

Report

The Netherlands

Social Media Advertising: How to Engage and Comply

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I. Introduction

Using influencers (bloggers, vloggers or other content creators) as part of a marketing strategy is very common these days. However, incorporating these “third parties” in the marketing plan also requires a certain amount of risk management. A fundamental requirement that follows from Dutch advertising rules, also laid down in the self-regulatory Dutch Advertising Code, is that advertisements should be recognisable as such. This is often a problem on social media, as it is difficult to distinguish (hidden) advertising from other posts. Companies offer compensation to influencers, for example by sending products for free in return for online exposure or a review. Influencers are usually free to decide on the contents of their posts. Followers of these influencers, the consumers, are not always aware of the relationship between the advertiser and the influencers. This can be risky, as the relationship may affect the content and consequently the credibility of the influencer, and the advertiser.

1. Advertising Code Social Media: Disclosure Is Key

To address this issue, the Advertising Code Social Media was introduced in 2014, which is part of the Dutch self-regulatory advertising system. Key to this Code is that it requires influencers to disclose the relationship between the advertiser and the influencer. The influencer is somewhat free to decide **how** this rela-

tionship is disclosed. The shortest way to do so is to add a hashtag to the message, such as “#ad” or “#spon”. Another option is to simply mention the received compensation: “*I received this product for free from [company name]*”.

In 2015, one year after the introduction of the Code, popular Dutch food bloggers “Oh My Foodness” and “Yellowlemontree” promoted the brand Daniel Wellington (famous for their watches) on their blog. They introduced a special discount code for their followers, for which in return they received a watch from Daniel Wellington. In one of the first cases after the introduction of the Code, the Advertising Committee decided that the relationship between Daniel Wellington and the bloggers was made sufficiently clear in the posts.¹ Although the bloggers did not use the “common” hashtag ‘spon’ or ‘ad’, they did make clear that the posts were sponsored by Daniel Wellington by giving hints such as “Santa came by early this year”, by using the hashtag Danielwellington and the fact that the discount codes were personalized (“Holidayomy” and “Holidaylemon-tree”).

2. But How to Disclose?

This freedom for the influencer shows that the assessment of the disclosure of the relationship is a difficult one. On a case-by-case basis it should be decided whether or not the relationship was made sufficiently clear. This creates some leeway for an advertiser, as it is not strictly necessary to oblige an influencer to use a specific hashtag. On the other hand, the advertiser does have a duty of care. The advertiser should inform the influencer about the contents of the Code. If the advertiser has a contract with the influencer regarding the performance of services, then the advertiser is even obliged to let the influ-

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1 ACC 17 November 2015, 2015/00917 (*Daniel Wellington*).

encers undertake to comply with the Code and the Dutch Advertising Code in general. Another challenge for advertisers involves kids. Many influential bloggers or vloggers, especially on Youtube, have a fan base that consists of young children. This becomes tricky when the advertised product is subject to specific rules, which is the case for food products. In the Netherlands food advertising targeted at children is prohibited, unless it concerns 'healthy' products. Hence, companies active in the food industry should carefully select the influencers they work with. If the followers or audience of the influencer consists of more than 25% children below 12 years old, the advertisement is in violation of the food advertising rules. There is a small exception to this rule for 'healthy' food advertisements targeted at kids between 7 and 12 years old. Influencers are often not aware of these specific rules when starting a collaboration with (food) advertisers.

II. Burden of Proof

In case of a complaint, depending on the nature of the case and the complaint, only the advertiser or both the influencer and advertiser are asked to defend themselves. An important question is always: was there a relationship between the advertiser and the influencer that should be disclosed? The burden of proof often lays with the advertiser. However, it seems to occur more often that the initiative for the relationship was started by the influencer.

In 2016, popular vlogger Mascha decided to give herself a present: a cosmetic surgery treatment by Dr. Jani. After the treatment, Dr. Jani decided to give her the treatment for free. By doing so, a relationship as defined in the Code had started from that point onwards. A complaint was filed: the vlogger failed to disclose the relationship properly. Right below the vlog on YouTube she placed a link to his website and Instagram along with the following message: "like I say in the video, I got these botox injections as a present from Dr. Jani from Docter Inc B.V., however this did not influence my opinion". In the last few minutes of the vlog she says to her viewers: I intended to give it as a present to myself but Dr. Jani gave it to me instead". The Advertising Code Committee ruled that this way of disclosing is compliant with the Code. Masha mentioned the relationship both during and as a description below the vlog.² After

this ruling, the Code was amended. The explanatory notes to the Code now also clarify that the compensation may have been received before, during, or after the creation of the content. However, in all cases the relationship needs to be disclosed. This was not the first time Mascha searched for the boundaries: previously Mascha posted two vlogs shortly after each other, both dedicated to the brand Swiss Sense. Great publicity for Swiss Sense, who also published the vlogs on her own website. It was clear that Swiss Sense offered Mascha a discount for her second vlog. A discussion emerged about when the relationship started. Neither were able to pinpoint the exact date of the start of the collaboration. The ACC holds this uncertainty against Swiss Sense. Due to the lack of evidence that the discount was given only after the first vlog, the ACC concludes that the collaboration had commenced beforehand.

III. Personal opinion or advertising?

When an influencer promotes a product on his/her *own initiative* in a vlog, this could (under circumstances) be seen as advertising. As soon as a post on social media is considered an advertisement in the sense of the Dutch Advertising Code, logically, the post will have to comply with all the rules prescribed in it.

IV. Just an Enthusiastic Vlogger and Her Favorite Product?

The vlogger in question published a video on YouTube in which she explains why she chose for infant formula rather than breastfeeding her newborn. She tells her followers that she uses "the standard Nutricia", which, according to her, is a great infant formula. While she explains her view on the product, a package of Nutrilon is clearly visible in the vlog. An observant complainant filed a complaint with the Advertising Code Committee³. According to the complainant, the provision which prohibits the advertisement for infant formula for the age 0 to 6 months

² ACC 23 December 2016, 2016/00896 (*Dr. Jani*).

³ ACC 19 June 2017, 2017/00387/1 (*Vlog Nutrilon*).

old was violated.⁴ The vlogger was surprised by the complaint, as she did not receive any remuneration and as there was no other form of sponsorship between Nutricia and her. Because of this, the vlog should merely be seen as her own story and personal experience, the vlogger argues. Nutricia confirms that there is no relationship between the two and that Nutricia did not influence the content of the vlog in any way.

The President of the Advertising Code Committee answered a question that has been on the mind of various parties involved in the Advertising industry. Is a vlog in which a product is expressly mentioned and shown on the influencer's own initiative purely his/her personal creation, or could it fall under the definition of advertising? The President is clear in his judgement: the statements and images should be considered as a promotion for Nutrilon. In this case, the circumstances are as such that the vlogger should be distinguished from just an average consumer. She has her own website which she exploits commercially and she is able to influence a considerable amount of young mothers in their choice on how to feed their babies.

Infant Formula: Advertising Prohibited, Vlogger Responsible

In this "advertisement", an infant formula for the age of 0 – 6 months is advertised, which is prohibited. Therefore, the vlog is considered in violation of Dutch law, for which the vlogger is held accountable. Since Nutricia explicitly stated that there was no involvement from her side, Nutricia was not considered responsible.

4 As laid down in article 10 Commission Delegated Regulation (EU) 2016/127 of 25 September 2015 supplementing Regulation (EU) No 609/2013 as regards the specific composition and information requirements for infant formula and follow-on formula.

5 ACC 2 October 2017/00518 (*Doutzen Kroes*).

V. A Shock for Influencers?

The practical impact of this judgement remains to be seen. The President clearly took the context of the vlog and the capacity of the vlogger into consideration in his ruling. It seems that if an influencer has many followers and a true business model, it is likely that an explicit or consistent promotion of a product can be regarded as an advertisement for that product. In that case, all the rules comprised in the Dutch Advertising Code and the applicable law apply to the post. For advertisers, the judgment seems to have a more favorable outcome. If there truly is not any sort of relationship between the company and influencer, the producer cannot (also) be held responsible for violation of the advertising rules.

VI. Advertising on Social Media: Tips

Social media advertising is more popular than ever. Influencers are making a serious living from their advertising incomes, but they are often not aware of the rules applicable to online advertising (for food products). Social media posts are quite easily seen as advertisements, for which the advertisers will most likely be held responsible. This was again confirmed in a recent judgment which considered an Instagram post of a world-famous model.⁵ Practical advice for advertisers when starting a partnership with influencers: always make sure to record when the relationship starts and ends and what the relationship consists of. This also applies when the influencers are not directly addressed, but when media companies are used. Help the influencer by addressing the most common mistakes in relation with the product concerned: forbidden claims, forbidden audience (kids) or unlawful use of pictures. Bear in mind that once a relationship is established, most of the time the advertiser is held accountable. When these basic rules are kept in mind, social media advertising can be rewarding and inspirational. Happy blogging!