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Advertising self-regulation challenges in the light of legal and ethical risks of influencer marketing

Retos de la autorregulación publicitaria ante los riesgos jurídicos y éticos del marketing de influencers

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Abstract

In the light of the growth of influencer marketing, this descriptive and analytical study pursues the following three objectives: first, to identify and describe the legal and ethical boundaries of this advertising practice; second, to assess its supervision on the basis of case law and resolutions of the Spanish advertising self-regulation system; third, to identify the role advertising self-regulation could play to guarantee consumer protection in accordance with the actions performed by two leading advertising markets, the United States and the United Kingdom. The results show: the absence of published specific regulation or codes of ethics around advertising practice in Spain; the absence of case law or self-regulation resolutions around compliance with the principle of advertising identification; finally, the crucial role self-regulation can and must play in raising awareness among advertisers, influencers and the audience regarding the necessary identification of this advertising practice, promoting the commitment and co-responsibility of the parties, and involving them in the monitoring and control process of possible infringements.

Keywords

Self-regulation; law; ethics; influencer marketing; advertising; social media

Resumen

Ante el auge del marketing de *influencers*, este estudio, descriptivo y analítico, responde a tres objetivos: identificar y describir los límites legales y éticos de esta práctica publicitaria; en segundo lugar, valorar su supervisión sobre la base de la jurisprudencia y las resoluciones del sistema de autorregulación publicitaria español y, en tercer lugar, identificar el rol que puede desempeñar la autorregulación publicitaria para garantizar la protección del consumidor a la luz de las acciones llevadas a cabo en dos mercados publicitarios de referencia, Estados Unidos y el Reino Unido. Los resultados constatan: la inexistencia de legislación o códigos éticos específicos publicados sobre esta práctica en España; la inexistencia de jurisprudencia o resoluciones de Autocontrol sobre el cumplimiento del principio de identificación publicitaria; y el papel clave que puede y debe desempeñar la autorregulación para concienciar a anunciantes, *influencers* y destinatarios de la necesaria identificación de esta práctica publicitaria, fomentar el compromiso y la corresponsabilidad de las partes, e implicarse en el seguimiento y control de posibles infracciones.

Palabras clave

Autorregulación; derecho; ética; marketing de influencers; publicidad; redes sociales

1. Introduction

The rise in digital media has directly impacted the communication strategies of businesses and institutions. Faced with the saturation of traditional media, the digital environment offers new forms of advertising; some, more interactive; others, less invasive. Brands offer users content that interests them so that they voluntarily approach the brand. In this context, so-called *influencers* emerge, also known as *social media influencers*: content creators that build up a solid base of followers with whom they share their personal life, day-to-day, experiences and opinions through social media (De Veirman, Cauberghe & Hudders, 2017).

The traditional figure of the opinion leader, hired by brands for their ability to positively influence shopping decisions, migrates to the digital environment and their power of influence is exponentially amplified. Castelló and del Pino (2015) identify five kinds of leaders/influencers in the 21st century: the celebrity—the familiar face who is well-known by the masses—; the expert—specialised in a specific topic—; the blogger—someone with knowledge of their sector and access to social media with a large number of followers—; the journalist—with a great ability to influence communication channels that reach the masses—and, lastly, the consumer—someone with a very high ability to influence their inner circles.

The growing popularity of social media calls brands to effectively integrate this channel as a means of advertising (Kumar & Gupta, 2016). For example, in the United States, 86% of marketing professionals used influence marketing in 2017; and, what is even more significant is that 92% of them considered this to be an effective option (Linquia, 2018). In Spain, according to the *Estudio Anual Redes Sociales 2018* [2018 Annual Study on Social Media] by IAB Spain, 85% of Internet users between 16 and 65 years of age use social media. Of these, more than 25 million users, 72%, declare that they follow influencers mostly through Facebook (42%), Instagram (35%), YouTube (28%) and Twitter (20%). Women and younger users are the profiles most attracted to these posts (IAB Spain & Elogia, 2018).

From an advertising point of view, the data from the *I Estudio Content & Native Advertising* confirms that, for most of the surveyed consumers, the association of products or brands with influencers: increases the level of attention given to advertising content (67%); improves the perception of a brand (67%); provides credibility (64%); encourages them to speak about the brand to other people (62%); and increases the likelihood of purchasing products from the brand (59%) and recommending it (58%) (IAB Spain, nPeople, 2017).

The interest of users in content published by influencers, the influencers' ability to have an impact on purchasing decisions and the growing use of systems that block other types of digital advertising are the main factors that explain the rise in so-called *influencer marketing* (De Veirman et al., 2017). A rise that, in Spain, has been reflected for the first time in the *Estudio Infoadex de Inversión Publicitaria* [InfoAdex Study of Advertising Investment]. In 2018, investment in advertising via influencers soared to EUR 37 million and represented 0.5% of all non-conventional advertising media (Infoadex, 2019). This data, although symbolic in terms of investment, explicitly acknowledges the consolidation of this new form of advertising.

1.1. Influencer marketing: an advertising action with multiple designations

Brands negotiate agreements with influencers so that they are incorporated into their content and their products or services are directly or indirectly recommended. The existence of this agreement explains why influencer marketing is considered an advertising activity. The presence of the brand within the content published by the influencer is not spontaneous, but responds to a prior agreement where the brand pays for this placement and can even determine, in some cases, the way in which the product appears within the published content.

Despite the consensus regarding the advertising nature of these practices, we observe that different names are used to designate this concept, although *influencer marketing* is the most widely spread. For this reason, we have decided to use this designation in this article, for general purposes.

In academic literature, we have observed a rise in the number of publications that address different aspects regarding agreements between brands and influencers. Some denominations include: *influencer marketing* (Boerman, Helberger, van Noort & Hoofnagle, 2018; Segarra-Saavedra & Hidalgo-Marí, 2018; De Veirman et al., 2017; Woods, 2016; Castelló & del Pino, 2015); *influencer advertising* (Evans, Phua, Lim & Jun H, 2017) and *sponsored content*, a name used by some leading authors in this field of study (Boerman, Willemsem & van Der Aa, 2017; Boerman & van Reijmersdal, 2016; Hwang & Jeong, 2016; Lu, Chang & Chang, 2014).

The concept of influencer marketing is clearly prevalent in studies, reports and professional guides (Comisión de Industria Publicitaria, 2019; Zine, 2019; EASA, 2018; Linquia, 2018; Augure, 2017; IAB, 2016),

although these agreements are also addressed within the context of so-called *native advertising*—which is naturally integrated into editorial content and thus less invasive—(IAB Spain & nPeople, 2017) and, also, within the field of public relations (Adecec, 2016; Zerfass, Verhoeven, Moreno, Tench, & Verčič, 2016).

Practices such as inviting potential opinion leaders to events or sending product samples without an agreement or compensation between the parties are public relations strategies. According to the Association of Communication and Public Relations Consultancy Companies (ADECEC), relationships between brands and influencers must be based on a mutual win-win situation: "The key is how to get influencers to talk about products organically on their social media profiles and how to establish a long-term strategy with them." (Adecec, 2016:3).

Nevertheless, when these practices evolve, agreements with influencers extend to marketing and advertising strategies. This is set forth in the study *The State of Influencer Marketing 2018: a look into how brands and agencies view the future of influencer marketing* that, after interviewing 181 marketing managers, found that in 2017 38% of agreements between brands and influencers were managed by advertising and media teams, while only 15% of them were managed by public relations and communication professionals (Linqia, 2018).

Brands are increasingly interested in collaborating with influencers and they, in turn, are becoming more interested in making their role professional and receiving financial compensation from these agreements. Aware of their ability to make content that affects user purchasing decisions, in 2016, payment was already influencers' main expectation when approached by a brand for any potential collaboration. Meanwhile, 82% of industry professionals admitted to having paid their influencers to collaborate with the brand (Augure, 2017). Advertising is one of the most regulated financial activities (Vilajoana-Alejandre, 2011), which is why, given the acknowledged advertising nature of these practices, the following research question arises: What legal limitations can be applied to advertising through influencers to guarantee that the rights of consumers and users are protected?

1.2. Advertising self-regulation and consumer protection from the legal and ethical risks of influencer marketing

Credibility and popularity are the two main attributes that make an influencer a good brand ambassador (IAB Spain & nPeople, 2017). Brands and influencers seek to generate empathy, credibility, authenticity and trust (IAB Spain, Epsilon & Gestazon, 2018). Therefore, credibility is a fundamental value for the consumer, brands and, also, for influencers, who risk losing followers if they feel deceived by their posts (Caro Castaño, 2015): portraying that the influencer is a real consumer or user of a brand or service; that their comments reflect their honest, objective and spontaneous opinions and are not a direct result of compensation from a brand.

Advertising's economic and social impact requires public authorities to guarantee the rights of consumers and users through legislation. Nevertheless, as suggested by Boddewyn (1989), besides regulations, there are other complementary means of socially controlling marketing activities, among which self-regulation is noteworthy. EU and Spanish legislators recognise and promote systems of advertising self-regulation, and recognise the legitimacy of their dispute resolution out-of-court bodies (Vilajoana-Alejandre & Rom-Rodríguez, 2017) for their greater speed, specialisation, transparency, low cost and easy access (Patiño-Alves, 2007).

In Spain—as in most of its neighbouring countries—the advertising industry has an advertising self-regulation system at its disposal: Autocontrol, the Association for Self-regulation of Commercial Communication. Autocontrol is a non-profit association made up of advertisers, agencies, media and professional associations who have written a code of ethics which they are voluntarily obliged to comply with. The aim of Autocontrol is to work towards verified, legal, honest and loyal advertising for the benefit of consumers, competitors and the market (Autocontrol, 2019b) through three instruments: their codes of conduct, the Complaints Committee—the dispute resolution out-of-court body—and Copy Advice®, the legal advice in charge of prior consultation service.

Resolutions of the Autocontrol Committee are legally binding for all members, who currently represent 70% of advertising investment in Spain. Additionally, Autocontrol collaborates with many national and regional administrations responsible for controlling advertising activities, with whom they have signed more than 30 agreements. In some cases, this collaboration means creating co-regulation systems, a hybrid control mechanism between the industry's own self-regulation and the legal regulation that provides the system with greater objectivity, transparency and sanctioning capacity (Vilajoana-Alejandre & Rom-Rodríguez, 2017).

From a consumer point of view, Autocontrol "contributes to responsible advertising, seeking to avoid or correct non-compliance with legal or ethical regulations. In addition, it offers a free, flexible and efficient system to process complaints, through a Committee made up of independent experts" (Autocontrol, 2019b:6). This Committee settles complaints in an average period of 14 days in the first instance. Since November 2018, the Committee has been certified as an alternative dispute resolution entity by the Directorate-General for Consumer Affairs of the Ministry of Health, Consumer Affairs and Social Welfare.

In order to guarantee its impartiality, 25% of Committee members are appointed at the proposal of the Directorate-General for Consumer Affairs, a percentage that is considered inadequate (Muela-Molina & Perelló-Oliver, 2014), especially taking into account that, traditionally, no independent consumer association representatives were members (Feenstra & González, 2019). This situation has been reverted and, since January 2019, complaints presented by individual consumers are processed by a section of the Committee composed of a legal representative, a representative of the consumer associations with whom Autocontrol has signed an agreement, and an advertising industry representative (Autocontrol, 2019b).

After analysing the content of the 718 complaints presented before the Autocontrol Committee between 2010 and 2015, Perelló-Oliver and Muela-Molina (2016) confirm the increasing role of consumer associations, public bodies and, particularly, individuals who file complaints. According to the latest data published, in 2017, 68% of the total number of cases solved by the Committee originated in consumer and user complaints (Autocontrol, 2018).

González-Esteban and Feenstra confirm that consumer associations value and recognise the advances in preciseness, seriousness and speed of advertising self-regulation, but request that it "go beyond regulating the relationships between advertisers, in favour of a model that regulates relationships between advertisers and society" (2018:112). After analysing the Committee's resolutions, Perelló-Oliver and Muela-Molina (2017) conclude that Autocontrol tends to protect the interests of advertisers more than the rights of consumers.

From the point of view of the media, Autocontrol carries out an intense activity regarding advertising in digital media. Of 36,395 Copy Advice® applications issued in 2018, four out of ten were regarding electronic commercial communications—referring to advertising on social media, among other aspects—, which translates into a 25% increase regarding 2017. Meanwhile, of the 185 cases resolved in 2018 by the Complaints Committee, one out of three (43%) referred to advertising disseminated through the internet (Autocontrol, 2019a).

Given the significant role of advertising self-regulation to guarantee the ethical commitment of advertising, the following research questions arise: What ethical limitations can currently be applied to influencer marketing? Are there other professional associations who have addressed the ethical limitations of these practices? Have consumer rights been protected by court rulings or resolutions of the Autocontrol Committee which have analysed the legality and ethics of these campaigns? What role can advertising self-regulation play to defend consumer protection from the legal and ethical risks of influencer marketing?

This research pursues the following three objectives: to identify and describe the legal and ethical limitations of the actions of influencer marketing; to assess its practical incidence on the basis of the number of resolutions made through judicial proceedings and advertising self-regulation in Spain, and, finally, to identify the role that the advertising self-regulation system could play to guarantee consumer protection from the legal and ethical risks of influencer marketing, on the basis of the regulation and self-regulation of two leading advertising markets: the United States and the United Kingdom.

2. Methodology

Through a model combining descriptive and analytic methodology, this exploratory work first presents an analysis of the content of the legislation, codes of ethics and legal and professional guidelines applicable to the agreements between brands and influencers in Spain. To respond to the first research objective, consolidated versions of the legal regulations that regulate advertising, monographs and leading journal articles on influencer marketing and advertising law, Autocontrol codes of ethics and other professional guidelines from institutions directly related to advertising in digital media were consulted.

To respond to the second research objective, a systematic search of court rulings, administrative sanctions and Autocontrol Committee resolutions on surreptitious advertising was performed. The search strategy includes, first, consulting, via thesaurus by the key word "surreptitious advertising", the court rulings included in the two main legal databases, Thomson Reuters Aranzadi and Laleydigital, between 1988 and 2019; second, consulting administrative sanctions imposed by the currently so-called Secretary of State for Digital

Advancement through its electronic office; and, third, consulting, through the "surreptitious" advertising type, the Autocontrol Complaints Committee resolutions database since its creation in 1995 to today.

Finally, the research is completed with a brief summary of the guidelines provided by the legislation and codes of conduct of the two leading traditional international markets with regard to volume of investment, the United States and the United Kingdom, as well as the recommendations recently published by the European self-regulation body related to the limitations of influencer marketing. The search strategy was carried out by consulting academic journals on the subject and the regulations, documents and actions available on the Federal Trade Commission's electronic office, the federal agency of the United States whose double mission is to protect consumers and promote competition; the Advertising Standards Authority, the independent advertising regulation body of the United Kingdom; and the European Advertising Standards Alliance, the body coordinating European advertising self-regulation systems.

3. Results

3.1. Legal limitations of influencer marketing in Spain

Currently, neither the European Union legislation nor the Spanish legislation directly or specifically regulate influencer marketing. Nevertheless, the analysis of the current advertising legislation in Spain—which incorporates content from European regulations—allow us to identify the general legal limitations that are applicable to this new form of advertising.

Digital advertising does not currently have its own legislation. Instead, three regulations define the main legal limitations of advertising disseminated through this medium. On the one hand, two laws that regulate advertising activity in general: Law 34/1988 on General Advertising (LGP) and Law 3/1991, on Unfair Competition (LCD). Therefore, the content of these laws is applicable to any commercial advertising action, by any activity sector and disseminated through any medium. On the other hand, Law 34/2002 on Information Society Services and Electronic Commerce (LSSI) regulates the services provided through digital media and, among these, the so-called electronic commercial communications.

The LGP contemplates a broad concept of advertising, including:

Any communication performed by a physical or legal person, public or private, within the execution of a commercial, industrial, craft or professional activity in order to directly or indirectly promote the procurement of movable or immovable goods, services, rights and obligations (article 2).

Accordingly, any action derived from an agreement between a brand and an influencer in order to directly or indirectly promote the sale of a product or the procurement of a service will be subject to advertising legislation.

From the point of view of advertising legislation, the term *consumer* must be understood in a broad sense. Given that in most advertising actions the message audience has not established a contractual tie with the advertiser yet, in advertising it is more appropriate to use the concept of *advertising audience* in line with Spanish legislation (Capodifero Cubero, 2017). Therefore, consumer protection is extended to the message audience and future potential goods or service purchasers.

The LGP contemplates misleading advertising as a form of illicit advertising and refers to the LCD for the development of this ban. The LCD defines misleading advertising as: "any behaviour that contains false information or information that, although true, because of its content or presentation, leads or may lead to misunderstanding by its audience, and is susceptible to altering their economic behaviour" (article 5). This general definition indirectly includes the specific case of misleading advertising by omission (article 7, LCD), a form of advertising also contemplated in the Royal Legislative Decree 1/2007, of November 16, approving the Consolidated Text of the General Law for the Protection of Consumers and Users and other complementary laws (TRLGDCU) (article 20).

The LCD considers advertising to be misleading by omission, on the one hand, when it omits or conceals information that the audience needs to make an informed decision regarding its economic behaviour and, on the other hand, when the advert is unclear, unintelligible or ambiguous for the average consumer, despite including discernible essential information. To determine the ruse, the advertising's factual circumstances must be addressed, taking into account the limitations of the media used and the measures adopted by the business owner or professional to communicate the necessary information through other means, on the basis of what scholars call the *principle of integrity of the campaign* (Vilajoana-Alejandre, 2011).

The legislator mentions surreptitious advertising indirectly as one of the forms of misleading advertising by omission: *surreptitious advertising* is advertising which, because of its presentation, misleads or may mislead

its audience since it conceals the advertising nature of the message. In this case, the element that constitutes the ruse is not within the content of the message—which may be true—, but in the way it is communicated. Advertising therefore breaks the *principle of advertising identification* which compels advertisers to disclose the advertising nature of their actions and, also, the media to distinguish informative content from advertising (article 9, LGP).

In addition, the LCD covers the specific case of surreptitious advertising in the media within the framework of the specific regulation of commercial practices with consumers and users (article 26). The legislator considers payment or compensation a key element to prove the existence of this specific case of surreptitious advertising. Nevertheless, due to the complexity of proving the existence of remuneration, in the case of surreptitious advertising, the courts "have unanimously ruled that it is not necessary to prove this requirement, but—only—the advertising intention of the advertiser" (Lema Devesa, 2012: 383). Compensation is therefore enough evidence, but not always necessary if a message's advertising intention can be proven through other contextual elements.

Regarding the form of payment in kind, the advertising nature of the action is considered clear when the influencer receives the product or service free of charge in exchange for communicating a certain message (Tato Plaza, 2019). The existence of an advertising relationship could only be excluded if it can be proven that when the gift was delivered the influencer was under no obligation (Monteagudo & Garcia, 2017).

Surreptitious advertising aims to give the false impression of being a declaration of an impartial third party or an event unconnected to the advertiser, so that the audience gives these practices a greater degree of credibility (Lema Devesa, 2007). Thus, actions derived from advertising agreements with influencers that do not clearly and unambiguously reveal their advertising nature from the point of view of an average consumer would incur a case of surreptitious advertising (Tato Plaza, 2019). According to the Court of Justice of the European Union, an average consumer is a consumer who is normally well-informed and reasonably attentive and insightful, taking into account social, cultural and linguistic factors (Vilajoana-Alejandro, 2011).

Regarding the way to notify the advertising nature of these messages, Tato Plaza (2019) considers the indications "advertising", "ad", "sponsored by", "in cooperation with" or "thanks to" to be adequate, and other expressions or abbreviations whose meaning is unknown to the average consumer to be inadequate. In addition, the warning must be included in the message itself and inform the audience immediately of its advertising nature at the beginning of the post.

On the basis of the legal definition of the means of advertising (article 8, LGP), as suggested by Agustinoy and Monclús, "it is clear that a profile on social media can, therefore, constitute an advertising platform in the legal sense of the term. Similarly, the operator of the corresponding social media may be considered a means of advertising" (2016:101). Therefore, in addition to the general advertising legislation, when using digital media to disseminate messages, influencer marketing will also be submitted to the content of the LSSI, which regulates commercial communications disseminated through digital media.

The LSSI requires electronic commercial communications to comply with two conditions: that they be clearly identified as such and that they also clearly identify the physical or legal person on whose behalf they are advertising (article 20.1). Therefore, the LSSI recalls the need for respecting the principle of advertising identification, also in digital media, and incorporates the need for identifying the advertiser clearly in these commercial communications which, it is understood, would include posts by influencers derived from an advertising agreement.

Lastly, it is important to bear in mind that, additionally, advertising through influencers must respect specific legislation with regard to certain practices, such as promotions—in the case of being communicated through influencers—, the use of minors in advertising or the specific additional legislation that certain activity sectors are subject to, for example.

3.2. Ethical limitations of influencer marketing in Spain

Ethics—which is more individual—and deontology—which is more related to a specific group—require a good professional to not only search for technical prowess, limiting themselves to strictly complying with the law, but to go beyond that and try to contribute to society through their professional work (Megías & Cabrera, 2013). Going beyond legislation should therefore be the purpose of any ethical commitment. Within the field of advertising, this commitment has mainly meant the creation of Autocontrol, the Spanish advertising self-regulation system.

Since its inception, Autocontrol has written different codes of ethics, the main ones being: the *Código de conducta publicitaria* (CCP) [Code of advertising conduct] (2011), which is general; the *Código Ético de Confianza Online* [Code of Ethics of Online Trust] (Adigital & Autocontrol, 2018), applicable to advertising disseminated through digital media; and twenty more specific codes of conduct that strengthen the ethical commitment of advertising in different business sectors. Recently, certain professional media has published that the Spanish Association of Advertisers (AEA) and Autocontrol are writing a *Código de conducta sobre el uso de influencers en la publicidad* [Code of conduct on the use of influencers in advertising] (IPMARK, 2019). AEA has confirmed that the proposal has been presented to the Secretary of State for Digital Advancement, the public body responsible for the compliance of legislation in digital media. For this reason, its entire contents, at the time of writing this article, is confidential and no reference to it is found on the Autocontrol website.

Generally, the CCP only collects and develops advertising legislation content. Therefore, the principle of authenticity (regulation 13), by which advertising must be identified as such whatever its form or the medium used, is directly applicable to influencer marketing. This is a broad interpretation of the principle of advertising identification included in the legislation.

Additionally, the CCP includes regulations on certain advertising forms and techniques, including the use of testimonials in advertising (regulation 19). Although the ethical regulation refers to adverts that include a recommendation—the testimonial expressing a favourable opinion—, whether paid for or not, most scholars consider that showing preference for a product or service presenting yourself publicly as a consumer or user on social media must be considered a case of testimonial advertising. Accordingly, influencer marketing actions will require, on the one hand, complying with the principle of truthfulness, both with regard to the influencer's qualities—if they are an expert—, and to the content of the recommendation; and, on the other hand, they will be banned when a specific—legal or ethical—regulation forbids the use of testimonials in the advertising of certain products or services (Tato Plaza, 2019).

The *Código Ético de Confianza Online* [Code of Ethics of Online Trust]—originally called the *Código Ético de Comercio Electrónico y Publicidad interactiva* [Code of Ethics of Electronic Commerce and Interactive Advertising]—has reduced its advertising content in its current version, from May 2018. Without any justification in its new foreword, despite keeping the issues that affect advertising in the first instance within its scope of application, the new version of this code has revoked ten of the eleven articles that comprised Title II, dedicated to advertising. Therefore, the *Código Ético de Confianza Online* [Code of Ethics of Online Trust] only maintains the so-called *principle of legality in advertising*, which simply recalls that advertising disseminated through electronic means by companies adhered to the code must conform to applicable law and the CCP, as well as complying with the traditional principles of loyalty, honesty and truthfulness (article 3).

Regarding the new *Código de conducta sobre el uso de influencers en la publicidad* [Code of conduct on the use of influencers in advertising] by AEA and Autocontrol which is officially awaiting approval, some media declare that its content recognises the fair nature of this communication strategy, as long as current legislation and the principle of authenticity or advertising identification are respected. Despite the fact that neither AEA or Autocontrol have published any reference to this code, professor Tato Plaza advances part of its content in the footnotes of a recent article.

Therefore, according to Tato Plaza (2019), the new code restricts its scope of application to those messages issued by the influencer in exchange for economic compensation—payment, a free product, free access to a service, invitations to events, trips, etc.—as long as the advertiser exercises editorial control over the published content—which can be identified by analysing the circumstances of the message. When the advertising nature of the message is not clear and evident, the code obliges the advertiser to include an explicit and immediate indication suitable for the medium and the message—among which it advises against expressions such as “legal”, “information”, “collab” (collaboration), or “sp” (sponsored). The code will not impose a location for the identification, but it will make specific recommendations which vary according to the social media used: blogs, Facebook, Instagram, Pinterest, Twitter, Videoblogs and Youtube.

In order to improve the credibility, safety, effectiveness and transparency of the advertising industry, in general, and online advertising practices, in particular, AEA created the so-called Advertising Industry Commission (CIP) in 2017. To comply with its goal, the CIP has published the new *Good Practices Guide: Transparency, Ad Fraud & Brand Safety* (2019). The new guide includes influencers among the risk environments where a brand can lose value or even fail on the market. Although this guide focuses on protecting the brands more than the consumer, truthfulness, credibility and real influence are values and good practices to be preserved in an influencer marketing strategy.

Given the general nature of the legal and ethical limitations set forth, while awaiting the approval of the new specific code, we think it is important to mention the existence of a series of legal guides written by IAB Spain, the advertising, marketing and digital communication association in Spain. Since they are written by a professional association and their compliance is not mandatory, these guides cannot be considered legal texts or self-regulation codes, but documents of professional good practices. For this reason, we briefly touch on their content in this section.

IAB Spain's *Guía Legal: Marketing de Influencers* [Legal Guide: Influencer Marketing] is particularly noteworthy. This guide broadly summarises the legislation and includes good practices when hiring the services of an influencer. Firstly, it recommends drawing up a written agreement between both parties; a contract that must clearly define the services that the brand requests from the influencer, the form and background of the content to be published and the subsequent responsibilities for each of the parties in the case of non-compliance. The guide recalls the consumer's right to know when they are receiving advertising content online with current legislation criteria. Additionally, the content of the posts must respect the industrial and intellectual property right of third parties and the regulations of the media or social media through which they are disseminated. Lastly, regarding compensation, it sets that gifts, as payment in kind, have economic value and will be considered advertising as long as they imply any kind of agreement or commitment (IAB Spain, 2016).

Most recently, IAB Spain and the Rey Juan Carlos University (URJC) have published the *Guía legal sobre niños influencers* [Legal guide regarding child influencers] related to influencer marketing, although it is more specific. Its goal is to "know the detailed rights and duties of minors as content generators, and the main legal aspects that must be taken into account by brands, as well as parents and guardians" (IAB Spain & URJC, 2018:4). Given its specificity, the content of this guide, which concludes with fourteen practical recommendations, goes beyond the research objectives of this paper.

3.3. Supervision and control in the case of offence: case law analysis

Up to this point, we have presented the legal and ethical limitations of influencer marketing. That said, in order for consumer protection from these practices to be real and effective, it is necessary to establish means to ensure its compliance. These means are: in the case of non-compliance of advertising legislation, the courts of justice and administrative bodies with enforcement power and, in the case of non-compliance of the Autocontrol codes, its own Committee as the body in charge of resolving disputes.

In general, the non-compliance of advertising legislation will trigger civil liability and the mercantile courts will be responsible for resolving the complaints presented in the first instance. The results of the search for civil court rulings on surreptitious advertising confirm the absence of court cases, accessible through both reference legal databases, with regard to influencer marketing practices.

Regarding advertising, in certain cases, both the courts and the administrative bodies are able to impose sanctions. This happens more often with special legislation, such as the case of the LSSI which can fine information society service providers who do not comply with regulations, as well as taking them to court. Sanctions imposed by administration bodies can be subject to judicial appeal through contentious-administrative proceedings. Additionally, the TRLGDCU considers non-compliance of regulations related to advertising goods and services a consumer and user offence (article 49.1 f); its sanction, according to the gravity of the offence, will also be a fine.

Despite the lack of accessibility and transparency of its sanctioning procedures, the electronic office of the Secretary of State for Digital Advancement does not list any sanction due to infraction of the LSSI through influencer marketing. The absence of administrative sanctions is also confirmed by the search results for court rulings through contentious-administrative proceedings, which also verify the absence of court cases, accessible through the reference legal databases, with regard to influencer marketing practices.

Lastly, the systematic resolution search of the Autocontrol Committee regarding surreptitious advertising confirms that, to date, the Committee has not processed a single case directly related to the ethical limitations of influencer marketing previously described.

Nevertheless, on January 24 2019, the Autocontrol Committee issued a non-binding decision against an advert by a Spanish fashion brand who was not a member of Autocontrol. At the request of a consumer from the United Kingdom, the Committee analysed two posts published on Instagram by a blogger (an influencer) including the text "ad" with a link that redirected to the respondent. The consumer considered that the advertising was surreptitious since the dress she bought through the link was different to the one shown by the influencer in the posts. The Committee concluded that only if under the terms of an opposition procedure—which did not occur—the advertiser proved that the dress worn by the blogger was the same

as the one sold through the link, the advertising would not be considered surreptitious (Autocontrol, 2019c). Otherwise, the advert would infringe the principle of truthfulness required of any advertising action and, subsequently, also of influencer marketing.

This decision can therefore be considered Autocontrol's first declaration with regard to an influencer marketing action. Nevertheless, since it was not a legal ruling and it referred to a general legal and ethical limitation, not specific to influencer marketing, its relevance is limited.

3.4. International perspective: United States, United Kingdom and European self-regulation

In order to offer a full overview of consumer protection from the legal and ethical challenges that influencer marketing poses, next, we describe the main initiatives carried out from an international point of view in two leading advertising markets, the United States and the United Kingdom, and also, by the European Advertising Standards Alliance (EASA), the body coordinating the European advertising self-regulation systems.

In chronological order, the first country that incorporated influencer marketing into its advertising and product promotion guides was the United States (ICAS, 2019). Given the success of social media, the Federal Trade Commission (FTC) started to warn brands and sponsors of the need to identify influencer marketing actions and added this practice to its traditional *Endorsement Guides*.

Already in 2015, the FTC investigated an advertising campaign by Lord & Taylor, the oldest luxury chain in the US, where they paid 50 fashion influencers to publish photos wearing their dresses without informing the audience of the advertising nature of this content. Lord & Taylor legally required the influencers to include the Instagram user (@lordandtaylor), the hashtag #DesignLab (related to the name of the dress) and approved the content of the posts prior to their publication. Nevertheless, Lord & Taylor did not require the influencers to disclose that they had received compensation—the dress as a gift and economic remuneration—for publishing the photo; for this reason, the company admitted that the action could have been surreptitious for consumers (Federal Trade Commission, 2016).

In addition to these actions, the FTC has several guides; the main ones are related to the use of recommendations and testimonials in advertising and, since 2012, they have been updated on several occasions to include new actions related to digital media. These guides do not belong to a self-regulation system, but do serve to inform companies of the FTC interpretation criteria, to enable and promote compliance (Boerman et al., 2018).

After settling the first case against influencers for recommending a gambling service and not disclosing that they were the owners of the recommended company (Federal Trade Commission, 2017b), the FTC intensified its involvement to prevent new offences. On the one hand, the FTC sent educational letters to influencers and brands reminding them of the need to disclose any agreement or material "connection" in their posts and how to do it (Federal Trade Commission, 2017b). On the other hand, the FTC published a new update—which is still current—under the title *The FTC's Endorsement Guides: What People Are Asking* (Federal Trade Commission, 2017a) including more than twenty new questions and answers on how to disclose advertising agreements between brands and influencers.

These new guidelines include the following recommendations: to clearly indicate whether a financial or family relationship exists between the brand and the influencer; to ensure that the identification of the sponsorship is clear enough and hard to be missed by the consumer; to use hashtags to indicate sponsorship, both in images and any other recommendation; and on imaging platforms such as Snapchat, to superimpose the advertising identification. Among the practices to be avoided, the FTC advises influencers to not: take for granted that followers will know about all their relationships with brands; trust that advertising identifications on social media will be enough; use ambiguous hashtags such as #thanks, #spon or #ambassador; or trust identifiers that followers cannot see in the first instance and must access for more information.

Data from the study *The State of Influencer Marketing 2017: a look into how brands and agencies view the future of influencer marketing* recognises the work carried out by the FTC: 87% of marketing professionals declared requiring influencers to comply with FTC guidelines in their posts and 71% of professionals admitted to updating their knowledge through FTC guides (Linqia, 2018: 13).

In Europe, the United Kingdom, as well as being a leading market from an advertising point of view, has one of the most established and efficient advertising self-regulation systems in the world (Muela-Molina & Perelló-Oliver, 2014). The Advertising Standards Authority (ASA) ensures that the adverts issued in the UK

comply with advertising regulations and writes its own advertising codes through the Committee of Advertising Practice (CAP).

After settling different cases of surreptitious advertising through influencer marketing and warning more than 200 influencers of the risk of breaking the rules, in September 2018, ASA published *An Influencer's Guide to making clear that ads are ads*, a guide written jointly by the CAP and the Competition and Markets Authority (CMA). This new guide aims to help all the parties involved in this advertising activity to comply with the regulations.

Regarding influencer marketing practices, the code recalls that, to comply with consumer protection legislation, it is necessary to identify advertising in the following cases: when the influencer receives economic compensation from a brand, a product or service provided, any incentive or commission, or the promoted product for free. Ensuring that the advert is clearly identified is another of the code's contributions: identification must be obvious—through hashtags such as #ad, #advert, #advertising—; any other hashtag or means of identification must be visible, without the need for the user to perform any additional action; it must be prominent enough to be perceived; suitable for the channel and adaptable to viewing on different devices, including mobile phones (CAP & CMA, 2018).

In addition, the guide includes a flow chart to enable the parties involved to quickly detect if a post needs to state that it is an ad more clearly. Parallel to the publication of this guide, CMA, the competition and markets authority in the United Kingdom, started an investigation on the identification of these advertising practices, also in order to protect consumer rights.

With a more global view, the European Advertising Standards Alliance (EASA), the body coordinating the European advertising self-regulation systems published a new guide of good practices specialised in influencer marketing in December 2018: the *EASA Best Practice Recommendation on Influencer Marketing*. After addressing the concept and relevance of this advertising practice, the guide identifies two criteria to distinguish editorial content from advertising content: editorial control of content, understood broadly, including any suggestion by a brand; and compensation, also understood broadly, in line with the ASA code.

Additionally, the new EASA guide sets that influencer marketing communications must be designed and presented in a way that the audience can recognise and identify immediately. The guide does not provide specific identification guidelines and summons national self-regulation systems to specify aspects such as suitable placement, timing, which hashtags are clear enough and which are not, and which texts correctly identify these advertising practices. Nevertheless, EASA recognises that these specific criteria must be flexible to adapt to the constant evolution of advertising in digital media.

4. Discussion and conclusions

The results of this research confirm, first, the absence of specific published legal or ethical limitations with regard to influencer marketing in the legislation and codes of ethics of the advertising self-regulation system in Spain. Nevertheless, influencer marketing must comply with the general principle of advertising identification to not commit surreptitious advertising practices, a form that is banned by legislation and the Autocontrol CCP. This lack of regulation and specific self-regulation is currently made up for, in terms of awareness, by the work developed by the association IAB Spain through the publication of its legal guides and, more specifically, the *Guía legal: Marketing de Influencers* [Legal guide: Influencer marketing] although its content is non-binding with regard to consumer protection guarantees.

Despite verifying that Autocontrol is writing, together with AEA, a *Código de conducta sobre el uso de influencers en la publicidad* [Code of conduct on the use of influencers in advertising], the deletion of the content related to advertising in the last version of the *Código Ético de Confianza Online* [Code of Ethics of Online Trust], without any justification within the text, and the delay in the publication of specific indications leave plenty of room for improvement for the Spanish self-regulation system to guarantee the rights of consumers against new forms of advertising disseminated on digital media. Despite the prestige and recognition that Autocontrol receives from advertising professionals (Vilajoana-Alejandre & Rom-Rodríguez, 2017) and consumers themselves (González-Esteban & Feenstra, 2018), other self-regulation systems within our surroundings have already published specific codes regarding influencer marketing (ICAS, 2019). Additionally, this scarcity diverges greatly from the high percentage of Copy Advice® applications and digital advertising decisions by the Committee. This data reasserts the need to improve the updating and reviewing processes of Autocontrol's codes of ethics (Feenstra & González, 2019) to include much more specific guidelines and therefore fill the gaps in legislation thanks to more agile self-regulation processes.

Second, the absence of court rulings, administrative sanctions and Autocontrol Committee decisions regarding influencer marketing confirms the rare practical incidence of the general legal and ethical limitations included in the legislation and Autocontrol codes. Although from a legal point of view, the costs and duration of court proceedings can justify the lack of precedent in this field, the lack of self-regulation decisions is less justifiable, especially taking into account that ASA, the British self-regulation system, has resolved complaints in this field. This result confirms the greater effectiveness of the British self-regulation system compared to the Spanish system (Muela-Molina & Perelló-Oliver, 2014), in this case, regarding influencer marketing practices.

In relation to the contributions of Muela-Molina and Perelló-Oliver, given the confirmation of the legal and ethical risks of influencer marketing, in addition to more specific codes—like the one that is awaiting approval—, monitoring by control bodies is imperative to identify malpractices and raise awareness among the agents involved of the need to effectively comply with the principle of advertising identification. Despite the few studies focused on identifying these practices—another shortfall, in this case, from a research point of view—one example is enough: the work of Segarra-Saavedra and Hidalgo-Marí (2018) who, after analysing the Instagram posts of thirteen leading influencers in Spain, conclude that “the strategies of the influencers and the brands they collaborate with do not identify the advertising nature of their posts” (2018: 323).

Regarding the third research objective, the descriptive analysis of strategies implemented in the two leading advertising markets proves the significant role that advertising self-regulation can play, also and especially, regarding educating and creating a public conscience (Harker, 2003), in this case, related to influencer marketing practices. Among the good practices performed by the FTC and ASA, the following are noteworthy: updating and publishing clear and specific guidelines regarding the practical application of the principle of advertising identification in influencer marketing actions; an active dissemination policy of the actions of these bodies to, on the one hand, raise awareness among the agents involved of the need for compliance with the legal and ethical limitations and, on the other hand, warn consumers of their existence and identification criteria; monitoring malpractices and sending specific notifications to brands and influencers warning of the legal and ethical risks of their actions.

Nevertheless, all the agents involved admit that credibility is an essential factor for influencer marketing to achieve its goals. Therefore, we can conclude that, not only brands, but also influencers must become aware of the fact that complying with the basic rights of consumers, the followers who admire and trust them, is part of their personal success and, also, the success of the brands that pursue these advertising strategies.

Boerman and van Reijmersdal (2016) analysed the published scientific literature on the effects of identifying sponsored content in the response of consumers. Their conclusions highlight that the perception of identifying sponsored content is quite low, but when consumers are aware of it, persuasive knowledge is activated and brand recall can increase. The results on the effects of identification in terms of the attention given to sponsored content, critical processing, attitude towards the brand and intention to purchase are non-conclusive. What the study does show is that the—auditory, visual or audiovisual—form of identification does not have significant effects, but its content, the moment it is shown, its duration, the audience's mood and their perceptions of the sponsored content or the sponsor are important factors. Online, the analysis tackled sponsored content on blogs and *advergames*, so both authors highlight that “more research is needed on differences in effects of disclosures in different media and on disclosures of online sponsored content online (e.g. sponsored tweets and vlogs)” (2016: 115).

More recently, other studies have researched the identification of advertising actions with influencers on digital media, mainly on blogs (Boerman et al., 2018; Hwang & Jeong, 2016; Lu et al., 2014) and on the two preferred social media networks for influencer marketing actions (IAB, 2018; Augure, 2017): Facebook (Boerman et al., 2017) and Instagram (Evans et al., 2017; De Veirman et al., 2017). Consumer protection from the legal and ethical risks of influencer marketing is, therefore, a relevant topic also from an academic research perspective.

To alleviate the confirmed deficits regarding the legal and ethical limitations of influencer marketing, we can conclude that self-regulation faces three key challenges: to raise awareness among the parties involved—brands, influencers and consumers—regarding the need for complying with the principle of advertising identification by specifying and disseminating clear application criteria; to promote commitment and co-responsibility from brands and influencers by formulating an agreement that clearly includes the advertising agreements between both parties; and to promote the greater involvement of self-regulation bodies and, also, public administration bodies with power over digital media and consumption, to identify and sanction practices that go against the codes of conduct and legislation.

Finally, from the point of view of academic research, the rise in influencer marketing and the challenge of guaranteeing the rights of consumers and users with this new advertising practice justify the need for new studies in this field. Future research areas include empirically analysing the right identification of these practices on leading influencer profiles in light of the content of the new *Código de conducta sobre el uso de influencers en la publicidad* [Code of Conduct on the use of influencers in advertising]—pending approval—; comparatively studying the identification of these practices on influencer profiles in Spain, the United States and the United Kingdom to verify the effectiveness of the actions performed in each country; and delving into the analysis of the perception of the advertising identification elements of these actions.

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