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Influencing the influencers: CMA and CAP issue new guidance on the use of influencers

Julius Stobbs (Stobbs IP) · Wednesday, July 26th, 2023

The CMA and CAP have taken measures to address concerns with the legal framework around affiliate marketing by issuing new guidance directed at influencers. This article will briefly explain the previous regulations and then compare them to the new guidance of March 2023. This article will then attempt to determine if this new guidance has any importance in relation to regulating affiliate marketing.

An important consideration regarding the state of the law prior to this guidance is that it is derived from 15-year-old regulations (The Consumer Protection from Unfair Trading Regulations 2008). It therefore does not feature sufficiently specific vocabulary to address the type of advertising where affiliate marketing typically occurs. A brief reading of these regulations will reveal catch-all terminology such as ‘commercial practices’ and ‘materially distort’ used in relation to the prohibition of unfair commercial practices. In a modern world where methods of advertising now exist that did not 15 years ago and even the concept of influencers did not exist in the same way that it does today, it is easy to see how such regulations are not equipped to tackle the task at hand.

“You should be able to tell as soon as you look at a post if there is some form of payment or reward involved, so you can decide if something is really worth spending your hard-earned money on.” This quote is taken directly from Andrea Coscelli, Chief Executive of the CMA. This shows that the overriding principle of this guidance is transparency, particularly regarding incentives to influencers for promoting products, services, etc. offered by brands. This principle corroborated in the CAP and BCAP codes. The first general rule regarding misleading advertising in the BCAP code is that advertisements must not materially mislead or be likely to do so. The CAP code mirrors this sentiment but applies more broadly to marketing communications. This theme emerging demonstrates the importance placed on transparency.

Comparing this to the above phrase ‘commercial practices’, we can see the reinforcement that this guidance offers the previous regulations by enabling direct engagement with the problem in modern terms. While this may not appear sufficiently robust given the inadequacy of the 2008 regulations, the new guidance also states if ‘you’ve received payment or any other incentive from a brand, or you are otherwise personally or commercially connected to the brand, any related content will need to make clear that it’s advertising’. The new guidance even goes further by clarifying what constitutes ‘commercially connected to the brand’. In linking these concepts together and emphasising transparency in advertising as detailed above, brands and influencers will have little cause for confusion if in doubt about acting unlawfully.

While we have so far explored less tangible issues about the law surrounding affiliate marketing, we have not discussed enforcement. The 2008 regulations were enforced by the Trading Standards Service which has been inadequately funded to tackle an issue so prevalent. Given the fact that organisations such as the CMA and ASA are now tackling this issue head on, the practical enforcement of this new guidance should prove to be a bigger deterrent to potentially dishonest affiliate marketing. Taking this into account, the law is seemingly in a better position to A) make any offenders aware that they are acting unlawfully and B) do something about it. The significance of this is perhaps best highlighted by the fact that the CMA have more robust enforcement powers. For example, it can apply to the court for powers to compel compliance. Hence the significance of the CMA now being more actively involved in regulating affiliate marketing.

As already mentioned, given that the last major development of law in this area was in 2008, the impact of this new guidance cannot be understated. We now have a legal framework equipped to engage modern problems using the same vocabulary and therefore eliminate a lot of ambiguity in affiliate marketing. Additionally, we have better funded organisations assuming responsibility so a tangible impact should be made. However, due to the recency of this guidance, this is merely speculation and time will tell what the true impact will be.

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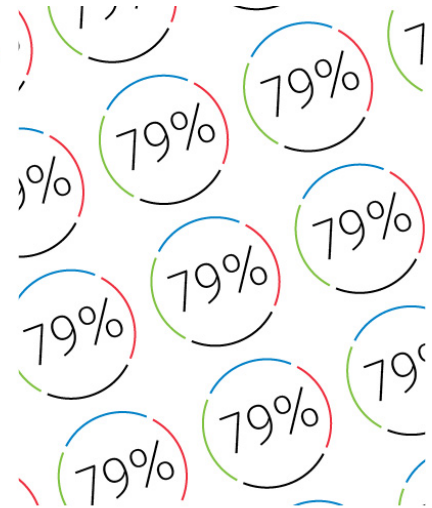
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