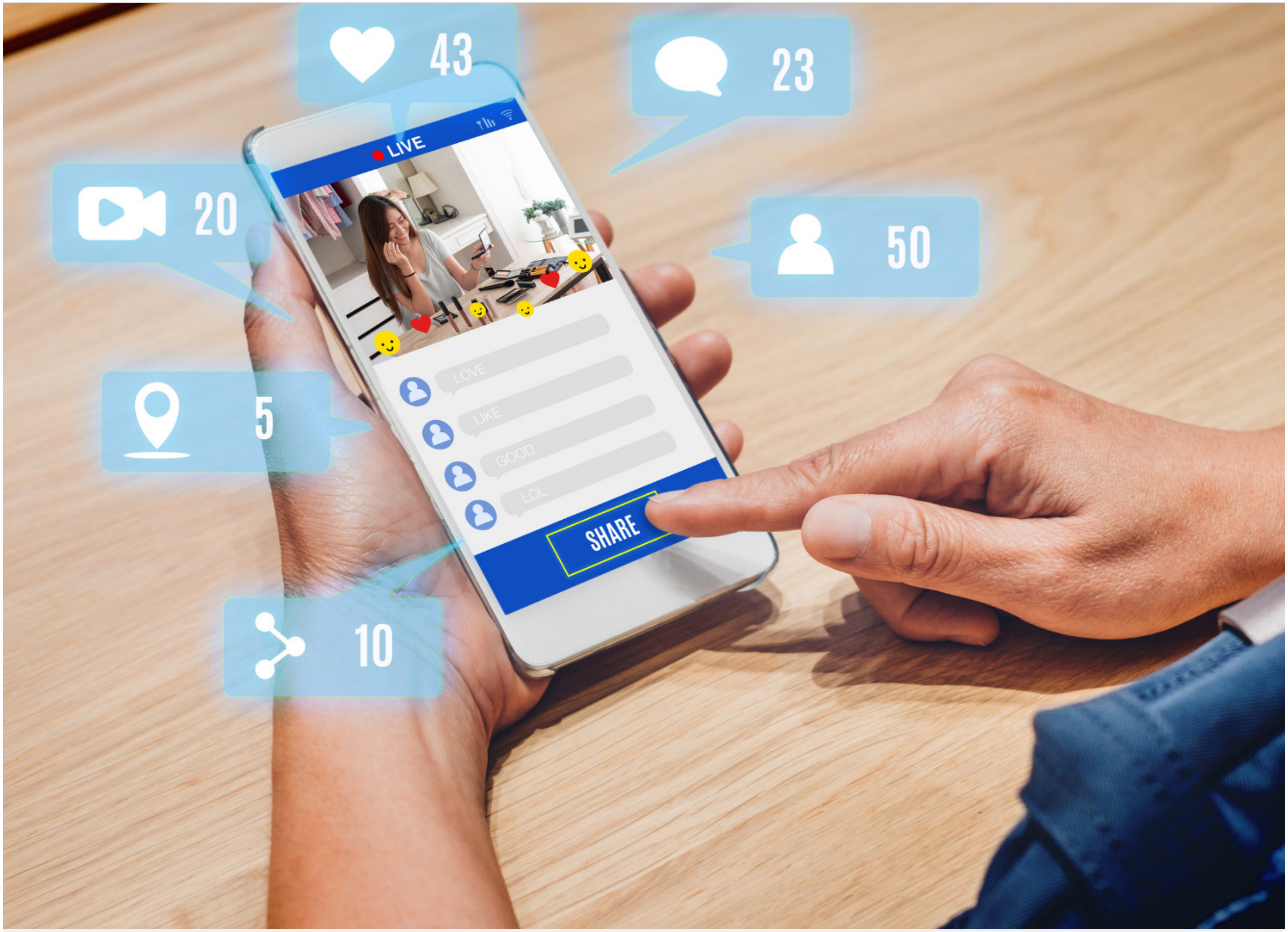

Zaštita potrošača na društvenim mrežama – influenser marketing

Consumer protection on social media – influencer marketing

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**Zaštita potrošača na društvenim mrežama – influenser marketing/
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Svjedoci smo činjenice da društvene mreže predstavljaju neizostavni dio svakodnevnog života modernog čovjeka. Pored toga što su jedan od glavnih kanala komunikacije i trgovci ih sve više koriste kako bi lakše doprli do potrošača. Pravna regulativa uveliko zaostaje za tehnologijama koje se razvijaju neslućenom brzinom. Evropska Unija („EU") poslednjih godina preduzima značajne korake u oblasti regulisanja različitih društvenih sfera „pogođenih" razvojem tehnologija (npr. GDPR, upotreba AI).

We are witnessing the fact that social media has become an inseparable part of the everyday life of modern individuals. In addition to being one of the main communication channels, businesses increasingly use them to reach consumers more easily. Legal regulation significantly lags behind technologies that are developing at an unprecedented speed. In recent years, the European Union ("EU") has taken significant steps in regulating various social spheres affected by technological development (e.g., GDPR, the use of AI).

Zaštita potrošača u digitalnom prostoru predstavlja jedan od izazova za zakonodavce kako na nivou EU, tako i na nacionalnim nivoima. Krovni dokument kojim se reguliše zaštita potrošača od nepoštenih poslovnih praksi je Direktiva o nepoštenim poslovnim praksama koja je izmijenjena 2019. godine.

Cilj izmjena je bio da se pruži veći obim zaštite potrošačima od nepoštenih poslovnih praksi u digitalnom prostoru, te se kao važna oblast izdvaja zaštita potrošača od nepoštene poslovne prakse u oglašavanju na društvenim mrežama.

Ovaj tekst ima za cilj da ukaže na to kako treba sagledati potrošača u digitalnom prostoru, te na najveće rizike po potrošače kada govorimo o influenser marketingu.

Consumer protection in the digital space is one of the major challenges for lawmakers both at the EU level and at the national level. The key document regulating the protection of consumers from unfair commercial practices is the Unfair Commercial Practices Directive, which was amended in 2019.

The aim of these amendments was to provide a broader scope of protection to consumers from unfair practices in the digital environment, with consumer protection against unfair commercial practices in social media advertising highlighted as an important area.

The purpose of this text is to point out how consumers should be viewed in the digital space and to emphasize the greatest risks they face in the context of influencer marketing

U potrošačkom pravu razlikuju se dvije kategorije potrošača – prosječni potrošači i ranjivi potrošači. Prosječni potrošač je onaj potrošač koji je u razumnoj mjeri obaviješten, pažljiv i oprezan, pri čemu se u tom smislu u obzir uzimaju socijalni, kulturološki i jezički činioci. S druge strane, ranjivi potrošači su oni koji usljed manjka duševne ili tjelesne moći, starosti ili lakovjernosti u odnosu na određenu poslovnu praksu ili proizvod imaju niži stepen sposobnosti da se sami zaštite zbog čega postoji potreba za dodatnim stepenom zaštite ove kategorije potrošača.

Princip na kome počiva pravo zaštite potrošača jeste potpuna informisanost koja podrazumijeva da potrošač mora biti informisan o bitnim okolnostima od kojih zavisi njegova odluka da kupi ili ne kupi određeni proizvod. Potrošači u digitalnom prostoru često nijesu svjesni na koji način se upotrebljavaju mehanizmi koje trgovci koriste, kao i koje infomacije o sebi dijele, kome ih dijele i na koji način se iste upotrebljavaju.

Consumer law distinguishes between two categories of consumers – average consumers and vulnerable consumers. An average consumer is reasonably well-informed, reasonably observant, and circumspect, taking into account social, cultural, and linguistic factors. On the other hand, vulnerable consumers are those who, due to mental or physical weakness, age, or gullibility, have a lower ability to protect themselves in relation to a particular commercial practice or product and therefore require an additional level of protection.

The principle underlying consumer protection law is full information, which means that the consumer must be informed about all essential circumstances that influence their decision to purchase or not to purchase a particular product. Consumers in the digital space are often unaware of the mechanisms used by traders, as well as the type of information they share about themselves, with whom they share it, and how it is used.

Sa daljim napretkom tehnologija i sve većim uplivom digitalizacije u život potrošača, linija koja odvaja prosječne potrošače od ranjivih postaje sve tanja.

Digitalna asimetrija može učiniti sve potrošače ranjivima u digitalnom okruženju i podrazumijeva ograničenu ili nepostojeću pregovaračku moć potrošača, koja je u pojedinim slučajevima dodatno pogoršana nedostatkom digitalne pismenosti, kognitivnim pristrasnostima, činjenicom da su potrošači prezasićeni i preopterećeni informacijama. Sve ovo ukazuje na potrebu za dodatnim stepenom zaštite potrošača.

Teško je zamisliti savremenog čovjeka bez pristupa društvenim mrežama makar na jedan dan. Platforme kao što su Instagram, Facebook, TikTok, YouTube i mnoge druge su zamijenile tradicionalne kanale komunikacije, što stvara povoljne uslove za trgovce i promociju njihovih proizvoda.

With the continued advancement of technology and the growing digitalization of everyday life, the line between average and vulnerable consumers is becoming increasingly blurred.

Digital asymmetry can make all consumers vulnerable in the digital environment, as it implies limited or non-existent bargaining power on the part of consumers. This is further aggravated in some cases by a lack of digital literacy, cognitive biases, and overwhelming and excessive exposure to information. All of this highlights the need for additional consumer protection.

It is difficult to imagine a modern person without access to social media, even for a single day. Platforms such as Instagram, Facebook, TikTok, and YouTube have replaced traditional communication channels, creating favourable conditions for businesses to promote their products.

Jedan od najčešćih načina na koji trgovci vrše promociju svojih proizvoda je kroz saradnju sa influenserima. Saradnja trgovaca i influensera može se manifestovati na različite načine - kroz davanje novčane naknade za usluge promocije proizvoda, ugovaranjem plaćanja određenog procenta od svake prodaje ostvarene kuponom koji se povezuje sa određenim influenserom ili davanjem besplatnih PR paketa. Najveći problem u odnosu trgovac – influenser – potrošač jeste to što influenseri često na sadržajima koje objavljuju ne naznačavaju da se radi o plaćenim promocijama proizvoda.

Trenutni zakonodavni okvir u Crnoj Gori ne predviđa izričite odredbe koje regulišu ponašanje influensera na domaćem tržištu, stoga postoji veliki prostor za njegovo unapređenje i poboljšanje kada govorimo zaštiti potrošača od nepoštenih poslovnih praksi na društvenim mrežama. Mogućnosti su različite – izmjene i dopune važećeg Zakona o zaštiti potrošača i uvođenje odredaba koje regulišu odgovornost influensera kao i donošenje posebnog zakona kojim će se regulisati influenser marketing i zaštita potrošača.

One of the most common ways companies promote products is through collaborations with influencers. Such collaborations may take various forms – payment of a fee for promotional services, agreements awarding a percentage of sales made using a coupon linked to a particular influencer, or the provision of free PR packages. The biggest issue in the trader – influencer – consumer relationship is that influencers often fail to disclose that the content they post involves paid product promotion.

The current legislative framework in Montenegro does not contain explicit provisions regulating influencer behavior in the domestic market, leaving significant room for improvement when it comes to protecting consumers from unfair commercial practices on social media. There are several possibilities – amending the existing Consumer Protection Act to introduce provisions on influencer liability or adopting a special law regulating influencer marketing and consumer protection.

Jedan od jednostavnijih načina jeste donošenje podzakonskog akta koji bi sadržao obaveze influensera koje su dužni pratiti prilikom objavljivanja sponzorisanog sadržaja u ime i za račun trgovaca. Primjera radi, jedna od obaveza influensera bila bi obaveza izričitog označavanja plaćene promocije proizvoda na način koji je svakom korisniku jasan, nedvosmislen i razumljiv.

Obaveza izričitog označavanja sadržaja mogla bi se smatrati ispunjenom kada influenser izvrši označavanje na dva nivoa (eng. two-level tagging), tako što će odabirom opcije naznačavanja sponzorisanog sadržaja u okviru same platforme označiti sadržaj kao takav, a ujedno će to navesti i u tekstu koji prati samu objavu. Činjenica koja se uzima u obzir prilikom ocjene postojanja veze između influensera i trgovca jeste stepen uticaja trgovca na sadržaj koji kreira influenser. Primjera radi, davanje instrukcija od strane trgovca influenseru na koji način objava treba da bude kreirana, i uticaj na propratni tekst uz objavu ukazuje na postojanje veze između trgovca i influensera koja može biti od značaja za utvrđivanje odgovornosti kako trgovca, tako i influensera.

A simpler approach would be the adoption of a by-law that would set out the obligations influencers must follow when posting sponsored content on behalf of traders. For example, one such obligation could be the explicit disclosure of paid product promotion in a manner that is clear, unambiguous, and understandable to every user.

This requirement could be considered fulfilled when the influencer uses two-level tagging – by selecting the sponsored content tagging option provided within the platform itself and by indicating the sponsorship in the accompanying text of the post. A relevant factor in assessing the existence of a relationship between the trader and the influencer is the level of influence the trader has on the content created by the influencer. For instance, providing instructions on how the post should be created or influencing the accompanying caption indicates the existence of a relationship that may be relevant for establishing the liability of both the trader and the influencer.

Zakonodavni koraci regulisanja zaštite potrošača od nepoštenih poslovnih praksi u oglašavanju na društvenim mrežama, i regulisanje influenser marketinga uopšte nalaze se na samom začetku. Evropski pionir u tom dijelu jeste Francuska koja je prva EU zemlja koja je donijela poseban zakon kojim reguliše pitanje influenser marketinga. Zakonom o influenser marketingu se zabranjuje posredno ili neposredno oglašavanje pojedinih proizvoda od strane influensera. Tu primjera radi spada oglašavanje tehnika i metoda estetske hirurgije, kao i nikotinskih proizvoda (promocija elektronskih cigareta, IQOS i drugih sličnih proizvoda).

Dodatno, predviđa se obaveza influensera i trgovaca da zaključe ugovor o saradnji u pisanoj formi kada dosegnu određeni prag novčane naknade ili pogodnosti u naturi. Ti ugovori moraju sadržati obavezne klauzule među koje spadaju odredbe o obimu povjerenih aktivnosti i uslovima plaćanja. Korak dalje je i propisivanje solidarne odgovornosti influensera i trgovca za štetu koja je pričinjena potrošačima.

Legislative efforts to regulate consumer protection from unfair commercial practices in social media advertising and influencer marketing are still in their early stages. A European pioneer in this field is France, the first EU country to adopt a special law regulating influencer marketing. The Influencer Marketing Act prohibits influencers from directly or indirectly advertising certain products. These include, for example, the promotion of aesthetic surgery techniques and procedures, as well as nicotine-related products (such as electronic cigarettes, IQOS, and similar products).

Additionally, the law requires influencers and traders to conclude a written cooperation agreement once they reach a certain threshold of monetary compensation or in-kind benefits. These agreements must contain mandatory clauses, including provisions on the scope of entrusted activities and payment terms. A step further is the introduction of joint liability of influencers and traders for any harm caused to consumers.

Na kraju, poruka potrošačima, a to znači svima nama, jeste da ipak izdvojimo par minuta prije nego pristupimo nekom sajtu i pročitamo šta zapravo piše iznad ponuđenog “prihvatam sva podešavanja” i da na društvenim mrežama obratimo pažnju da li je riječ o sponzorisanoj reklami ili ličnom stavu u pogledu recenzije određenog proizvoda.

Finally, the message to consumers – and that means all of us – is to take a few minutes before accessing a website to read what is written above the “accept all” button, and to pay attention on social media to whether the post is sponsored or simply reflects a personal opinion in the form of a review of a particular product.

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