, this was simply caused by the parties involved adopting the specific commitments the Authority deemed appropriate to rectify any potential unlawful elements of the reported commercial practices.

These commitments must be carefully assessed, as they constitute best practices to adhere to and, specifically, they caused Alitalia to adopt the following measures:

* Recommendation for all corporate functions involved “in the management of Influencer Marketing of a formal communication recommending the strictest adherence to unfair commercial practice regulations, specifically referring to the adoption of all necessary clauses in order to avoid any potential case of disguised advertising.
* Adoption of specific guidelines “aimed at clarifying and setting codes of conduct Influencers need to adhere to, which will constitute part of a commercial cooperation agreement signed with individual Influencers. In the instance of a breach of such codes of conduct by the Influencers, Alitalia will contractually enforce graduated sanctions based on the nature and value of the signed agreement, exercising its discretion to quantify the sanction clauses which will be included in contracts signed following the adoption of the guidelines.”
* Inclusion of a standard clause in co-marketing agreements “which sets out the obligation for commercial partners to adopt any necessary measures and cautions to avoid any instances of disguised advertising, as well as to encourage Influencers to adopt appropriate conducts. Based on such clause, Alitalia will adopt the following procedure: they will send an official warning to the commercial partner reporting the instance of malpractice in question and inviting them to cease and desist, as well as to more carefully ensure the Influencers’ compliance with the disguised advertising ban; in the instance the partner doin doesn’t comply, Alitalia will issue a penalty, which will be commensurate to the financial value of the agreement and the severity of the breach, reserving the right to terminate the contract in the more severe cases, as well as the ability to request compensation for the damage.”

Aeffe’s and AGCM’s commitments were also significant.

* Issuing of communications to attach to any gift package, written in the Influencer’s language. This states that: “Aeffe is committed to ensuring adherence to consumer and competition laws, as well as transparency regulations, and encourages you to do so for all communications across all platforms. To this end and in order to comply with AGCM regulations, we invite you to always disclose the free/gifted nature of all products gifted or loaned by our company in each post, for instance using hashtags such as #suppliedbyAlbertaFerretti or #loanedbyAlbertaFerretti or #adv or #sponsored. We remind you it is important to adhere to all indications outlined on [www.agcm.it](http://www.agcm.it) and www.iap.it.”
* Issuing of a circular communication to all Influencers who received gifts in the past in order to “raise awareness of the importance of complying with transparency laws regulating online commercial policies, specifically referring to the Authority’s and IAP’s guidelines.”
* Commitment within endorsement or sponsorship contracts “to bind the Influencer with whom the contract is signed to adhere to such regulations, as well as to disclose any promotional purposes of content relating to Aeffe and published on social media, by including the following contractual clauses: in the instance of the Influencer’s non-compliance, a clause granting Aeffe the right to request payment of a penalty from the Influencer amounting to at least 10% of the total amount provided for in the contract; a clause granting Aeffe the right to terminate the contract in accordance with Article 1456 of the Italian Civil Code in the instance that the Influencer’s non-compliance continues beyond the term indicated in the formal notice sent by Aeffe. This term will be a minimum of 3 days and a maximum of 5. It being understood that Aeffe also has the right to enforce the payment of an additional penalty amounting to at least 10% of the total amount provided for in the contract, without prejudice to any greater damage.”
* Commitment to monitoring Influencer adherence to contractual obligations.

Another aspect of the case is also interesting, specifically regarding the commitments of 13 Influencers against whom AGCM had brought proceedings.

In the instance that she would show gifted products, Alessia Marcuzzi committed to including “on her social media profiles any relevant disclosures through the use of hashtags such as #prodottofornitoda+brand/#suppliedbybrand or wording aimed at disclosing the gifted nature of the products (such as “Thank you – brand name – for gifting me this amazing dress” or “Guys, I’m showing you this new lipstick I was gifted by – brand name).”

Furthermore, for the promotion of a product as commissioned by a brand, the Influencer commits to include “any relevant disclosures such as #advertising, #ad, #sponsoredby+brandname, #pubblicità”.

Lastly, a general commitment to communicating the values of correct advertising “by sharing, within 20 days of the conclusion of the proceedings and for at least 3 times during the following 12 months, on their Instagram profile and other social media profiles, one or more posts on the importance of transparency in advertising and of adhering to rules protecting consumers.”

Other Influencers committed to adopting the following measures: in the instance of products gifted or loaned by Aeffe with no promotional commitments (even in the case of provision of products from brands other than Aeffe), they committed to “include relevant disclosures such as *#suppliedbyAlbertaFerretti, #AlbertaFerrettigift, #loanedbyAlbertaFerretti or #fornitodaAlbertaFerretti or #regalatodaAlbertaFerretti*”.

In the case of a working relationship, the commitment to use disclosures such as *“#pubblicitàbrand, #sponsorizzatodabrand, #advertisingbrand, #inserzioneapagamentobrand*” was made.

**4.2.2 The Barilla “Pan di Stelle” Case**

Another well-known case in which AGCM intervened is the one involving several Micro Influencers, who shared on their Instagram profiles posts featuring Barilla products from the Pan di Stelle line.[[25]](#footnote-25)

The order opens with a dispute for disguised advertising of Barilla products through “two posts on the Insanitypage Instagram profile, one featuring a close-up photograph of a tub of Pan di Stelle spread, and the other relating to a contest, the winner of which would be awarded a free supply of Pan di Stelle products” brought both against the company and the individual owner of the Insanitypage Instagram profile.

The proceedings were subsequently extended to 9 additional Micro Influencers engaged by Barilla in sharing Instagram posts featuring recipes using products from the Pan di Stelle line.

AGCM highlights that “such practice falls within the area of Influencer Marketing, which currently constitutes a well-established form of communication consisting in bloggers and Influencers sharing photographs, videos and comments on blogs, vlogs and social media (such as Facebook, Instagram, Twitter, YouTube, Snapchat, Myspace), openly supporting and endorsing specific brands, thereby generating a promotional effect. Such form of communications was initially employed by celebrities, but is now spreading among a significant number of social media users who in some cases have a relatively low number of followers”. The proceedings were later dismissed but only in light of the parties agreeing to specific commitments.

Once again, the Authority considered the goal to foster the creation of best practices rather than issue sanctions.

The owner of the brand committed to the following: spreading specific guidelines aimed at further raising awareness of the codes of conduct the Influencers will be required to adhere to in order to ensure transparency.

Specifically, such guidelines: a) will recall the key principles of the transparency rule for advertising, such as are practically derived from the Authority’s and IAP’s interventions. This includes, specifically to the latter, the Digital Chart; b) will include, among others and as hereby stated, clear provisions related to the disclaimers that must be included in Influencers’ statements across social media profiles, in order to guarantee communication transparency for consumers, by appropriately warning them that they are viewing sponsored content; c) will include clear provisions in relation to the contractual models approved by the Legal function, which shall be applied within the relationship with Influencers and the agencies which will employ them on behalf of Barilla; d) an excerpt of the guidelines with specific binding provisions for Influencers will be attached to and represent an integral part of the contracts between Barilla and Influencers and the contracts between the agencies employed by Barilla and Influencers.”

The commitment towards Influencers directly employed by Barilla is subject to the contractual clauses which will provide for the obligation to comply with the guidelines, as well as “standard clauses with deterrent mechanisms (such as a decrease in the consideration price and/or penalties and/or withdrawal of payments) and sanctions in the instance of a breach of the aforementioned obligation; such mechanisms will of course be applied by taking into account the principle of reasonableness, proportionality and graduation (such as appeal, formal notice, termination of the contract in the most severe cases) and, therefore, will depend on specific real circumstances (such as severity of the breach, value of the contract) and therefore, will comply with one’s own entrepreneurial autonomy and contractual freedom.”

Whereas in the instance that the relationship is not directly established between Barilla and the Influencer, but the latter enters into a relationship with an agency, the commitment consists in binding the agencies to sign contracts which provide for the obligation to adhere to the company’s guidelines, as well as to encourage the agencies to supervise the Influencer’s conduct. Lastly, the commitment in these cases also aims at including deterrent mechanisms and sanctions in the instance of a breach of the aforementioned obligations by the agency.

The commitments made by Influencers were also precise and clear as follows.

* Commitment to include a disclaimer in each post featuring products received free of charge: “in the instance that in the future, companies shall gift the Influencer products, with no obligation to promote them in any way, the Influencer commits to include hashtags such as #suppliedbybrand or #brandgift or #fornitodabrand in each post featuring images or the mention of such products, or other similar wordings disclosing that the product was provided or gifted by the brand. Such measure will be adopted in any case since the communication of such measure and the acceptance of the commitments.”
* Commitment to including disclaimers in posts featuring products received as part of a working relationship or collaboration agreement: “in the instance that the sharing of posts on social media is part of a working relationship and/or collaboration between the Influencer and the advertising companies, the Influencer shall include in each post the hashtags #pubblicitàbrand or #sponsorizzatodabrand or #advertisingbrand or #inserzioneapagamentobrand. Such measure will be adopted in any case following the communication of such measure and the acceptance of the commitments.”
* Commitment not to reshare content selected by the advertising companies except as explicitly provided for by the contract with relevant obligations.
* Commitment to communicate the values of correct advertising and transparency for consumer protection “by sharing, within 30 days of the communication of such judgment and acceptance of commitments and for a total of at least 2 times during the following 12 months, on their Instagram profile and/or other social media profiles, one post on the importance of transparency in advertising and of adhering to rules protecting consumers.”

**4.2.3 The Philip Plein – Ferrari Case**

Another case to highlight is that of Influencers using a brand without the brand owner’s prior consent. Are Influencers allowed to do so? It depends. It depends on whether they do so for commercial purposes or with the aim to simply describe their daily habits.

It is well known that Influencers share their private life with followers, and therefore they are likely to feature products from other brands.

In such cases, it is important to distinguish between lawful and unlawful uses.

To this end, the Genoa Court[[26]](#footnote-26) ruling over one specific case clearly exemplifies this distinction.

The judicial measure was issued following an appeal brought by Ferrari S.p.A. against famous German designer Philipp Plein. The latter was accused of posting two videos on Instagram, one featuring a pair of shoes – created and marketed by the designer – resting on the hood of a Ferrari, with the car’s logo in the foreground. The second video featured scantily clad young women performing a so-called carwash of the car – with the shoes still resting on the hood of the car, accompanied by a marketing caption in the margins.

The measure clearly defines the distinction between lawful and unlawful uses of the brand by Influencers.

The order’s passages can be adopted as conduct guidelines in order to avoid legal infringements.

The Court highlights their own awareness that for the work of an Influencer “it is essential to showcase one’s private life as well as feature consumer goods owned by the Influencer. It is inevitable for such showcase of the Influencer’s consumer habits to include features – and use – of the products’ trademarks.”

Following this premise, the Court defines the distinction between an Influencer’s lawful and unlawful conduct. The use of other brands is lawful “in the instance that it is authorized by the trademark owner; in the instance that the images published communicate to the audience a different meaning than promotional and marketing purposes, i.e. they are descriptive of scenes from the Influencer’s life or that of third parties. Such lawfulness arises from an obvious consideration, according to which the publication of daily life scenes implies the inevitable sharing of product trademarks which are normally used by the subject in question to fulfil the action showcased.”

In the instance that the images shared by the Influencer don’t have any other meaning than the promotional and marketing purposes towards their followers, the use of other brands shall be considered unlawful.

The Court also highlighted criteria to discern such promotional and marketing purposes: “This arises when the brand’s feature: a) is accompanied by explicitly marketing messages or captions; b) is published in a context (such as a website, other Instagram profile or other social media platform) that is primarily aimed at marketing communication, i.e. primarily features marketing messages (such as in the example in question); c) is included in images which, alone, do not have any other meaning than the showcasing of a product for marketing purposes, rather than simply depicting scenes from the Influencer’s life or that of third parties.”

It appears evident that the shoe placement on the Ferrari hood does not describe a life moment (“such moment should not include eating, resting, walking, partying, talking, etc.”) and such feature can only “be explained as having the purpose to promote the sale of shoes created by the designer by associating them with the luxury vehicle hereby portrayed.”)

Additionally, for the second video featuring scantily clad young women washing a Ferrari car, the commercial purposes can be deduced both by the caption included in the margins of the video (“5000 U.S. $ is the price tag for this one of a kind sneakers which is only available at PP stores and online (..).com”) and, as highlighted by the Court, as “it is important to note that the profile is primarily promotional in nature and function, and it advertises the designer’s products.”

The juxtaposition of the brand’s shoes and Ferrari is therefore considered as unlawful and aimed at taking advantage of the latter brand’s prestigious image, with the consequence that the unlawful act was sanctioned, prohibiting the use of the brand and its models, as well as ordering the removal of videos and posts from Instagram. Additionally, the designer was ordered to pay a €20,000.00 penalty for each violation or breach.

From a legal perspective, the Ferrari brand is well-known, and therefore it is entitled to extended protection under Article 20 of the Industrial Property Code. This means that the owner is entitled to prohibit third parties from using in their financial marketing activities “c) a mark that is identical or similar to the trademark registered for related and unrelated products or services, if the trademark is well-known and if the use of the trademark, even for purposes other than distinguishing products or services, ensures without fair reason an unfair advantage arising from the trademark or well-known nature of the trademark or is detrimental for the brand.” Furthermore, Article 9 (3), letter e) of the Trademark Regulation sets out the ability for the trademark owner to prohibit the use of the trademark, even in the instance that this is done in business correspondence or advertising (i.e. even in the instance of no counterfeiting).

**Chapter Five**

**5. GOLDEN RULES**

**5.1 Professional Influencers**

The bond of trust between Influencers and their audience, the sponsorship contracts signed with companies engaging Influencers to promote their products by providing them with guidelines and direction, the market rules and their limitations and so much more – these are the reasons that make Influencing an actual profession.

In general, the activities carried out by the so-called Talent fall within the area of self-employment, as regulated by article 2222 of the Italian Civil Code. Of course, it all depends on how the working relationship is structured, however if the Influencer carries out their activities genuinely as a sole trader, they will certainly fall within the self-employment criteria.

Usually, Influencers have a contract in place with their reference agency, which subsequently and in turn signs and complies with contracts with companies. The agency will be entitled to an agreed-upon percentage of the remuneration earned by the Influencer, as they will act as an intermediary.

As such and as for all respectable professions across all industries, the Influencer’s profession needs rules and protections. For instance, this might include collective bargaining for the sector, aimed at regulating the working relationship with Influencers.

One of the first countries to act on the matter was Great Britain, with the institution of the first trade union, “The Creator’s Union” in July 2020. The association aims at setting minimum remuneration thresholds, guaranteeing fair contractual agreements for Influencers, supporting them in their negotiations with companies and promoting the correct use of online content.

A similar trade association, called “American Influencer Council” was founded in the United States, which disciplines commercial practices for the digital market, with a specific focus on Influencers.

Assoinfluencer (Associazione Italian Influencer) was founded in Italy in June 2019. This association is the single trade union existing for the sector in Italy, and it was created with the specific goal of promoting and protecting the newly created profession of the same name.

The main goal of the association is to protect Influencer remuneration, as well as to build a network and provide legal advice to their members on different topics (correct form of marketing messages, contracts, etc.)

The association recently submitted a proposal to the Labor Committee of the Italian Chamber of Deputies (Commissione Lavoro della Camera dei Deputati), which included a number of proposed measures aimed at protecting the Influencer profession. One of the proposals is the introduction of legal sanctions against the companies which own social media platforms, in the instance that fair and transparent procedures are not put in place concerning penalties for professional users of the social media platforms.

In conclusion, considering that as we have often heard, “social media are the future”, there is still a legal gap to bridge in relation to the new “Influencer” job title.

This is a dynamic, flexible and constantly evolving profession, requiring an adequate level of protection and ad hoc tools, such as collective bargaining and contracts regulating the entire course of the working relationship.

**5.2 10 golden rules for your social media business**

1. THE ART OF (NOT) IMPROVISING

It is important NOT to improvise your work as an Influencer, not to go with the flow without realizing the power and responsibilities you hold and the opportunities you can take advantage of. Going with the flow unaware is never a good idea.

1. KNOW THE RULES OF THE GAME

It is essential to know reference regulations.

For companies, it would be useful to adopt and share Influencer Marketing Guidelines, in order to clearly set codes of conduct for Influencers, so as to ensure transparent communications.

1. TOE THE (THIN) LINE BETWEEN INSPIRATION AND PLAGIARISM

DO NOT take other Content Creators’ content and post it on social media as if it were your own.

1. PROTECT YOUR BRAND

Do all that is necessary to protect and showcase your immaterial assets – be they trademarks, domain names or social media handles.

1. DO NOT TAKE ADVANTAGE OF OTHERS’ BRANDS

DO NOT use brands – especially well-known brands – by other subjects to lead consumers to believe there is a connection or association between the two businesses so as to obtain advantages.

1. NEGOTIATE YOUR CONTRACTS

NEVERsign a contract without carefully reading it, going through each individual clause and appendix. Negotiating an endorsement contract well is the starting point for an effective and successful collaboration.

1. PACTA SUNT SERVANDA, BUT NOT ALWAYS

DO NOT breach the terms agreed upon in an endorsement contract (type and volume of content, deadlines, exclusives, confidentiality, etc.)

1. TRANSPARENT ADVERTISING, IN THE RIGHT MEASURE

DO NOT promote products without prior disclosure to your followers of the promotional purposes of such operation. Basically, always use the appropriate hashtag:

* In the case of a sponsorship or collaboration, you must include some of the following disclaimers: *#pubblicità(brand) #sponsorizzatoda(brand) #advertising(brand) #ad(brand) #sponsoredby(brand) #inserzioneapagamento(brand)*;
* If you receive gifted products, you must disclose this by using the related disclaimers, such as *#prodottofornitoda(brand) #suppliedby(brand)*

1. BE CAREFUL WITH VIOLATIONS

Regularly check that there are no unauthorized uses of your content and trademarks taking place. Once you discover a breach, immediately proceed to request a cease and desist and compensation for the damage incurred.

10) ENJOY YOUR BUSINESS

Never lose sight of your goal, know your business and follow the rules, but also don’t forget that social media are about being spontaneous and credible. So relax and enjoy your success!

**APPENDICE**

**1. Il Codice di Autodisciplina della Comunicazione Commerciale**

**68ª edizione, in vigore dal 9 febbraio 2021**

[**Norme Preliminari e Generali**](https://www.iap.it/codice-e-altre-fonti/il-codice/)

**a) Finalità del Codice**

Il Codice di Autodisciplina ha lo scopo di assicurare che la comunicazione commerciale, nello svolgimento del suo ruolo particolarmente utile nel processo economico, venga realizzata come servizio per il pubblico, con speciale riguardo alla sua influenza sul consumatore.

Il Codice definisce le attività in contrasto con le finalità suddette, ancorché conformi alle vigenti disposizioni legislative; l’insieme delle sue regole, esprimendo il costume cui deve uniformarsi l’attività di comunicazione, costituisce la base normativa per l’autodisciplina della comunicazione commerciale.

**b) Soggetti vincolati**

Il Codice di Autodisciplina della Comunicazione Commerciale è vincolante per utenti, agenzie, consulenti di pubblicità e di marketing, gestori di veicoli pubblicitari di ogni tipo e per tutti coloro che lo abbiano accettato direttamente o tramite la propria associazione, ovvero mediante la sottoscrizione di un contratto di cui al punto d), finalizzato all’effettuazione di una comunicazione commerciale.

**c) Obblighi degli enti firmatari**

Gli enti firmatari si impegnano ad osservare ed a far accettare dai loro associati le norme del Codice stesso e dei Regolamenti autodisciplinari, a dare opportuna diffusione alle decisioni dell’organo giudicante, nonché ad adottare adeguati provvedimenti nei confronti dei soci che non si attengano al giudizio dell’organo stesso o siano recidivi.

**d) Clausola di accettazione**

Per meglio assicurare l’osservanza delle decisioni dell’organo giudicante, gli organismi aderenti si impegnano a far sì che ciascun soggetto ad essi associato inserisca nei propri contratti una speciale clausola di accettazione del Codice, dei Regolamenti autodisciplinari e delle decisioni assunte dal Giurì, anche in ordine alla loro pubblicazione, nonché delle ingiunzioni del Comitato di Controllo divenute definitive.

**e) Definizioni**

Agli effetti del Codice il termine “comunicazione commerciale” comprende la pubblicità e ogni altra forma di comunicazione, anche istituzionale, diretta a promuovere la vendita di beni o servizi quali che siano le modalità utilizzate, nonché le forme di comunicazione disciplinate dal titolo VI. Non comprende le politiche commerciali e le tecniche di marketing in sé considerate.

Il termine “prodotto” comprende qualsiasi oggetto della comunicazione commerciale e si intende perciò esteso anche al servizio, metodo, trattamento, diritti, obbligazioni e simili. La natura del prodotto o del servizio in sé considerata non forma oggetto del Codice di Autodisciplina.

Il termine “messaggio” comprende qualsiasi forma di presentazione al pubblico del prodotto e si intende perciò esteso anche all’imballaggio, alla confezione, all’etichetta e simili.

Il termine “consumatore” comprende ogni soggetto – persona fisica o giuridica come pure ente collettivo – cui è indirizzata la comunicazione commerciale o che sia suscettibile di riceverla.

Agli effetti del Codice di Autodisciplina non costituisce comunicazione commerciale la distribuzione a scopo didattico di materiale promozionale quando sia richiesto dagli Istituti scolastici pubblici o privati e l’uso avvenga sotto il controllo del personale docente.

**Titolo I – Regole di comportamento**

**Art. 1 – Lealtà della comunicazione commerciale**

La comunicazione commerciale deve essere onesta, veritiera e corretta. Essa deve evitare tutto ciò che possa screditarla.

**Art. 2 – Comunicazione commerciale ingannevole**

La comunicazione commerciale deve evitare ogni dichiarazione o rappresentazione che sia tale da indurre in errore i consumatori, anche per mezzo di omissioni, ambiguità o esagerazioni non palesemente iperboliche, specie per quanto riguarda le caratteristiche e gli effetti del prodotto, il prezzo, la gratuità, le condizioni di vendita, la diffusione, l’identità delle persone rappresentate, i premi o riconoscimenti.

Nel valutare l’ingannevolezza della comunicazione commerciale si assume come parametro il consumatore medio del gruppo di riferimento.

**Art. 3 – Terminologia, citazioni, prove tecniche e scientifiche, dati statistici**

Terminologia, citazioni e menzioni di prove tecniche e scientifiche devono essere usate in modo appropriato. Prove tecniche e scientifiche e dati statistici con limitata validità non devono essere presentati in modo da apparire come illimitatamente validi.

**Art. 4 – Testimonianze**

Le testimonianze e altre forme di accreditamento di un prodotto, con finalità promozionali, devono rendere palese la loro natura ed essere autentiche e responsabili.

**Art. 5 – Garanzie**

Le garanzie obbligatorie non possono essere comunicate con modalità tali da fare ritenere che il loro contenuto sia maggiore o diverso.

Qualora vengano comunicate garanzie maggiori o diverse rispetto a quelle obbligatorie, la comunicazione commerciale deve precisare il contenuto e le modalità della garanzia offerta, oppure riportarne una sintetica ma significativa indicazione insieme al contestuale rinvio a fonti di informazione scritta disponibili presso il punto vendita o unite al prodotto.

**Art. 6 – Dimostrazione della verità della comunicazione commerciale**

Chiunque si vale della comunicazione commerciale deve essere in grado di dimostrare, a richiesta del Giurì o del Comitato di Controllo, la veridicità dei dati, delle descrizioni, affermazioni, illustrazioni e la consistenza delle testimonianze usate.

**Art. 7 – Identificazione della comunicazione commerciale**

La comunicazione commerciale deve sempre essere riconoscibile come tale. Nei mezzi e nelle forme di comunicazione commerciale in cui vengono diffusi contenuti e informazioni di altro genere, la comunicazione commerciale deve essere nettamente distinta per mezzo di idonei accorgimenti.

Per quanto riguarda talune forme di comunicazione commerciale diffuse attraverso internet, i principali idonei accorgimenti sono indicati nel Regolamento Digital Chart.

**Art. 8 – Superstizione, credulità, paura**

La comunicazione commerciale deve evitare ogni forma di sfruttamento della superstizione, della credulità e, salvo ragioni giustificate, della paura.

**Art. 9 – Violenza, volgarità, indecenza**

La comunicazione commerciale non deve contenere affermazioni o rappresentazioni di violenza fisica o morale o tali che, secondo il gusto e la sensibilità dei consumatori, debbano ritenersi indecenti, volgari o ripugnanti.

**Art. 10 – Convinzioni morali, civili, religiose e dignità della persona**

La comunicazione commerciale non deve offendere le convinzioni morali, civili e religiose.

Essa deve rispettare la dignità della persona in tutte le sue forme ed espressioni e deve evitare ogni forma di discriminazione, compresa quella di genere.

**Art. 11 – Bambini e adolescenti**

Una cura particolare deve essere posta nei messaggi che si rivolgono ai bambini, intesi come minori fino a 12 anni, e agli adolescenti o che possono essere da loro ricevuti. Questi messaggi non devono contenere nulla che possa danneggiarli psichicamente, moralmente o fisicamente e non devono inoltre abusare della loro naturale credulità o mancanza di esperienza, o del loro senso di lealtà.

In particolare questa comunicazione commerciale non deve indurre a:

* violare norme di comportamento sociale generalmente accettate;
* compiere azioni o esporsi a situazioni pericolose;
* ritenere che il mancato possesso del prodotto oggetto della comunicazione significhi inferiorità, oppure mancato assolvimento dei loro compiti da parte dei genitori;
* sminuire il ruolo dei genitori e di altri educatori nel fornire valide indicazioni dietetiche;
* adottare l’abitudine a comportamenti alimentari non equilibrati, o trascurare l’esigenza di seguire uno stile di vita sano.

La comunicazione commerciale relativa ai prodotti alimentari e alle bevande rivolta ai bambini, o che può essere da loro ricevuta, è altresì soggetta alle norme contenute nell’apposito Regolamento, che costituisce parte integrante del presente Codice.

La comunicazione commerciale non deve contenere un’esortazione diretta ai bambini affinché acquistino o sollecitino altre persone ad acquistare il prodotto pubblicizzato.  
L’impiego di bambini e adolescenti nella comunicazione deve evitare ogni abuso dei naturali sentimenti degli adulti per i più giovani.

Sono vietate rappresentazioni di comportamenti o di atteggiamenti improntati alla sessualizzazione dei bambini, o dei soggetti che appaiano tali.

**Art. 12 – Tutela dell’ambiente naturale**

La comunicazione commerciale che dichiari o evochi benefici di carattere ambientale o ecologico deve basarsi su dati veritieri, pertinenti e scientificamente verificabili.  
Tale comunicazione deve consentire di comprendere chiaramente a quale aspetto del prodotto o dell’attività pubblicizzata i benefici vantati si riferiscono.

**Art. 12bis – Sicurezza**

La comunicazione commerciale relativa a prodotti suscettibili di presentare pericoli, in particolare per la salute, la sicurezza e l’ambiente, specie quando detti pericoli non sono facilmente riconoscibili, deve indicarli con chiarezza. Comunque la comunicazione commerciale non deve contenere descrizioni o rappresentazioni tali da indurre i destinatari a trascurare le normali regole di prudenza o a diminuire il senso di vigilanza e di responsabilità verso i pericoli, tra cui immagini del corpo ispirate a modelli estetici chiaramente associabili a disturbi del comportamento alimentare nocivi per la salute.

**Art. 13 – Imitazione, confusione e sfruttamento**

Deve essere evitata qualsiasi imitazione servile della comunicazione commerciale altrui anche se relativa a prodotti non concorrenti, specie se idonea a creare confusione con l’altrui comunicazione commerciale.

Deve essere inoltre evitato qualsiasi sfruttamento del nome, del marchio, della notorietà e dell’immagine aziendale altrui, se inteso a trarre per sé un ingiustificato profitto.

**Art. 14 – Denigrazione**

È vietata ogni denigrazione delle attività, imprese o prodotti altrui, anche se non nominati.

**Art. 15 – Comparazione**

È consentita la comparazione quando sia utile ad illustrare, sotto l’aspetto tecnico o economico, caratteristiche e vantaggi dei beni e servizi oggetto della comunicazione commerciale, ponendo a confronto obiettivamente caratteristiche essenziali, pertinenti, verificabili tecnicamente e rappresentative di beni e servizi concorrenti, che soddisfano gli stessi bisogni o si propongono gli stessi obiettivi.

La comparazione deve essere leale e non ingannevole, non deve ingenerare rischi di confusione, né causare discredito o denigrazione. Non deve trarre indebitamente vantaggio dalla notorietà altrui.

**Art. 16 – Variabilità**

Una comunicazione commerciale accettabile per un determinato mezzo o per un determinato prodotto non necessariamente è accettabile per altri, in considerazione delle differenti caratteristiche dei vari mezzi e dei vari prodotti.

Nei casi di cui ai successivi articoli 17, 18, 21, 27, 28 e 46 sono consentiti messaggi che non contengano tutte le informazioni ivi previste, quando i messaggi stessi si limitino a enunciazioni generiche.

La conformità di una comunicazione commerciale alle norme del Codice non esclude la possibilità, per i mezzi, di rifiutare, in base alla loro autonomia contrattuale, una comunicazione che sia difforme da più rigorosi criteri da loro eventualmente stabiliti.

[**Titolo II – Norme Particolari**](https://www.iap.it/codice-e-altre-fonti/il-codice/)

**A) Sistemi di vendita**

**Art. 17 – Vendite a credito**

La comunicazione commerciale relativa a vendite a credito deve precisare chiaramente l’entità del versamento iniziale e delle rate successive, il tasso di interesse e gli oneri accessori nonché il prezzo totale del prodotto. Essa deve particolarmente precisare le condizioni cui è subordinata la concessione del finanziamento, le condizioni di riservato dominio e simili, nonché quelle della locazione o del noleggio con patto di riscatto.

**Art. 18 – Vendite a distanza**

La comunicazione commerciale relativa a vendite a distanza deve descrivere chiaramente i prodotti offerti in vendita, i prezzi e le condizioni di pagamento, i costi di consegna e ogni altro onere a carico del consumatore, le condizioni di fornitura e, ove previste, le condizioni di annullamento della vendita, nonché l’esistenza e le modalità di esercizio del diritto di recesso.

Essa deve inoltre indicare identità, sede e indirizzo geografico del venditore.

**Art. 19 – Forniture non richieste**

È vietata ogni comunicazione commerciale relativa a forniture non richieste, che mirino a obbligare il ricevente al pagamento qualora questi non rifiuti i prodotti fornitigli o non li rinvii al fornitore.

**Art. 20 – Vendite speciali**

La comunicazione commerciale relativa alle vendite speciali di qualsiasi tipo, e in particolare quella relativa alle vendite promozionali, deve indicare chiaramente in che cosa consiste la favorevole occasione d’acquisto, nonché la scadenza dell’offerta. Quest’ultima indicazione non è richiesta sulla confezione.

**Art. 21 – Manifestazioni a premio**

La comunicazione commerciale relativa alle manifestazioni a premio, realizzate attraverso concorsi od operazioni a premio, deve mettere il pubblico in grado di conoscere chiaramente e agevolmente le condizioni di partecipazione, i termini di scadenza e i premi, nonché – nei concorsi – il loro numero e valore complessivo, le modalità di assegnazione e i mezzi con cui verranno resi noti i risultati.

**B) Settori merceologici**

**Art. 22 – Bevande alcoliche**

La comunicazione commerciale relativa alle bevande alcoliche non deve contrastare con l’esigenza di favorire l’affermazione di modelli di consumo ispirati a misura, correttezza e responsabilità. Ciò a tutela dell’interesse primario delle persone, ed in particolare dei bambini e degli adolescenti, ad una vita familiare, sociale e lavorativa protetta dalle conseguenze connesse all’abuso di bevande alcoliche.

In particolare la comunicazione commerciale non deve:

* incoraggiare un uso eccessivo e incontrollato, e quindi dannoso, delle bevande alcoliche;
* rappresentare situazioni di attaccamento morboso al prodotto e, in generale, di dipendenza dall’alcol o indurre a ritenere che il ricorso all’alcol possa risolvere problemi personali;
* rivolgersi o fare riferimento, anche indiretto, ai minori, e rappresentare questi ultimi o soggetti che appaiano evidentemente tali intenti al consumo di alcol;
* utilizzare segni, disegni, personaggi e persone, direttamente e primariamente legati ai minori, che possano generare un diretto interesse su di loro;
* associare la guida di veicoli con l’uso di bevande alcoliche;
* indurre il pubblico a ritenere che il consumo delle bevande alcoliche contribuisca alla lucidità mentale e all’efficienza fisica e sessuale e che il loro mancato consumo comporti una condizione di inferiorità fisica, psicologica o sociale;
* rappresentare come valori negativi la sobrietà e l’astensione dal consumo di alcolici;
* indurre il pubblico a trascurare le differenti modalità di consumo che è necessario considerare in relazione alle caratteristiche dei singoli prodotti e alle condizioni personali del consumatore;
* utilizzare come tema principale l’elevato grado alcolico di una bevanda.

**Art. 23 – Prodotti cosmetici e per l’igiene personale**

La comunicazione commerciale relativa ai prodotti cosmetici e per l’igiene personale non deve indurre a ritenere che essi abbiano caratteristiche, proprietà e funzioni diverse da quella di essere applicati sulle superfici esterne del corpo umano, sui denti e sulle mucose della bocca, allo scopo esclusivo o prevalente di pulirli, profumarli, modificarne l’aspetto, proteggerli, mantenerli in buono stato e correggere gli odori corporei.

Tale comunicazione commerciale, quindi, pur potendo presentare detti prodotti come aventi caratteristiche sussidiarie per la prevenzione di particolari situazioni patologiche, purché a tale scopo abbiano formule e ingredienti specifici, non deve indurre il consumatore a confondere i prodotti cosmetici o per l’igiene personale con i medicinali, con i presìdi medico-chirurgici, con i dispositivi medici e coi trattamenti curativi.

**Art. 23 *bis* – Integratori alimentari e prodotti dietetici**

La comunicazione commerciale relativa agli integratori alimentari e ai prodotti dietetici non deve vantare proprietà non conformi alle particolari caratteristiche dei prodotti, ovvero proprietà che non siano realmente possedute dai prodotti stessi.

Inoltre detta comunicazione commerciale deve essere realizzata in modo da non indurre i consumatori in errori nutrizionali e deve evitare richiami a raccomandazioni o attestazioni di tipo medico.

Queste regole si applicano anche agli alimenti dietetici per la prima infanzia, a quelli che sostituiscono in tutto o in parte l’allattamento materno e a quelli che servono per lo svezzamento o per l’integrazione alimentare dei bambini.

Per quanto attiene, in particolare, alla comunicazione commerciale relativa agli integratori alimentari proposti per il controllo o la riduzione del peso e di altre tipologie specifiche di integratori, valgono le norme contenute nell’apposito Regolamento, che costituisce parte integrante del presente Codice.

**Art. 24 – Trattamenti fisici ed estetici**

La comunicazione commerciale relativa ai trattamenti fisici ed estetici della persona non deve indurre a ritenere che tali trattamenti abbiano funzioni terapeutiche o restitutive, ovvero abbiano la capacità di produrre risultati radicali, e deve evitare richiami a raccomandazioni o attestazioni di tipo medico.

**Art. 25 – Prodotti medicinali e trattamenti curativi**

La comunicazione commerciale relativa a medicinali e trattamenti curativi deve tener conto della particolare importanza della materia ed essere realizzata col massimo senso di responsabilità nonché in conformità alla scheda tecnica riassuntiva delle caratteristiche del prodotto.

Tale comunicazione commerciale deve richiamare l’attenzione del consumatore sulla necessità di opportune cautele nell’uso dei prodotti invitando in maniera chiara ed esplicita a leggere le avvertenze della confezione e non inducendo a un uso scorretto dei prodotti medesimi.

In particolare, la comunicazione commerciale al consumatore relativa alle specialità medicinali da banco deve comprendere la denominazione del medicinale e quella comune del principio attivo; quest’ultima non è obbligatoria se il medicinale è costituito da più princìpi attivi, o se la comunicazione ha il solo scopo di rammentare genericamente la denominazione del prodotto.

Inoltre la comunicazione commerciale relativa alle specialità medicinali da banco o ai trattamenti curativi non deve:

* indurre a ritenere che l’efficacia del medicinale sia priva di effetti secondari, o che la sua sicurezza o la sua efficacia sia dovuta al fatto che si tratta di una sostanza naturale;
* attribuire al medicinale o al trattamento una efficacia pari o superiore a quella di altri;
* far apparire superflua la consultazione del medico o l’intervento chirurgico o indurre a una errata autodiagnosi;
* rivolgersi esclusivamente o prevalentemente ai bambini o indurre i minori a utilizzare il prodotto senza adeguata sorveglianza;
* avvalersi di raccomandazioni di scienziati, di operatori sanitari o di persone largamente note al pubblico, o del fatto che è stata autorizzata l’immissione in commercio del medicinale, né far riferimento a certificati di guarigione in modo improprio o ingannevole;
* assimilare il medicinale ad un prodotto alimentare, cosmetico o ad un altro prodotto di consumo;
* indurre a ritenere che il medicinale o il trattamento curativo possano migliorare il normale stato di buona salute, così come la loro mancanza possa avere effetti pregiudizievoli; a meno che si tratti di una campagna di vaccinazione;
* avvalersi in modo improprio, ingannevole o impressionante di rappresentazioni delle alterazioni del corpo umano dovute a malattie o lesioni, o dell’azione del medicinale.

Per quanto attiene, in particolare, alla pubblicità dei medicinali veterinari valgono le norme contenute nell’apposito Regolamento, che costituisce parte integrante del presente Codice.

**Art. 26 – Corsi di istruzione e metodi di studio o insegnamento**

La comunicazione commerciale relativa a corsi di istruzione e metodi di studio o di insegnamento non deve contenere alcuna promessa di lavoro né esagerare le possibilità di impiego o di remunerazione che si offrono a coloro che seguono i corsi stessi o adottano i metodi proposti e neppure offrire titoli e qualifiche non riconosciuti o comunque non ottenibili con questi mezzi.

**Art. 27 – Operazioni finanziarie e immobiliari**

La comunicazione commerciale diretta a sollecitare o promuovere operazioni finanziarie e in particolare operazioni di risparmio e di investimento in beni mobili o immobili deve fornire chiare ed esaurienti informazioni onde non indurre in errore circa il soggetto proponente, la natura della proposta, la quantità e le caratteristiche dei beni o servizi offerti, le condizioni dell’operazione, nonché i rischi connessi, onde consentire ai destinatari del messaggio, anche se privi di specifica preparazione, di assumere consapevoli scelte di impiego delle loro risorse.

Essa in particolare:

1. deve evitare, nell’indicare i tassi annui di interesse, di utilizzare termini quali “rendita” e “resa” nel senso di sommatoria fra reddito di capitali e incremento del valore patrimoniale;
2. non deve incitare ad assumere impegni e a versare anticipi senza offrire idonee garanzie;
3. non deve proiettare nel futuro i risultati del passato né comunicare i rendimenti ottenuti calcolandoli su periodi che non siano sufficientemente rappresentativi in relazione alla particolare natura dell’investimento e alle oscillazioni dei risultati.

La comunicazione commerciale per le operazioni immobiliari deve essere espressa in forme atte a evitare l’ingannevolezza derivante dal far passare investimenti mobiliari per immobiliari o dal privilegiare l’aspetto economico immobiliare senza fornire adeguate indicazioni sulla reale natura mobiliare dell’investimento.

Le disposizioni del presente articolo si applicano anche alla comunicazione commerciale relativa all’attività bancaria e a quella assicurativa, quest’ultima quando sia necessario metterne in evidenza l’aspetto di investimento.

**Art. 28 – Viaggi organizzati**

La comunicazione commerciale relativa ai viaggi organizzati, sotto qualsiasi forma, deve fornire informazioni complete ed accurate, con particolare riguardo al trattamento ed alle prestazioni incluse nel prezzo minimo di partecipazione. Essa deve mettere in evidenza un invito a considerare con attenzione le condizioni di partecipazione, di pagamento e di recesso, contenute nella documentazione informativa o nel modulo di adesione.

**Art. 28 *bis* – Giocattoli, giochi e prodotti educativi per bambini**

La comunicazione commerciale relativa a giocattoli, giochi e prodotti educativi per bambini non deve indurre in errore:

* sulla natura e sulle prestazioni e dimensioni del prodotto oggetto della comunicazione commerciale;
* sul grado di abilità necessario per utilizzare il prodotto;
* sull’entità della spesa, specie quando il funzionamento del prodotto comporti l’acquisto di prodotti complementari.

In ogni caso, questa comunicazione non deve minimizzare il prezzo del prodotto o far credere che il suo acquisto sia normalmente compatibile con qualsiasi bilancio familiare.

[**Titolo III – Organi e loro competenza**](https://www.iap.it/codice-e-altre-fonti/il-codice/)

**Art. 29 – Composizione del Giurì**

Il Giurì è composto da membri nominati dall’Istituto dell’Autodisciplina Pubblicitaria e scelti tra esperti di diritto, di problemi dei consumatori, di comunicazione.

I membri del Giurì durano in carica due anni e sono riconfermabili.

L’Istituto nomina tra i membri del Giurì il Presidente e i Vicepresidenti che svolgono le funzioni del Presidente in assenza di questi.

I membri del Giurì non possono essere scelti fra esperti che esercitano la loro attività professionale in materia di autodisciplina della comunicazione commerciale.

**Art. 30 – Composizione del Comitato di Controllo**

Il Comitato di Controllo, organo garante degli interessi generali dei consumatori, è composto da membri nominati dall’Istituto e scelti tra esperti di problemi dei consumatori, di tecnica pubblicitaria, di mezzi di comunicazione e di materie giuridiche.

I membri del Comitato di Controllo durano in carica due anni e sono riconfermabili.

L’Istituto nomina tra i membri del Comitato il Presidente e i Vicepresidenti.

Il Comitato può operare articolato in sezioni di almeno tre membri ciascuna, presiedute dal Presidente o da un Vicepresidente. Per quanto riguarda la composizione e il funzionamento della Sezione Pareri Preventivi valgono le norme contenute nell’apposito Regolamento.

I membri del Comitato non possono essere scelti tra esperti che esercitano la loro attività professionale in materia di autodisciplina della comunicazione commerciale.

**Art. 31 – Princìpi per il giudizio**

I membri del Giurì e del Comitato di Controllo svolgono le loro funzioni secondo il proprio libero convincimento e non in rappresentanza di interessi di categoria. Nell’adempimento dei loro compiti i membri del Giurì e del Comitato di Controllo sono tenuti ad osservare il massimo riserbo.

**Art. 32 – Funzioni del Giurì e del Comitato di Controllo**

Il Giurì esamina la comunicazione commerciale che gli viene sottoposta e si pronuncia su di essa secondo il presente Codice.

Il Comitato di Controllo:

* sottopone in via autonoma al Giurì, anche in seguito a segnalazioni pervenute, la comunicazione commerciale a suo parere non conforme alle norme del Codice che tutelano l’interesse del consumatore o la comunicazione commerciale;
* esprime pareri consultivi su richiesta del Presidente del Giurì;
* può invitare in via preventiva a modificare la comunicazione commerciale che appaia non conforme alle norme del Codice;
* può emettere ingiunzione di desistenza ai sensi dell’art. 39;
* su richiesta della parte interessata e secondo le norme stabilite nell’apposito Regolamento, esprime in via preventiva il proprio parere circa la conformità della comunicazione commerciale sottopostagli in via definitiva ma non ancora diffusa alle norme del Codice che tutelano l’interesse del consumatore o la comunicazione commerciale. Il parere viene espresso sotto riserva della validità e completezza dei dati e delle informazioni fornite dalla parte richiedente. A questa condizione l’approvazione impegna il Comitato di Controllo a non agire d’ufficio contro la comunicazione commerciale approvata. Le parti nei cui confronti è stato espresso il parere preventivo devono astenersi da ogni utilizzazione del parere medesimo per fini commerciali.
* può esercitare altre funzioni assegnate dal Consiglio Direttivo e rese note nel sito internet dell’Istituto.

In qualsiasi momento il Giurì e il Comitato di Controllo possono richiedere che chi si vale della comunicazione commerciale fornisca documentazioni idonee a consentire l’accertamento della veridicità dei dati, delle descrizioni, affermazioni, illustrazioni o testimonianze usate. Per la valutazione delle documentazioni prodotte il Giurì o il Comitato di Controllo possono avvalersi dell’opera di esperti.

Salvo quanto disposto nel presente Codice, il Giurì e il Comitato di Controllo esplicano le loro funzioni senza formalità.

**Art. 32 *bis* – Consulenti**

È istituito l’albo dei consulenti tecnici del Giurì nominati dall’Istituto dell’Autodisciplina Pubblicitaria fra esperti di chiara fama delle singole materie.

**Art. 33 – Segreteria**

La Segreteria dell’Istituto svolge anche l’attività di segreteria per il Giurì e il Comitato di Controllo.

La Segreteria attesta la pendenza di procedimenti avanti il Giurì e, su richiesta degli interessati, ne rilascia certificazione scritta.

**Art. 34 – Sede e riunioni**

Il Giurì, il Comitato di Controllo e gli uffici di Segreteria hanno sede presso l’Istituto.

Il Giurì e il Comitato di Controllo e le sue sezioni si riuniscono tutte le volte che se ne presenti la necessità, su convocazione dei rispettivi Presidenti da comunicarsi almeno tre giorni prima della data da essi fissata.

Tale termine può non essere osservato in casi di particolare urgenza.

Le riunioni del Giurì e del Comitato di Controllo non sono pubbliche.

Il Giurì è validamente costituito con la presenza di almeno 3 membri; il Comitato di Controllo, in seduta plenaria, di almeno 5 membri.

In assenza del Presidente e dei Vicepresidenti assume la presidenza il membro più anziano di carica. Il Giurì e il Comitato di Controllo, quest’ultimo in sessione plenaria, deliberano con il voto della maggioranza dei membri presenti; in caso di parità, prevale il voto di chi presiede.

Nelle sezioni del Comitato le decisioni devono essere prese all’unanimità; in caso contrario la decisione viene demandata al Comitato in sessione plenaria.

Le sezioni del Comitato di Controllo sono validamente costituite con la presenza di almeno tre membri.

Nelle loro riunioni il Giurì e il Comitato di Controllo sono assistiti da un funzionario di Segreteria tenuto al segreto di ufficio e che si allontana al momento della deliberazione del Giurì.

**Art. 35 – Amministrazione**

Le modalità amministrative relative alle istanze al Giurì e ai servizi resi dall’Istituto sono decise dal Consiglio Direttivo.

[**Titolo IV – Norme procedurali e sanzioni**](https://www.iap.it/codice-e-altre-fonti/il-codice/)

**Art. 36 – Istanze al Giurì e segnalazioni al Comitato di Controllo**

Chiunque ritenga di subire pregiudizio da attività di comunicazione commerciale contrarie al Codice di Autodisciplina può richiedere l’intervento del Giurì nei confronti di chi, avendo accettato il Codice stesso in una qualsiasi delle forme indicate nelle Norme Preliminari e Generali, abbia compiuto le attività ritenute pregiudizievoli.

La parte interessata deve presentare una istanza scritta indicando la comunicazione commerciale che intende sottoporre all’esame del Giurì, esponendo le proprie ragioni, allegando la relativa documentazione e i previsti diritti d’istanza.

I singoli consumatori, come le loro associazioni, possono gratuitamente segnalare al Comitato di Controllo la comunicazione commerciale ritenuta non conforme alle norme del Codice di Autodisciplina che tutelano gli interessi generali del pubblico.

**Art. 37 – Procedimento avanti al Giurì**

Ricevuta l’istanza il presidente del Giurì nomina fra i membri del Giurì un relatore e, qualora il caso lo richieda, il consulente tecnico *ex* art. 32 *bis*, esperto nella materia del contendere. Dispone la comunicazione degli atti alle parti convenute assegnando loro un termine, non inferiore agli otto e non superiore ai dodici giorni liberi lavorativi, per il deposito delle rispettive deduzioni e di eventuali documenti, e convoca le parti entro il termine più breve possibile per la discussione orale.

Nei casi in cui la comunicazione commerciale oggetto dell’istanza consista in una comparazione diretta, oppure riguardi una offerta promozionale di durata pari o inferiore a trenta giorni, su richiesta dell’istante il termine assegnato alla parte resistente per il deposito di deduzioni e documenti è di otto giorni liberi lavorativi, e l’udienza di discussione avanti il Giurì ha luogo, salvo casi eccezionali, non oltre i dieci giorni liberi lavorativi dalla presentazione dell’istanza.

Alla discussione partecipa un rappresentante del Comitato di Controllo, esprimendo, prima della replica delle parti, la propria posizione alla luce delle norme del Codice poste a tutela del consumatore e, se designato, il consulente tecnico. Le parti possono rivolgersi al consulente per chiarire specifici aspetti scientifici della controversia o per chiedere che il consulente indichi, prima della replica delle parti, i criteri a suo parere rilevanti per l’inquadramento di tali aspetti.

La parte istante può richiedere che nel caso di nomina del consulente tecnico sia riservata all’udienza di discussione un’intera riunione del Giurì, assumendosene gli ulteriori diritti d’istanza.

La discussione non può essere rinviata se non per casi eccezionali o per accordo delle parti.

Nei procedimenti a istanza di parte il Comitato di Controllo comunica le proprie conclusioni in forma scritta prima dell’udienza di discussione. Tali conclusioni possono essere motivatamente variate all’esito della discussione.

Esaurita la discussione, il Giurì:

1. qualora ritenga la pratica sufficientemente istruita emette la propria decisione;
2. qualora ritenga necessario acquisire ulteriori elementi di prova rimette gli atti al relatore, il quale provvede al più presto e senza formalità alla assunzione degli atti istruttori ritenuti necessari, esauriti i quali egli restituisce gli atti al Giurì per l’ulteriore corso del procedimento;
3. qualora durante il procedimento siano emersi elementi tali da fare ritenere la sussistenza di violazioni non previste nell’istanza in esame, le accerta, le contesta, e dichiara d’ufficio, salva la necessità di disporre la relativa istruttoria.

In qualsiasi momento del procedimento il Giurì può chiedere, senza formalità, al Comitato di Controllo pareri su qualsiasi questione.

Avanti al Giurì le parti possono farsi assistere e rappresentare da legali e consulenti.

**Art. 38 – Decisione del Giurì**

Il Giurì, al termine della discussione, si ritira in camera di consiglio ed eccezionalmente, al fine di chiarire residuali dubbi, può invitare il consulente tecnico, se designato, a partecipare senza diritto di voto.

Qualora il Giurì ritenga di non aver acquisito elementi tecnici sufficienti per la pronuncia di merito, ammette una consulenza tecnica d’ufficio, nomina il C.T.U., formula il quesito e fissa il termine di deposito della relazione. Durante la fase di consulenza tecnica d’ufficio deve essere rispettato il principio del contraddittorio e garantito il diritto di difesa.

Il Giurì emette la sua decisione, comunicando immediatamente il dispositivo alle parti. Quando la decisione stabilisce che la comunicazione commerciale esaminata non è conforme alle norme del Codice di Autodisciplina, il Giurì dispone che le parti interessate desistano dalla stessa, nei termini indicati dall’apposito Regolamento autodisciplinare.

Il dispositivo, quando opportuno, fornisce precisazioni sugli elementi riprovati.

Nel più breve termine il Giurì deposita la pronuncia presso la Segreteria che ne trasmette copia alle parti e agli enti interessati.

Le decisioni del Giurì sono definitive.

**Art. 39 – Ingiunzione di desistenza**

Se la comunicazione commerciale presa in esame appare manifestamente contraria a una o più norme del Codice di Autodisciplina, il Presidente del Comitato di Controllo, con proprio provvedimento, può ingiungere alle parti di desistere dalla medesima.

Il provvedimento, succintamente motivato, viene trasmesso dalla Segreteria alle parti, con la segnalazione che ciascuna di esse può proporre motivata opposizione al Comitato di Controllo nel termine non prorogabile di sette giorni.

La mancata presentazione dell’opposizione, o l’inosservanza del termine prescritto, o l’assenza di motivazione, vengono constatate dal Presidente del Comitato di Controllo. In questi casi l’ingiunzione acquista efficacia di decisione e, con la relativa attestazione della Segreteria, viene nuovamente comunicata alle parti affinché vi si conformino, nei termini indicati dall’apposito Regolamento autodisciplinare.

Se l’opposizione è proposta nel termine stabilito ed è motivata, l’ingiunzione si intende sospesa. Il Presidente del Comitato di Controllo, prese in considerazione le circostanze e le ragioni opposte dalle parti, può decidere, sentito il Comitato, di revocare l’ingiunzione e di archiviare il caso, dandone atto alle parti stesse. Qualora invece il Comitato di Controllo ritenga non convincenti le ragioni dell’opposizione, gli atti vengono trasmessi al Presidente del Giurì con la relativa motivazione. Se pure questi giudica non convincenti le ragioni dell’opposizione, restituisce gli atti al Presidente del Comitato di Controllo che provvede ai sensi del precedente terzo comma. Se invece ritiene opportuna una decisione del Giurì, convoca le parti per la discussione della vertenza entro il termine più breve possibile e comunque non oltre i termini previsti per la procedura ordinaria; con ciò l’ingiunzione si considera revocata.

**Art. 40 – Pubblicazione delle decisioni**

Tutte le decisioni sono pubblicate, a cura della Segreteria, nel sito Internet e nella banca dati dell’Istituto dell’Autodisciplina Pubblicitaria con i nomi delle parti cui si riferiscono.

Il Giurì può disporre che di singole decisioni sia data notizia al pubblico, per estratto, con i nomi delle parti, nei modi e sugli organi di stampa ritenuti opportuni, a cura dell’Istituto, e a spese della parte inserzionista soccombente che dovrà assumerne immediatamente l’onere. Qualora la parte soccombente sia inadempiente la parte vittoriosa, su richiesta dello IAP, sosterrà le spese con diritto di rivalsa.

Il testo dell’estratto è predisposto dal relatore e sottoscritto dal Presidente.

Le parti nei cui confronti la decisione è stata pronunciata devono astenersi da ogni utilizzazione della decisione medesima per fini commerciali.

**Art. 41 – Effetto vincolante delle decisioni del Giurì**

I mezzi attraverso i quali viene divulgata la comunicazione commerciale che direttamente o tramite le proprie Associazioni hanno accettato il Codice di Autodisciplina, ancorché non siano stati parte nel procedimento avanti al Giurì, sono tenuti ad osservarne le decisioni.

**Art. 42 – Inosservanza delle decisioni**

Qualora chi è tenuto ad uniformarsi alle decisioni del Giurì o del Comitato di Controllo non vi si attenga nei tempi previsti dall’apposito regolamento, il Giurì o il suo Presidente reiterano l’ordine di cessazione della comunicazione commerciale interessata e dispongono che si dia notizia al pubblico dell’inottemperanza, per estratto, con i nomi delle parti, nei modi e sugli organi di stampa ritenuti opportuni, a cura dell’Istituto, e a spese della parte soccombente che dovrà assumerne immediatamente l’onere. Qualora la parte soccombente sia inadempiente la parte vittoriosa, su richiesta dello IAP, sosterrà le spese con diritto di rivalsa.

A tal fine chiunque vi abbia interesse può presentare istanza al Presidente del Giurì. Il Presidente, se l’inottemperanza non è manifesta, dispone che il procedimento segua la procedura ordinaria. Diversamente, con decisione succintamente motivata, accerta l’inottemperanza e provvede ai sensi del primo comma, segnalando alle parti la facoltà di presentare motivata opposizione nel termine perentorio di 5 giorni liberi lavorativi, in pendenza dei quali il provvedimento rimane sospeso.

In mancanza di rituale presentazione dell’opposizione, ovvero nel caso di sua manifesta infondatezza, la decisione diviene esecutiva e viene comunicata alle parti interessate.

Diversamente, il Presidente revoca la propria decisione e convoca le parti dinanzi al Giurì per la discussione della vertenza entro il termine più breve possibile e comunque non oltre i termini previsti per la procedura ordinaria. Il Giurì, qualora accerti l’inottemperanza, provvede ai sensi del primo comma.

**Titolo V – Tutela della creatività**

**Art. 43 – Progetti creativi**

Qualora, in vista dell’eventuale futuro conferimento dell’incarico, un utente richieda ad una agenzia o a un professionista, nell’ambito di una gara, di una consultazione plurima o individuale, la presentazione di uno o più progetti creativi, deve astenersi dall’utilizzare o dall’imitare gli aspetti ideativi e creativi del o dei progetti non accettati o prescelti per un periodo di tre anni dalla data del deposito del relativo materiale da parte dell’agenzia o del professionista interessati, da effettuarsi in plico sigillato presso la Segreteria dell’Istituto dell’Autodisciplina Pubblicitaria, secondo le modalità stabilite dal Regolamento.

**Art. 44 – Avvisi di protezione**

Ai fini della tutela degli elementi creativi della comunicazione commerciale, i messaggi isolati utilizzati come anticipazione e a protezione di una futura campagna di comunicazione debbono essere depositati secondo le modalità previste dal Regolamento. I depositi in vigore sono consultabili nel sito Internet IAP.   
La protezione ha efficacia per un periodo di 12 mesi a far tempo dalla data di deposito e prima della scadenza può essere reiterata per una sola volta per un analogo periodo di 12 mesi.

**Art. 45 – Comunicazione svolta all’estero**

Gli utenti che vogliono tutelare la comunicazione commerciale da loro svolta in altri Paesi contro possibili imitazioni in Italia possono depositare gli esemplari di tale comunicazione presso la Segreteria dell’Istituto dell’Autodisciplina Pubblicitaria, secondo le modalità stabilite dal Regolamento.

Il deposito conferisce un diritto di priorità valido per un periodo di cinque anni dalla data del deposito stesso.

[**Titolo VI – Comunicazione sociale**](https://www.iap.it/codice-e-altre-fonti/il-codice/)

**Art. 46 – Appelli al pubblico**

È soggetto alle norme del presente Codice qualunque messaggio volto a sensibilizzare il pubblico su temi di interesse sociale, anche specifici, o che sollecita, direttamente o indirettamente, il volontario apporto di contribuzioni di qualsiasi natura, finalizzate al raggiungimento di obiettivi di carattere sociale.

Tali messaggi devono riportare l’identità dell’autore e del beneficiario della richiesta, nonché l’obiettivo sociale che si intende raggiungere.

I promotori di detti messaggi possono esprimere liberamente le proprie opinioni sul tema trattato, ma deve risultare chiaramente che trattasi di opinioni dei medesimi promotori e non di fatti accertati.

Per contro i messaggi non devono:

1. sfruttare indebitamente la miseria umana nuocendo alla dignità della persona, né ricorrere a richiami scioccanti tali da ingenerare ingiustificatamente allarmismi, sentimenti di paura o di grave turbamento;
2. colpevolizzare o addossare responsabilità a coloro che non intendano aderire all’appello;
3. presentare in modo esagerato il grado o la natura del problema sociale per il quale l’appello viene rivolto;
4. sovrastimare lo specifico o potenziale valore del contributo all’iniziativa;
5. sollecitare i minori ad offerte di denaro.

Le presenti disposizioni si applicano anche alla comunicazione commerciale che contenga riferimenti a cause sociali.

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| **2. Regolamento Digital Chart sulla riconoscibilità della comunicazione commerciale diffusa attraverso internet** |
| 1. RICONOSCIBILITÀ   La comunicazione commerciale diffusa attraverso internet, quali che siano le modalità utilizzate, deve rendere manifesta la sua finalità promozionale attraverso idonei accorgimenti.  Nei casi previsti dagli articoli seguenti, il requisito della riconoscibilità si considera sicuramente soddisfatto a fronte dell’adozione degli accorgimenti indicati.  2) ENDORSEMENT  Nel caso in cui l’accreditamento di un prodotto o di un brand, posto in essere da celebrity, influencer, blogger, o altre figure simili di utilizzatori della rete che con il proprio intervento possano potenzialmente influenzare le scelte commerciali del pubblico, (di seguito, collettivamente, influencer), abbia natura di comunicazione commerciale, deve essere inserita in modo ben visibile nella parte iniziale del post o di altra comunicazione diffusa in rete una delle seguenti diciture:  – “Pubblicità/Advertising”, o “Promosso da ... brand/Promoted by ... brand” o “Sponsorizzato da ... brand/Sponsored by ... brand”, o “in collaborazione con ... brand/In partnership with ... brand”; e/o nel caso di un post entro i primi tre hashtag, purché di immediata percezione, una delle seguenti diciture:  – “#Pubblicità/#Advertising”, o “#Sponsorizzato da ... brand/#Sponsored by... brand”, o “#ad” unitamente a “#brand”.  Nel caso di contenuti “a scadenza”, quali ad esempio le stories, una di tali diciture deve essere sovrapposta in modo ben visibile agli elementi visivi di ogni contenuto promozionale. |
| Nel diverso caso in cui il rapporto tra influencer e inserzionista non sia di committenza ma si limiti all’invio occasionale da parte di quest’ultimo di propri prodotti gratuitamente o per un modico corrispettivo, i post o altre comunicazioni diffuse in rete dall’influencer che citino o rappresentino tali prodotti dovranno contenere – in luogo delle avvertenze di cui sopra – un disclaimer del seguente tenore: – “prodotto inviato da ... brand”, o equivalente. |
| Nel caso di cui al comma precedente, l’inserzionista deve informare l’influencer, in modo chiaro e inequivoco, al momento dell’invio del prodotto, dell’esistenza dell’obbligo di inserire tale disclaimer.  In questo caso la responsabilità dell’inserzionista è circoscritta alla segnalazione all’influencer dell’esistenza di tale obbligo.  3) VIDEO  Nel caso in cui un video prodotto e diffuso in rete abbia natura di comunicazione commerciale, devono essere inserite, con modalità di immediata percezione, nella descrizione del video e nelle scene iniziali avvertenze scritte che ne rendano evidente la finalità promozionale (a titolo esemplificativo: “brand presenta ...”, oppure “in collaborazione con ... brand”). Nei video in streaming tali avvertenze, anche verbali, devono essere ripetute nel corso della trasmissione.  In particolare, l’inserimento con finalità promozionali di prodotti/brand di un inserzionista o dello stesso autore del video deve essere portato a conoscenza del pubblico attraverso appositi disclaimer nelle inquadrature di inizio e di fine del video, o in corrispondenza delle inquadrature contenenti la riproduzione dei prodotti/brand.  Nel diverso caso in cui il rapporto tra autore del video e inserzionista non sia di committenza ma si limiti all’invio occasionale da parte di quest’ultimo di propri prodotti gratuitamente o per un modico valore, e tali prodotti vengano citati, utilizzati o inquadrati nel video, quest’ultimo dovrà contenere in apertura un disclaimer, verbale o scritto, del seguente tenore: “questo prodotto mi è stato inviato da …”, “prodotto inviato da …”. |
| Nel caso di cui al comma precedente l’inserzionista deve informare l’influencer, in modo chiaro e inequivoco, al momento dell’invio del prodotto, dell’esistenza dell’obbligo di inserire tale disclaimer.  In questo caso la responsabilità dell’inserzionista è circoscritta alla segnalazione all’influencer dell’esistenza di tale obbligo.  4) INVITI A EVENTI |
| Nel caso in cui il rapporto tra influencer e inserzionista non sia di committenza ma si limiti all’invito da parte di quest’ultimo alla partecipazione ad un evento, i post e le altre comunicazioni diffuse in rete dall’influencer che diano notizia di un prodotto o brand in relazione all’evento dovranno informare il pubblico che la partecipazione è avvenuta su invito dell’inserzionista.  L’inserzionista deve informare l’influencer, in modo chiaro e inequivoco, al momento dell’invito, dell’esistenza di tale obbligo di informazione.  In questo caso la responsabilità dell’inserzionista è circoscritta alla segnalazione all’influencer dell’esistenza di tale obbligo.  5) USER GENERATED CONTENT (CONTENUTI GENERATI DAGLI UTENTI)  Gli user generated content che abbiano natura di comunicazione commerciale devono indicare con chiarezza tale natura, con l’adozione di uno degli accorgimenti indicati negli articoli che precedono. |
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| 6) IN-FEED UNITS (CONTENUTI REDAZIONALI)  Le in-feed units che abbiano natura di comunicazione commerciale devono rendere evidente tale natura mediante l’inserimento, in posizioni e con modalità atte a garantirne chiara visibilità, di avvertenze quali:  – “Pubblicità/Advertising”, “Promosso da … brand/Promoted by … brand”, “Sponsorizzato da … brand/Sponsored by … brand”, “Contenuto Sponsorizzato/Sponsored content”, “Post Sponsorizzato/Sponsored post”, “Presentato da … brand/Presented by … brand”, anche abbinate ad accorgimenti grafici specifici, come ad esempio l’inserimento di cornici e/o l’ombreggiatura e/o l’evidenziazione del testo o shading. |
| 7) PAID SERCH UNITS (RISULTATI DI RICERCA SPONSORIZZATI) Le paid search units devono rendere evidente la loro natura commerciale con una separazione anche grafica dai contenuti di ricerca c.d. organici, unitamente a diciture che informino gli utenti esplicitamente che si tratta di contenuto di natura promozionale (quali, ad esempio, “Pubblicità/Advertising”), collocate vicino al risultato di ricerca sponsorizzato e con modalità tali da renderle visibili e evidenti.  8) RECOMMENDATION WIDGETS (CONTENUTI RACCOMANDATI) I contenuti promozionali diffusi sotto forma di recommendation widgets devono rendere evidente la loro natura di comunicazione commerciale attraverso l’adozione di uno degli accorgimenti di seguito indicati:  – l’indicazione che il box contiene contenuti sponsorizzati;  – l’indicazione accanto al singolo contenuto del nome o del logo dell’inserzionista e l’indicazione che il contenuto è sponsorizzato.  Se i contenuti sono sviluppati da un “fornitore di tecnologia” (il soggetto che ha sviluppato il widget), oltre a riportare le indicazioni sopra elencate, occorre specificare tale provenienza menzionando il nome del fornitore.  9) IN APP ADVERTISING (APP CON CONTENUTO PUBBLICITARIO)  Qualora il contenuto di una App abbia in tutto o in parte natura di comunicazione |
| commerciale, gli utilizzatori della stessa devono essere avvertiti con mezzi idonei che tale contenuto è stato sponsorizzato dall’inserzionista.  10) ADVERGAME (GIOCHI PROMOZIONALI)  La natura promozionale di un advergame deve essere resa evidente attraverso l’uso di diciture specifiche, quali:  – “Promoted by ... brand/Promosso da ... brand”, o “Sponsored by ... brand/Sponsorizzato da ... brand”.  Tali diciture devono essere collocate nelle inquadrature di inizio o di fine del gioco. |

**3. Codice Etico per i Digital Content Creator della ASSOCIAZIONE IGERSITALIA**

* L’attività del Digital Content Creator (di seguito anche DCC) assume carattere professionale nel momento in cui è regolamentata da un contratto/accordo e ha come contropartita un compenso economico.
* Il DCC opera sempre a seguito di un incarico formale secondo le forme contrattuali previste dal tavolo di concertazione con le Agenzie aderenti. Nell’espletamento dell’incarico si attiene scrupolosamente alle indicazioni concordate con il Cliente e formalizzate all’interno del contratto.
* Nell’espletamento di incarichi professionali rende esplicita e chiara la natura promozionale dei contenuti pubblicati attraverso i propri canali utilizzando tali diciture, eventualmente rielaborandole e contestualizzandole con l’iniziativa: *contenuto realizzato in collaborazione con sponsored by inserimento di hashtag quali #ad #sponsored.*
* Si impegna a tenere nei confronti del Cliente un comportamento improntato a professionalità, serietà, coerenza. Nell’espletamento dell’incarico opera sempre al meglio delle proprie capacità senza dare al cliente preventive garanzie di successo, usando sempre la massima riservatezza a tutela del know-how della Committenza e nel rispetto della privacy secondo le normative vigenti. Non lede in alcun modo l’immagine del Cliente anche successivamente all’incarico portato a termine.
* Rispetta i propri colleghi astenendosi dall’esprimere apprezzamenti sull’attività professionale altrui. Le dinamiche concorrenziali di mercato non devono in alcun modo cagionare danni ai propri colleghi.
* Si impegna a favorire lo spirito associativo e a non far mancare la propria personale disponibilità a favore dell’Associazione rispettando e richiedendo l’applicazione del Codice in ogni situazione da esso contemplata.

* Nell’esecuzione degli incarichi fa sempre riferimento alle Guidelines operative che integrano il Codice Etico.

## Guidelines

#### Generali

Si impegna a creare un proprio media kit che raccoglie il proprio portfolio e una sintesi del cv da condividere con le aziende e le agenzie interessate al suo profilo. Il Media Kit deve essere compilato seguendo le linee guida di cui al capitolo 2 del presente documento.

Rispetta i tempi concordati in sede contrattuale mettendo sempre al corrente la Committenza, con largo anticipo, di eventuali impedimenti che possano compromettere il rispetto degli accordi.

Si impegna ad adeguare i propri collaboratori alle norme del Codice etico, e pertanto è responsabile del loro operato nei confronti della Committenza.

Non rimuove mai dai propri profili social o dal proprio blog/sito web i contenuti pubblicati in adempimento agli impegni contrattuali.

È in possesso di tutte le eventuali autorizzazioni e le abilitazioni necessarie per svolgere gli incarichi conferiti dalla Committenza (es. certificazione drone, etc.).

Non ricorre a piattaforme di compravendita follower / like per far crescere i propri profili o quelli dei propri clienti.

A tutela dell’immagine della Committenza è buona norma dotarsi di idonea copertura assicurativa di responsabilità civile per i danni che dovesse causare nell’esercizio dell’attività professionale.

## Media Kit

Il media Kit professionale deve contenere:

* Presentazione del professionista con indicazione dei titoli che gli competono, senza abusi o false dichiarazioni. Nella presentazione tra i titoli va indicato anche quello di Digital Content Creator aderente al Codice Etico Igersitalia indicando il link all’elenco pubblico per facilitare la verifica in tal senso.
* Indicazioni anagrafiche
* Località in cui opera ed eventuale disponibilità a trasferte
* Contatti (indirizzo, telefono, email)
* Link ai profili Social
* Collaborazioni passate e in corso con link a esempi di contenuti prodotti (foto, video, blog post, etc.)
* Statistiche traffico generato attraverso il profilo Instagram (visualizzazioni, copertura, interazioni) e altri profili Social (numero di Like e Commenti/ numero di RT e Mi piace)
* Statistiche sito web o blog (Numero di visualizzazioni articolo, numero di visite sul sito/blog con screenshot visibili)
* Strumenti utilizzati per la produzione di contenuti (device, software di post produzione, etc.).

## Il contratto / Accordo di collaborazione

#### Elementi del contratto

* Compenso, tempi e modalità di pagamento
* Quantità di contenuti da produrre
* Termini e hashtag da utilizzare
* Canali di pubblicazione dei contenuti (blog, social, etc.)
* Definizione eventuale patto di non concorrenza nell’ambito dello stesso settore del Committente e sua durata (indicativamente da 15 gg. a 3 mesi, comunque variabile in base agli accordi tra le parti).
* Esigenze della committenza in termini di reporting finale.

## I compensi

Di seguito i principali criteri da seguire da ambo le parti ai fini della determinazione del compenso.

Tipologia e quantità di contenuti richiesti:

* Foto per archivio del Cliente (no post su canali del professionista):
* Quotazione per foto in base alla qualità del servizio offerto (strumentazione utilizzata, curriculum del fotografo, etc.)
* Foto e relativa didascalia post pubblicata sui canali del professionista: quotazione per post in base alla qualità del servizio offerto (strumentazione utilizzata, curriculum del fotografo, etc.) e alla copertura stimata attraverso i suoi canali
* Realizzazione di Illustrazioni/Infografiche per archivio del Cliente (no post su canali del professionista): quotazione per illustrazione/infografica in base alla qualità del servizio offerto (strumentazione utilizzata, curriculum, etc.)
* Video (riprese + montaggio) per archivio del Cliente (no post su canali del professionista) quotazione per video in base alla qualità del servizio offerto (strumentazione utilizzata, curriculum del videomaker, etc.)
* Video (riprese + montaggio) e relativa didascalia post pubblicata sui canali del professionista: quotazione per video in base alla qualità del servizio offerto (strumentazione utilizzata, curriculum del videomaker, ect.) e alla copertura stimata attraverso i suoi canali.
* Articoli/Blog Post: quotazione in base al numero di visite del blog e di visualizzazioni per post blog.

**Afterword**

**By Giuseppe Vaciago and Matteo G.P. Flora**

In a world where avatars “come to life”, the concept of identity and Influencers is constantly evolving, specifically in two different phases.

In the first phase, we once again see well-known faces: actors, models, sports celebrities or entertainers who become “virtual” products and use their fame to take to the “virtual stage”. An example of this is Travis Scott in Fortnite[1]: the identity of Influencers moves and expands, and as a consequence, it allows them to use their own image for an unlimited audience. Audiences are not only real and in real time anymore, because from DeepFakes to the Metaverse, the possibilities of using one’s image in order to avoid having to carry out specific actions - by creating millions of copies of the same image - are endless. The dream of any marketing operator is to have millions of poses, shots, pieces of content, and it is now a reality. All of it can be used to advertise millions of products without even having the artist move.

In the second phase – which is already a reality – the concept of Influencer becomes that of a synthetic Influencer or a virtual Influencer.

Virtual Influencers already exist and have for a while[2], but through the Metaverse they have flourished and become well known in a different environment, which allows them to be more directly in touch with an audience that might have only seen them as inanimate representations shown in photos. Interacting with a Virtual Influencer is the new “following the life of an Influencer”, a new way to represent a dream.

“I am from Thailand but my spirit is global, I was created at the beginning of the pandemic and I will be 17 forever” states Naughty Boo in a video – one of the first virtual Influencers who, through the work of a team of developers, graphics, stylists, creatives, will certainly have a long and successful career in the metaverse.

The short term future will necessarily have to deal with CGI (Computer Generated Imagery) Influencers – fairly easily, they will be able to blend in with real Influencers in a dimension that Luciano Floridi defined as “on life” in 2016.

However, while the future is fascinating and scary at the same time, we have to take stock of the present, specifically the development of a phenomenon that even just in Italy creates 450,000 jobs directly or indirectly, with a market value of 280 million in 2021, and a 15% growth compared to the previous year. Globally, the overall value is 14 billion, vs. 9.7 billion in 2020.

These are significant figures in an alienating context; so much so that John Hanke, the creator of Pokemon Go – maybe the most successful Augmented Reality operation – wonders about the future and without any sort of ethical scrutiny, foresees that the Metaverse might become a “nightmare”, because of the lack of humanity behind each experience (and “person”), as we cannot tell the real ones and the imaginary ones apart. This is certainly not a cliché, considering that Meta itself has developed an ethical observatory in order to draft AI and AI-based Avatars guidelines – the “synthetic” section of Influencer Marketing which is causing concern and should be carefully assessed[3].

An Influencer can be all or nothing: they can be unparalleled athletes, impossibly beautiful models or even a memory we can get lost in, such as the daughter we lost and can meet again in the Metaverse[4].

Which limits exist? Which regulations? Which frameworks should we build? We do not know this, but it’s certainly time to think about it.

[1] Visit https://www.theverge.com/2020/ 4/23/21233637/travis-scott-fortnite-concert-astronomical-live- report

[2] Visit <https://influencermarketinghub.com/virtual-influencers/>

[3] Visit <https://www.facebook.com/business/news/insights/synthetic-media-signals-a-new-chapter-for-influencer-marketing>

[4] Visit <https://futurism.com/watch-mother-reunion-deceased-child-vr>

1. *P. Samuelson, "Digital Media and the Law", in Communication of the ACM, October, 1991, v. 34, 10, 23.* [↑](#footnote-ref-1)
2. *Article 1322 of the Italian Civil Code: “The parties can freely determine the contents of the contract within the limits provided for by law and corporate regulations. The parties can also enter into types of contracts that are not specifically regulated, provided that they are aimed at realizing interests that are worthy of protection according to the law.”*  [↑](#footnote-ref-2)
3. *Article 1456 of the Italian Civil Code: “The contracting parties can expressly agree that the contract will be automatically terminated should there be a breach of a specified obligation and its set requirements. In this case, termination happens when the interested party states to the other party the intention to take advantage of the termination clause.”* [↑](#footnote-ref-3)
4. *Article 1175 of the Italian Civil Code: “The debtor and creditor have a duty to behave with fairness.”*

   *Article 1375 of the Italian Civil Code: “The contract must be performed in good faith.”* [↑](#footnote-ref-4)
5. *Article 21, paragraph 1, Italian Constitution: “Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.”* [↑](#footnote-ref-5)
6. *https://www.garanteprivacy.it/home/faq/registro- delle- attivita- di- trattamento#:~: text=Tutti%20i%20titolari%20e%20i%20responsabili, 1%20e%202%20del%20RGPD* [↑](#footnote-ref-6)
7. *http://www.garanteprivacy.it* [↑](#footnote-ref-7)
8. *Article 87 Law No. 633/1941: “The images of persons or of aspects, elements or events of natural or social life, obtained by photographic or analogous processes, including reproductions of works of figurative art and stills of cinematographic film, shall be considered photographs for the purposes of this Chapter. This provision shall not apply to photographs of writings, documents, business papers, material objects, technical drawings and similar products.”* [↑](#footnote-ref-8)
9. *Rome Court, Chamber specialized in business matters, judgment No. 12076/2015.*  [↑](#footnote-ref-9)
10. *Genoa Court, Order of 04.02.2020.* [↑](#footnote-ref-10)
11. *Article 5, Legislative Decree No. 145/2007, recorded as “Transparency of advertising”: “1. Advertisements must be clearly recognisable as such. Press advertisements must be distinguishable from other forms of public notices, and use graphical forms that are easily perceptible. 2. The terms "guarantee", "guaranteed" and similar expressions may only be used if they are accompanied with specific details of the substance of the guarantees and the formalities relating to the guarantee offered. When the advertisement is too short to publish these details in full, the summary reference to the substance and the procedures for claiming against the guarantee most explicitly refer to a text which the consumer can easily obtain, setting out all the details. 3.* *All forms of subliminal advertising are prohibited.”* [↑](#footnote-ref-11)
12. *AGCM, order No. 27787/2019.* [↑](#footnote-ref-12)
13. *AGCM, order No. 28167/2020.* [↑](#footnote-ref-13)
14. *Article 27 bis, paragraph 1, Consumer Code.* [↑](#footnote-ref-14)
15. *cf. Preliminary and General Rules, Code of Marketing Communication Self-Regulation.* [↑](#footnote-ref-15)
16. *Review Board (IAP), Injunction No 26/19 of 30.05.2019.* [↑](#footnote-ref-16)
17. *Review Board (IAP), Injunction No. 50/2020 of 19.10.2020.* [↑](#footnote-ref-17)
18. *Review Board (IAP), Injunction No. 55/2019 of 27.09.2019.* [↑](#footnote-ref-18)
19. *Review Board (IAP), Injunction No. 79/2018 of 24.09.2018.* [↑](#footnote-ref-19)
20. *Review Board (IAP), Injunction No. 21/2019 of 13.05.2019.* [↑](#footnote-ref-20)
21. *Review Board (IAP), Injunction No. 50/2108 of 31.05.2018.* [↑](#footnote-ref-21)
22. *Jury (IAP), Ruling No. 58/2018 of 25.07.2018.* [↑](#footnote-ref-22)
23. *Jury (IAP), Ruling No. 45/2018 of 26.06.2018.* [↑](#footnote-ref-23)
24. *AGCM, Order No. 27787 of 22.05.2019.* [↑](#footnote-ref-24)
25. *AGCM, Order No. 28167 of 16.03.2020.* [↑](#footnote-ref-25)
26. *Genoa Court, Chamber specialized in business matters, Order No. 15949 of 30.01.2020.* [↑](#footnote-ref-26)