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PROTECTING CONSUMERS IN E-COMMERCE

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Foreword

This paper aims to complement the OECD *Recommendation of the Council on Consumer Protection in E-Commerce* by elaborating on its key principles in the context of online advertising and offering practical guidance on how to apply these principles. For these purposes, the guide provides a number of examples from policy makers, consumer enforcement agencies, and stakeholders that are relevant to the key principles. Building on those examples, the guide also offers tips for businesses in four areas of online advertising: (i) misleading marketing practices; (ii) ad identification; (iii) endorsements; and (iv) protection of children or vulnerable consumers.

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Executive Summary

This good practice guide aims to complement the OECD *Recommendation of the Council on Consumer Protection in E-Commerce* (*E-commerce Recommendation*) by elaborating on its key principles in the context of online advertising and offering practical guidance on how to apply these principles. For these purposes, the guide provides a number of examples from policy makers, consumer enforcement agencies, and stakeholders that are relevant to the key principles. Building on those examples, the guide also offers tips for businesses in four areas of online advertising: (i) misleading marketing practices; (ii) ad identification; (iii) endorsements; and (iv) protection of children or vulnerable consumers.

Misleading marketing practices

Misleading marketing practices can occur in a number of ways. This good practice guide highlights two potentially misleading practices addressed in the *E-commerce Recommendation*: (i) automatic repeat purchases and subscription renewals, and (ii) pricing information practices such as reference pricing, drip pricing, or bait pricing. The *E-commerce Recommendation* calls on businesses to provide consumers with a clear and full statement of recurring charges, such as automatic repeat purchases and subscription renewals, and ways to opt out from such automatic arrangements (para.35 iv), and to ensure that advertised prices do not misrepresent or hide the total cost of a good or a service (para. 16).

Indeed, consumers often encounter products or services advertised as for "free", which in fact enrol consumers in a subscription that, after a trial period, automatically generates charges (subscription traps or negative options). Consumers may not necessarily receive sufficient notification to be able to opt out to avoid such charges or cancel their memberships. Similarly, consumers can be susceptible to misrepresentations regarding the total cost of the transaction. If businesses present to consumers a price that is inaccurate or only part of the total price, consumers may be misled.

With respect to subscription traps, the good practice examples illustrate how businesses should provide consumers with sufficient information about any conditions required to take advantage of "free" offers. Such information can include disclosures on the length of the offer and the charges that will be incurred after the trial period ends. The information should be presented with the most prominent reference to the offers in advertisements, in a clear and conspicuous manner. Businesses must not hide or bury key conditions, such as those about charges for something advertised as "free," in text that is hard to find, hard to read, or hard to understand.

As for pricing information, examples provided by some countries indicate that price comparisons should reflect the price at which products have actually been sold or offered for sale over a significant time period. Other examples emphasize ways for businesses to clearly state any charges aside from initial price advertised to consumers, early in the transaction process. Information on any applicable fees should be available in close proximity to the headline prices and with appropriate prominence.

Ad identification

The *E-commerce Recommendation* provides that advertising should be recognisable as an ad (para.13). It also recommends that advertising should indicate the source of advertising. That way, consumers can be aware of the commercial nature of the content and the source of the information.

Current online advertising, however, sometimes blurs the line between advertising and other content. Such practices include, for instance, commercial messages posted in news media sites, online magazine, social media, or non-paid search engine results, through text or video format. Consumers thus sometimes face difficulties in distinguishing independent editorial content from advertising. Without recognising an ad as an ad, consumers find it difficult to determine whether to interact with the presented material, make decisions about the weight to give to the information conveyed about a product or service, and make well-informed purchasing decisions.

The good practice examples illustrate how businesses can make ads easily identifiable as such. This may require businesses to take care in designing of advertisements, with due consideration of the perspective of the average or reasonable consumer. Clear and conspicuous disclosures may be necessary to ensure that consumers can identify the nature and source of the advertising. The use of appropriate wording and visual cues including colour, logos and labels is encouraged. The placing and proximity of disclosures also matters.

Endorsements

Consumer endorsements, including endorsements by social media influencers, have increasingly been used in online advertising. This has raised concerns about paid endorsements, some of which do not necessarily reflect genuine views of endorsers and properly disclose the commercial arrangement behind them. The *E-commerce Recommendation* states that endorsements made in advertising should be truthful, substantiated, and reflect the true opinion or honest view of the endorsers (para.17). In addition, it calls for any relevant commercial relationships between businesses and endorsers to be clearly and accurately disclosed.

Paid endorsements should be easily understandable as a promotional content. Paid endorsements without appropriate disclosures may convey commercial messages that could mislead consumers. Disclosures should clearly state any connection between an advertiser and an endorser that could affect the credibility of the endorsement. Such connections can include, for instance, monetary payment, free products, discounts, and other financial benefits, as well as family or business relationships and friendships.

The good practice examples suggest that businesses can improve consumer recognition of paid-for-content by paying attention to the design of disclosures, including the position, wording, text size and colour of the labels and other qualifying information. Other visual cues such as background colour and border, and the presence of a logo or image may also be useful. Disclosures should be made in the same language as the one predominantly used in the endorsement, and be provided in formats that can be easily readable on different devices. Disclosures should be maintained when advertising or marketing is republished in different platforms or media.

Protection of children or vulnerable consumers

Some types of consumers, in particular children or vulnerable consumers may be more susceptible to fraudulent or misleading marketing practices. The *E-commerce Recommendation* calls for taking special care in adverting targeted toward those consumers (para.18). For instance, they may have difficulty in understanding the nature of advertised product or other potential risks. There is also concern for the use of targeted ads toward children or vulnerable consumers, based on collected personal data about them.

The good practice examples show that, in order to avoid misleading children or vulnerable consumers, businesses should consider the likely user of an advertised product or service to identify whether and how to design the ad tailored to a special need for them to avoid misleading practices. Special care is necessary to ensure that advertising targeted towards those consumers is presented in a way that is clearly identifiable as such for them. Businesses should design disclosures in such a way that these consumers can easily understand that they are seeing advertisements.

1. Introduction

For the purposes of this guide, "online advertising" refers to a form of advertising and marketing that uses the Internet as a medium to deliver promotional marketing messages to consumers. Online advertising can take a variety of forms. The most common ad formats include search ads, display ads, and advertising in social media. Advertisers are now trying in more ways than ever to connect with consumers across a range of platforms and online content.

The Committee on Consumer Policy (CCP) has been working on consumer issues and challenges arising from online advertising. The recent CCP report on online advertising (OECD, 2019[1]) introduces the key aspects of online advertising and highlights some of the main benefits and risks for consumers. The report indicates that online advertising provides consumers with two key benefits. The first is the potential for disseminating relevant, useful advertisements in a timely manner (e.g., corresponding to consumer's search inquiries). The second is that online advertising provides funding for online services that consumers can acquire at reduced prices or for "free." Consumers receive search services, social networking services, news services and other information services without monetary payment.

The report identifies, however, a number of potential consumer risks from online advertising, including: false and deceptive claims; deceptively formatted advertisements, which make it difficult for consumers to identify some advertisements as such threats from "malvertising"; and data privacy and security issues relating to increased data collection. It also outlines potential issues relating to online advertising and consumer biases and vulnerabilities.

Building on that work, this good practice guide aims to complement the OECD *Recommendation of the Council on Consumer Protection in E-Commerce* (*E-commerce Recommendation*) (OECD, 2016[2]) by illustrating its key principles in the context of online advertising and offering practical guidance on how to apply these principles. For these purposes, the guide includes a number of examples from policy makers, consumer enforcement agencies and stakeholders that are relevant to the key principles on online advertising. Building on those examples, the guide provides tips for businesses for protecting consumers in the context of online advertising. This guide focuses on issues concerning; a) misleading marketing practices, b) ad identification, c) endorsements, and d) the protection of children or vulnerable consumers.

The policy issues could be discussed from different angles with different provisions in the *E-commerce Recommendation* (through, for instance, provisions on online disclosures, confirmation of transaction, privacy and security). For the purposes of the guide, however, each section is organised to provide illustrations of key principles that are more relevant to online advertising, rather than providing a comprehensive set of guidance.

2. Misleading marketing practices

2.1. Relevant principles

The *E-commerce Recommendation* sets out general principles for online advertising that are applicable to any type of advertising and marketing. In general, these provisions aim to ensure that consumers recognise and understand when they receive online advertising, and that such advertising is not false or misleading.

Specifically, as a general rule for not misleading consumers through online advertising, the *E-commerce Recommendation* calls on businesses to:

- *Pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices. (para.3)*
- *Not make any representation or omission or engage in any practice that is likely to be deceptive, misleading, fraudulent or unfair. (para.4)*

In relation to potentially misleading marketing practices such as subscription traps and reference pricing, drip pricing, or bait pricing, the E-commerce Recommendation further provides that businesses should:

- *Ensure that advertised prices do not misrepresent or hide the total cost of a good or a service. (para.16)*

These three principles apply to the examples presented in this guide, in addition to the more specific principles set forth when relevant.

2.2. Subscription Traps

2.2.1. Overview of the issue

A subscription trap (sometimes known as a "negative option") involves unsolicited recurring charges that often come after a business induces consumers through a "free trial" or low-cost initial fee (such as shipping cost) to make a continuity purchase without adequately disclosing that the subscription services involves ongoing fees and that there will be recurring charges unless they cancel.

Consumers are often unaware that they will be charged for products or services that they thought were free when they signed up for. In addition, consumers may not necessarily receive sufficient notification to be able to opt out to avoid such charges or cancel their memberships.

Consumers in many OECD countries have reported their experiences in free trials and subsequent subscription traps, including:

- According to a study by European Consumer Centre Sweden (2017[3]), 3.5 million consumers in six European countries are estimated to have accepted an offer online or in social media over three years that led to a subscription trap. When they encounter subscription traps, the study shows that 19 percent of consumers choose to pay when the company demands money, even though they do not consider themselves to have ordered anything.

- National Consumer Affairs Centre of Japan found that the number of consumer consultation received in FY2016 concerning subscription traps was 14,314, which increased by more than double from the previous year (National Consumer Affairs Center of Japan, 2017[4]). The report highlighted some of the challenges consumer are facing, including inappropriate disclosures on conditions for trial offers and lack of access to businesses in order to cancel membership.
- Another study revealed that, in the United Kingdom, around 17 million consumers signed up to a subscription service using a continuous payment mechanisms between June 2014 and June 2015 (Citizens Advice, 2016[5]). The study also showed that over 2 million consumers made a request to cancel the payment for a subscription, but their requests were eventually declined.
- A study by the European Commission (EC) (2017[6]) sheds another light on the experiences and problems faced by consumers when engaging in an online free trial. Based on consumer survey and a mystery shopping exercise, the study found that consumers tend to be overconfident in remembering to unsubscribe, and later face difficulties in finding contact details of sellers in order to unsubscribe. They also do not fully understand the nature of such offers involving automatic subscriptions.
- Earlier, separate reports by the United States Senate Commerce Committee staff (US Senate Committee on Commerce, Science, and Transportation, 2009[7]) and staff of the Federal Trade Commission (Federal Trade Commission, 2009[8]) also discussed the serious financial risks consumers face from Internet-based negative option marketing when marketers fail to disclose adequately or misrepresent the material terms of negative option offers, fail to obtain consumers' express informed consent before billing or charging them and fail to provide effective means for consumers to cancel transactions.

2.2.2. Relevant principles

With respect to subscription traps, in addition to the principles set forth above, the *E-commerce Recommendation* provides principles on online disclosures that require businesses to provide consumers with a clear and full statement of the relevant terms and conditions of the transaction (para.34). Such information includes contract duration, recurring charges, such as automatic repeat purchases and subscription renewals, and ways to opt out from such automatic arrangements (para.35 iv). Businesses should also avoid the use of disclaimers that are hidden, hard to notice or to understand (para. 4).

2.2.3. Examples of good practice

The following section provides examples of steps that consumer authorities and other stakeholders have taken to address the issues outlined in this section.

Enforcement and policy initiatives

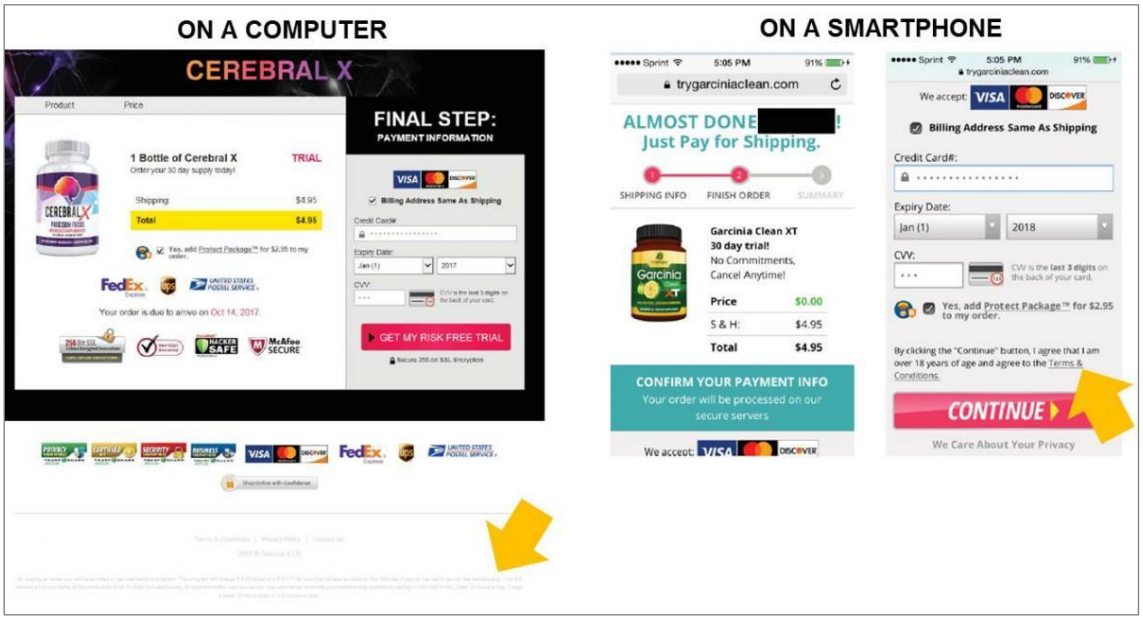
The Australian Competition and Consumer Commission (ACCC) took action against an exercise clothing company, Fabletics, which agreed to change its website after the ACCC raised concerns about inadequate disclosure of conditions and the ongoing costs of its membership program. According to the ACCC, consumer complaints pointed out that some Fabletics customers were not aware of their subscription to monthly membership, and they faced difficulty in unsubscribing their memberships. The ACCC acknowledges that there

is an increasing trend of treating a consumer's decision to make a single purchase as consent to enrolling in a paid, ongoing subscription service without adequately disclosing that the subscription service involves ongoing fees (Australian Competition and Consumer Commission, 2016[9]).

The Italian Competition Authority fined the online dating site Edates upon finding that, following a free registration to the site or a two-week try out subscription offered at a low price, consumers unknowingly found themselves bound to a six-month premium subscription at a cost of Euro 19 a week. Moreover, the Authority identified obstacles in exercising contractual rights, since it was difficult to find on the website the information necessary for correctly and promptly unsubscribing or rescinding the contract. In two parallel cases, the Authority accepted commitments submitted by the online dating sites C-Date and Meetic, aimed at providing transparency and clarity in the information offered with regard to the conditions for registering to the site and the terms for the automatic renewal of the registration. The commitments also aimed to remove the difficulties in cancelling the registration (Italian Competition Authority, 2016[10]).

Following a series of reports and hearings that examined negative option marketing practices in Internet transactions, the U.S. Congress passed the Restore Online Shoppers' Confidence Act (ROSCA) in 2010, which bans online negative options unless the seller: 1) clearly discloses all material terms of the deal before obtaining a consumer's billing information; 2) gets the consumer's express informed consent before making the charge; and 3) provides a simple mechanism for stopping recurring charges (Federal Trade Commission, 2010[11]). The Federal Trade Commission (FTC) of the United States has brought dozens of enforcement actions under the FTC Act as well as the ROSCA. For example, a federal district court recently granted the FTC's request to temporarily stop the operation by a group of Internet marketers that deceptively advertised free trial offers for a variety of products online, including skin creams, electronic cigarettes, and dietary supplements (see Figure 1 below). The FTC alleged that the Internet marketers violated ROSCA and other federal statutes by charging consumers full-price for the trial product, and enrolling them in expensive, ongoing continuity plans without their knowledge or consent. According to the FTC's complaint, the marketers made it difficult for consumers to cancel the continuity plan, stop or avoid the recurring charges, or obtain a refund. The litigation is ongoing. (Federal Trade Commission, 2018[12]).

Figure 1. Example of misleading free trial offer



Note: The yellow arrows on the image point out where the declaimers of the free trial offers appear. Consumers placing an order allegedly ended up enrolling in the continuity plan charging up to $84.71 every month.
Source: Federal Trade Commission (2018[13])

Another example is the FTC's consent order with NutraClick, a company offering nutritional supplements and beauty products online. Nutraclick released advertisements providing product samples for "free", where the company did not clearly inform consumers that they were automatically enrolled in a monthly membership for nutritional supplements once they received the offers. As alleged in the FTC's complaint, and as Figure 2 below shows, Nutraclick's disclosures about its ongoing membership program were not clear and conspicuous. They had two disclosures, both of which were insufficient to inform consumers. One was in a pop-up box that described the membership program and recurring monthly fees only when the consumer affirmatively clicked on the "Terms" hyperlink; consumers were not required to click on that link to purchase the products. The other appeared on the "payments page" halfway through a long terms and conditions paragraph in small type. The settlement between the FTC and NutraClick required the company not to advertise that samples are free if accepting them enrols consumers in a payment plan, as well as to inform consumers and obtain express consent from them before charging (Federal Trade Commission, 2016[14]).

Figure 2. Inappropriate disclosures about membership program

Note: Disclosures on membership fees are written in fine print, appeared in payments page (in the red).

Source: Federal Trade Commission (2016[15])

The Competition Bureau Canada released consumer alerts concerning pop-up windows or online surveys that eventually lured consumers into subscription traps. They highlighted that consumers are often directed to click through several websites in order to obtain a free product (that often has a small shipping cost), which turns out to be a monthly subscription (Competition Bureau Canada, 2018[16]) (Competition Bureau Canada, 2017[17]). The Competition Bureau also released an educational video in order to raise awareness on this issue (Competition Bureau Canada, 2018[18]).

The Competition and Consumer Protection Commission (CCPC) of Ireland provided tips for consumers in order to avoid being misled by subscription traps. The CCPC recommends that consumers should carefully examine any requirement for the subscription, and identify and cancel unwanted subscriptions through checking their bank accounts or credit card details (Competition and Consumer Protection Commission of Ireland, 2017[19]).

The Directorate General for Competition, Consumer Affairs and Repression of Fraud (DGCCRF) of France took action against an online shoe store related to monthly membership subscriptions to the store. This membership allegedly began as soon as the consumers joined the VIP club. Joining the VIP club was compulsory to take advantage of the discounted prices, and consumers were not able to unsubscribe their memberships (Direction Générale de la Concurrence de la Consommation et de la Répression des Fraudes, 2019[20]).

In 2017, the State Secretariat for Economic Affairs (SECO) of Switzerland reached a settlement with a Swiss company selling erotic products whose website contained misleading information about shipping costs. The consumers thought that there were no shipping costs for the order, but then they realized they concluded a “hidden” subscription to a VIP-Membership which costed 99€ per month. The company modified its website, general terms and confirmation e-mail to make this information more clear (State Secretariat for Economic Affairs of Switzerland, 2019[21]).

Examples of business guidance

The FTC provided recommendations for businesses engaging in online marketing with negative option offers (2009[22]). The high-level principles were developed based on the input from experts and past enforcement cases, and included the following:

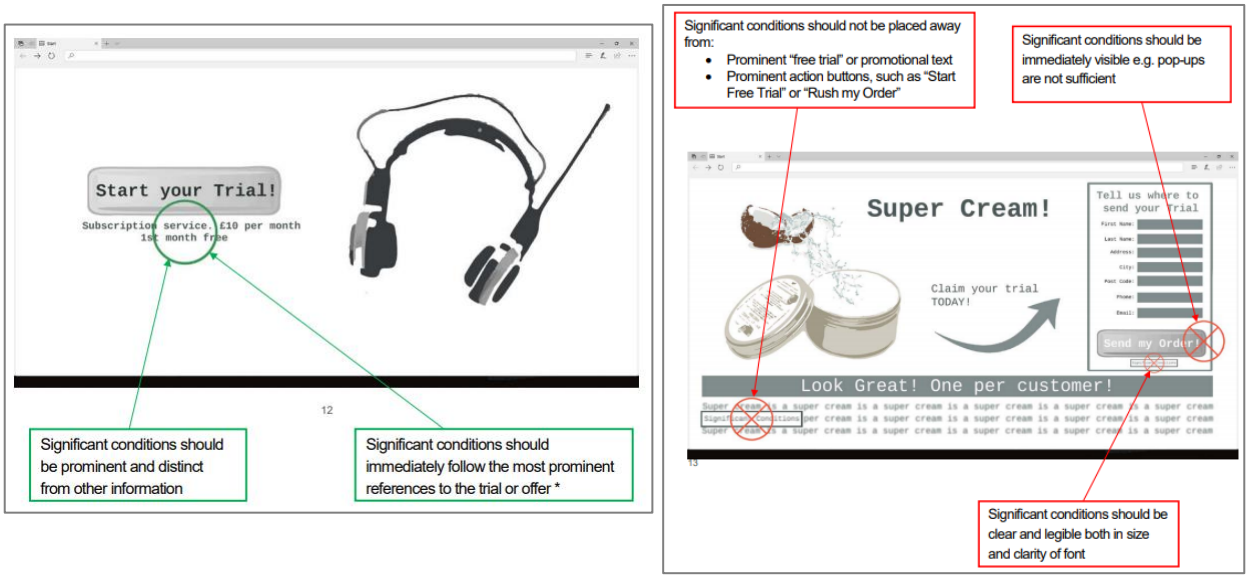
- Disclose the material terms of the offer in an understandable manner.
- Make the appearance of disclosures clear and conspicuous.
- Disclose the offer's material terms before consumers pay or incur a financial obligation.
- Obtain consumers' affirmative consent to the offer.
- Avoid impeding the effective operation of promised cancellation procedures.

Since issuing the high-level principles, the FTC has continued to provide advice to businesses in connection with its enforcement actions. For example, in connection with the case discussed above, FTC staff reinforced on its "Business Blog" the message that businesses must "clearly disclose all material terms and conditions up front and don't bury key information in hard-to-find or hard-to-read mouse print or behind obscure hyperlinks. Get consumers' express informed consent before charging their credit cards. And offer an easy way to stop recurring charges" (Federal Trade Commission, 2018[13]).

Industry groups have also developed self-regulatory codes in relation to free trial and subscription offers. For example, the Committee of Advertising Practice in the United Kingdom provided a practical guidance on how to provide effective disclosures in free trial and other promotional offer subscription models (see Figure 3 below) (Committee of Advertising Practice, 2017[23]). As an overarching principle, the guide recommends that advertising for free trial or promotional subscription offers need to make it clear;

- whether a paid subscription starts automatically (after the trial) unless cancelled,
- the extent of the financial commitment if the subscription is not cancelled (during the trial), and
- any other significant conditions, such as significant costs for membership.

Figure 3. Good practice examples of disclosures on free trials



Source: Committee of Advertising Practice (2017[23])

2.2.4 Tips for Businesses

Advertising products or services as "free", but which in fact enrol consumers in a subscription that automatically generates charges, deceives and misleads consumers. To ensure that advertised prices do not misrepresent or hide the total cost of a good or a service, businesses need to inform consumers about any conditions required to take advantage of a "free" offer in advertisements in a clear and conspicuous way. Such information includes disclosures on the length of the offer and the charges that will be incurred after the trial period ends.

Moreover, businesses must not hide or bury key conditions, such as those about charges for something advertised as "free," in text that is hard to find, hard to read, or hard to understand. Putting disclaimers in fine print or behind hyperlinks may not be noticeable to consumers and hence not be appropriate. Hiding such provisions in this way deceives and misleads consumers.

2.3. Misleading Pricing

2.3.1. Overview of the issue

Consumers can be deceived by inaccurate pricing information, or incomplete information about the total cost of a transaction. If businesses present to consumers inflated pricing information, or a price that is only part of the total price, they may in some circumstances mislead consumers into understanding that the displayed price is the total price.

Pricing techniques such as reference pricing, drip pricing, and bait pricing could also bring consumer risks. Reference pricing (or price comparisons) are useful for consumers to make informed decisions, but in some cases, the referenced price in advertisements could convey misleading impression to consumers. Consumers may be affected by inflated or inaccurate reference pricing information that could cause false consumer perceptions of value. Consumers may, for instance, be misled by advertisements that include information on the

savings that may be achieved. Such advertising often makes comparisons between the advertised price being charged to consumers and the reference price justified by, for instance, the competitor's price, the company's previous price or the cost of the product.

Consumers may also be lured in by attractive initial prices, where consumers face substantial fees and charges towards the end of the transaction. This practice is known as drip pricing. Such additional fees could include non-optional taxes and fees that apply to all or most buyers, as well as any applicable delivery fees, to name just a few. Consumers engaging in the transaction can end up in paying higher fees than advertised. Bait pricing refers to advertising with low prices to attract consumers, where consumers later find the advertised good unavailable and often end up purchasing a more expensive product. Bait pricing is considered as an illegal marketing practice in a number of OECD countries.

2.3.2. Relevant principles

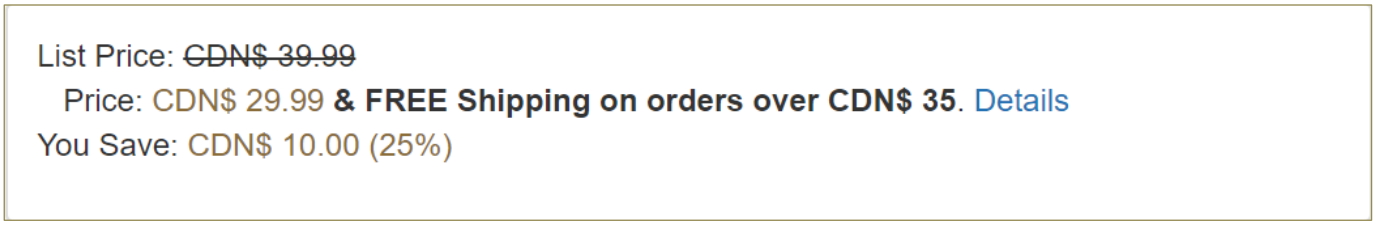
As for pricing practices including reference pricing, drip pricing, or bait pricing, the E-commerce Recommendation recommends that businesses provide information on not only initial price (para.35 i), but also the existence of variable compulsory and optional charges imposed by the business when they become known by the business and before consumers confirm the transaction (para. 35 ii). Businesses should avoid "the use of disclaimers that are hidden, hard to notice or to understand." (para. 4).

2.3.3. Examples of good practice

Enforcement and policy initiatives

The Competition Bureau Canada reached an agreement with Amazon resolving the Bureau's concerns with the online retailer's pricing practices on its Canadian website. The Bureau's investigation concluded that the company's claims on price comparisons created the impression that prices for items offered on its website were lower than prevailing market prices (see Figure 4 for an example of Amazon's price presentation). The Competition Bureau determined that Amazon relied on its suppliers to provide list prices without verifying that those prices were accurate (Competition Bureau Canada, 2017[24]).

Figure 4. Ordinary Selling Price claims made by Amazon

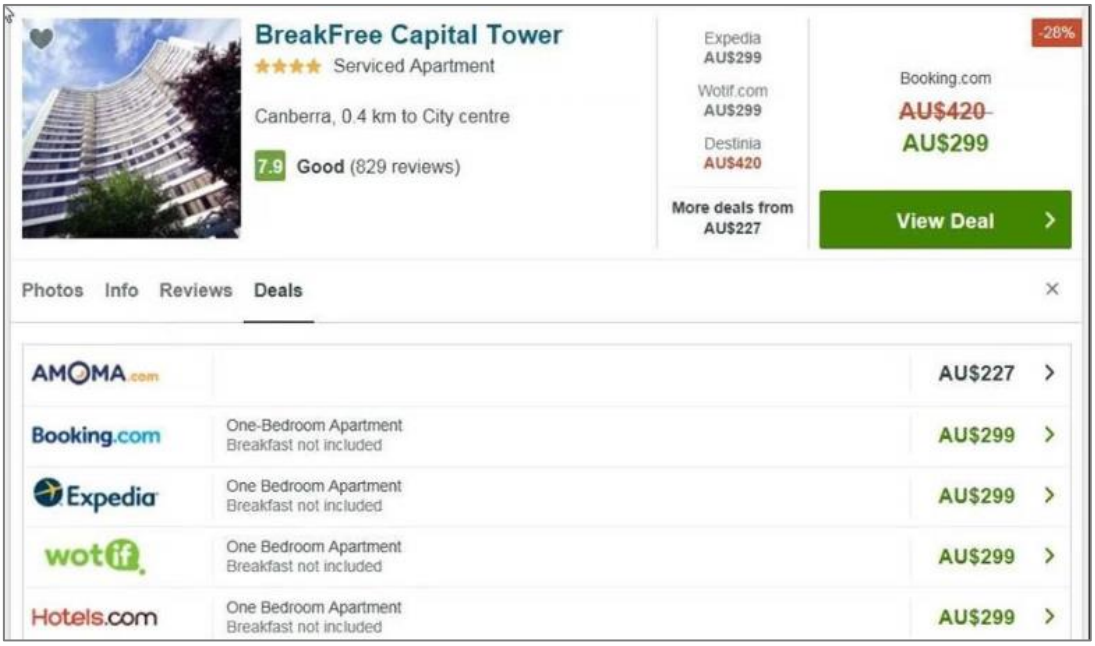


Source: Competition Bureau Canada (2017[25])

In Australia, the ACCC took action against Trivago, alleging that the company made misleading hotel pricing representations in its television advertising and website, which highlighted its website as an impartial and objective price comparison platform. In fact, Trivago's website prioritised advertisers who were willing to pay the highest cost per click fee to Trivago. The ACCC also alleged that, through price comparisions with other online travel websites, Trivago created an impression that it offered the best price, which was not necessarily the case (see Figure 5 below). In addition, the ACCC alleged that Trivago's price comparisons were false or misleading because they often compared an offer for a

standard room with an offer for a luxury room at the same hotel. This is an ongoing litigation (Australian Competition and Consumer Commission, 2018[26]).

Figure 5. Misleading saving claims by Trivago



Source: Australian Competition and Consumer Commission (2018[26])

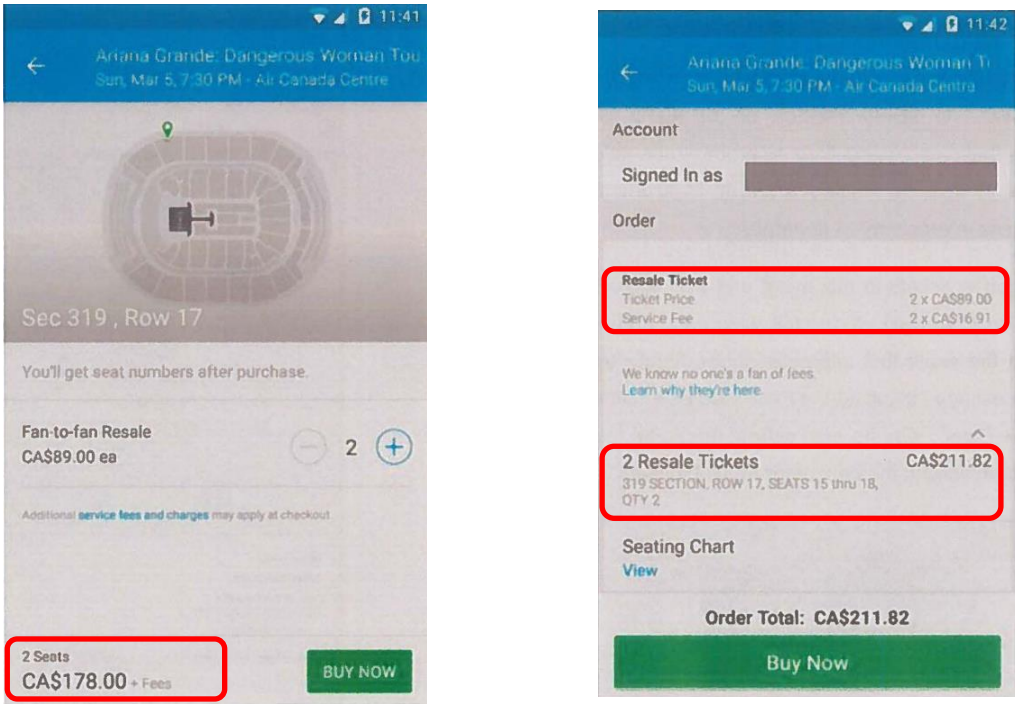
Similarly, the Consumer Affairs Agency of Japan brought a case against an online retailer, Brain Hearts, which allegedly provided misleading pricing information on its products sold online. The company's website offered price comparison information with "regular prices", which in fact were never actually offered (Consumer Affairs Agency, 2018[27]). The Agency also took action against McAfee, which made representations about non-existing ordinary prices about its software which misled consumers (Consumer Affairs Agency, 2018[28]).

In relation to drip pricing practices, the European Commission and EU consumer authorities called on Airbnb to align their terms and conditions with EU consumer rules and be transparent on their presentation of prices. The European Commission and EU consumer authorities claimed that the presentation of Airbnb's pricing did not comply with the requirements of EU law. Following the request, Airbnb committed to display the total price of bookings, including any extra fees, such as service and cleaning charges. In case where it is not possible to calculate the final price in advance, the company agreed to clearly inform consumers of the possibility of any applicable additional fees (European Commission, 2018[29]) (European Commission, 2018[30]).

The Competition Bureau Canada reached an agreement with a fourth car rental company, Discount Car & Truck Rentals Ltd., which allegedly advertised prices that were unattainable since mandatory fees were applied later in the transaction process. The Bureau also found that some of the fees were presented as mandatory taxes or surcharges imposed by various governments, which turned out to be imposed by the company to recover their own costs. These investigations have led to $5.95 million in administrative monetary penalties in the car rental industry and include similar agreements with Avis/Budget, Hertz/Dollar Thrifty and Enterprise (Competition Bureau Canada, 2018[31]).

In addition, the Competition Bureau Canada commenced proceedings against Ticketmaster and its affiliate for allegedly making deceptive claims to consumers in relation to advertised prices for sports and entertainment tickets. The Bureau found that Ticketmaster's misleading heading prices made consumers pay additional fees that are added later in the transaction process. Examples of the mandatory fees added by Ticketmaster include "service fees" (see Figure 6), "facility charges" and "order processing fees". Compared with the advertised price, Ticketmaster's mandatory fees often increase the ticket price by more than 20% and, in some cases, by over 65% (Competition Bureau Canada, 2018[32]).

Figure 6. Non-optional fees added later in the purchasing process by Ticketmaster



Note: The left image shows an initial price, whereas the right reflects an inflated final price with non-optional service fee.
Source: Competition Bureau Canada (2018[33])

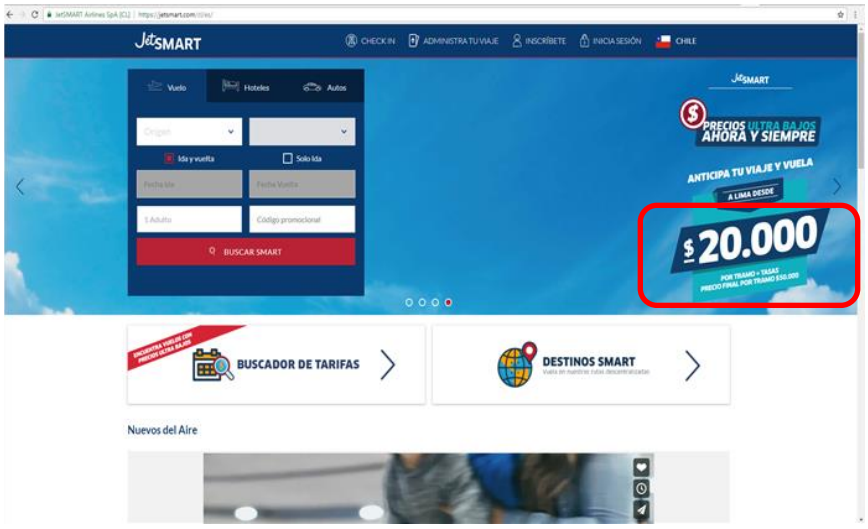
The Italian Competition Authority sanctioned six online travel agencies (lastminute.com, volagratis.com, opodo.it, govolo.it, edreams.it and gotogate.it), by more than 4 million euros collectively. The companies had applied a credit card surcharge, as well as an additional fee in case of choice of a credit card different from the one listed by default. Therefore, it was only at a very advanced stage of the transaction that the customer was presented with the total price, which was higher than the price initially displayed (Italian Competition Authority, 2018[34]).

The ACCC took actions against Jetstar and Virgin Australia, which allegedly engaged in misleading drip pricing practices. In the proceedings in the Federal Court, the ACCC claimed that Jetstar and Virgin failed to adequately inform consumers of an additional booking and service fees applied for booking made with most credit cards or PayPal. These fees were disclosed to consumers after they underwent a number of stages in the booking process. In 2017, the Federal Court ordered the companies to pay penalties for breaches of

the Australian Consumer Law (Australian Competition and Consumer Commission, 2015[35]) (Australian Competition and Consumer Commission, 2017[36]) .

In a similar case, the National Consumer Service of Chile (SERNAC) brought a case against the low cost airline JetSmart Airlines for misleading advertising concerning misleading pricing information. The company was alleged to fail to inform consumers about the full ticket price, since it did not include boarding fees and taxes. Figure 7 below indicates that a ticket to Lima is on offer from 20,000 Chilean Peso. However, the advertised price is actually not the "final price", and consumers were charged additional fees later in the transaction process (National Consumer Service of Chile, 2019[37]).

Figure 7. Misleading pricing information of flight tickets



Source: National Consumer Service of Chile (2019[37])

The Superintendence of Industry and Commerce from the Republic of Colombia also took action against Despegar.com, an online travel booking company that is present in many Latin American countries. The company was allegedly involved in misleading “drip pricing” practices by advertising travel packages with a “best price guarantee”, when the initial price was inconsistent with the final one that included additional charges such as taxes. Colombian Law 300 of 1996 obliges all tourism companies to advertise consumers the final price from the beginning of the campaign. The Agency also issued an administrative order requiring the modification of misleading information (Superintendence of Industry and Commerce of Colombia, 2014[38]).

The Consumer Rights Protection Centre of Latvia took action against misleading marketing practices including misleading reference pricing, discount and sales campaigns (Consumer Rights Protection Centre of Latvia, 2019[39]). More than 25 internet shops were inspected, and the main problems detected were related to:

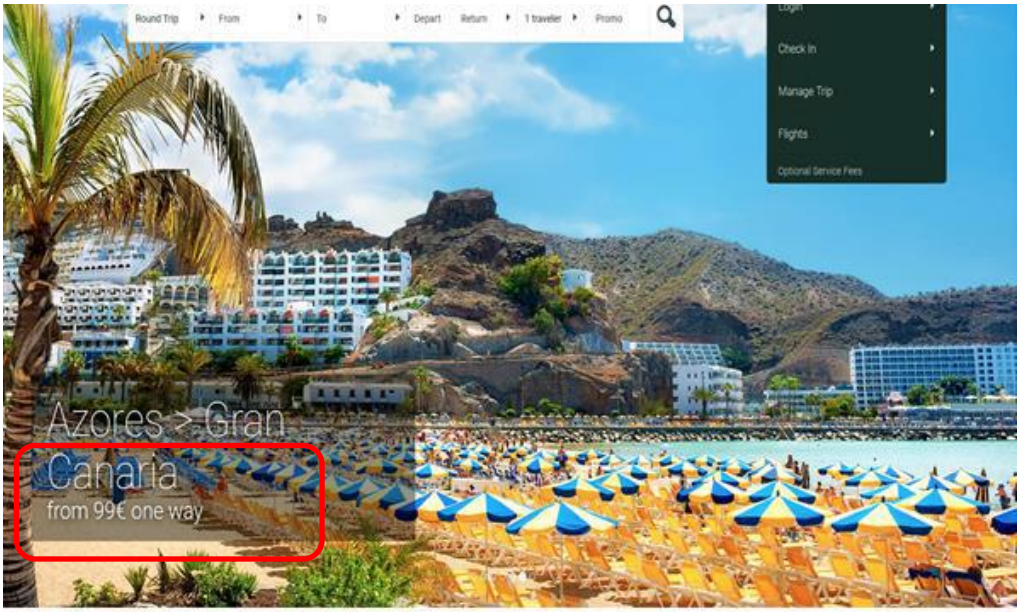
- Artificially raised reference prices, which may mislead a consumer into believing that they are receiving a higher discount benefit;
- Misleading discount and sales campaigns involving special offer periods that were indefinitely prolonged without expiration, providing a misleading impression to consumers.

The Commission for the Supervision of Unfair Competition of Peru took action against a company spreading information about the sale of air tickets through its website, because the price announced in its website did not include the applicable taxes and charges. The Special Chamber in Defense of Competition, however, concluded that the questioned material did not qualify as an advertisement, as it only consigned neutral information (prices, airlines and schedules of flights), which did not seek to persuade consumers about the acquisition of an air ticket by highlighting the characteristics of the products (Commission for the Supervision of Unfair Competition of Peru, 2019[40]).

In 2017, the State Secretariat for Economic Affairs (SECO) of Switzerland filed a civil action against a ticket reselling platform, Viagogo. The SECO claims that Viagogo should always clearly indicate the actual price to be paid on its website. This final price must include VAT and other non-optional surcharges, such as service and delivery charges. In addition, Viagogo should be required to indicate clearly on its website that its business is to resell tickets. Viagogo should also be prohibited from exerting artificial pressure on potential customers and from using certain misleading expressions such as 'low prices', 'no call-queueing', etc. The procedure is still pending (State Secretariat for Economic Affairs of Switzerland, 2017[41]).

With regard to bait pricing, the Consumer Directorate General of Portugal took action against air travel tickets online advertising. Thirty-six advertising messages have been analysed and infringements of the Directive Unfair Commercial Practices Directive have been detected in 14% of the cases. In the advertising messages, the expression "from" a certain price was used (see Figure 8 below), with the prospect of leading the consumer to acquire a service (air travel) for that value. These messages were presented on the homepage, which implied the possibility that this amount could correspond to an actual minimum price for the service. However, the price initially presented did not correspond in any minimum price offered to the consumer for the service (Consumer Directorate General of Portugal, 2019[42]).

Figure 8. Example of bait pricing advertising



Source: Consumer Directorate General of Portugal (2019[42])

Similarly, the Swedish Consumer Ombudsman brought a case on price information in holiday accommodation promotion where the price was presented as an entry-level price, indicating a basic low-cost version of the offer. The Patent and Market Court ordered the trader Stena Line Travel Group AB to inform the consumers in a clear and comprehensible manner how the entry-level price is calculated based on the example of two adults and two children travelling. The Court also prohibited the trader to market holiday accommodation with entry-level prices if there is no offer where the product actually can be purchased for the lowest marketed price (Swedish Consumer Ombudsman, 2018[43]).

Examples of business guidance

A number of policy makers have provided guidelines for pricing practices. For instance, Norway's Consumer Authority (2018[44]) released an updated version of the guideline on price marketing. The guideline clarifies what information should be included in different types of pricing practices, such as price comparisons and lowest price claims, and how such information should be presented to consumers. For instance, when providing price comparisons with suggested prices, the guide calls on businesses to justify that suggested prices are real alternative prices in the market.

Similarly, the ACCC developed business guidance on how to display prices in accordance with applicable rules. An overarching principle of the guide is to disclose the total price of a product or service to consumers. The guide provides business recommendations for various type of pricing practices. As for the price comparison with its own past price, for instance, the guidance recommends that businesses should be able to identify indicators suggesting that the relevant consumers would have bought products at the previous price (Australian Competition and Consumer Commission, n.d.[45]).

Furthermore, the Danish Consumer Ombudsman published a number of guidelines for businesses on pricing practices, The revised guidelines (Danish Competition and Consumer Authority, 2017[46]) provide that a price reduction compared to the trader's own previous price will in general not be considered as misleading, if:

- the normal price that the price reduction is compared to has been in force for a longer period (at least 6 weeks) immediately prior to the price reduction announcement;
- the requirements for the length of the price reduction period are fulfilled, meaning that the reduction must only apply for a short period, which is 2 weeks for regular products, and 1 week for basic household commodities and seasonal products.

The Advertising Standards Authority (ASA) in the United Kingdom provided a guidance offering practical advice for traders on good practices specific to reference pricing. The guide shows how to ensure pricing practices complying with the applicable regulations, including how to make price saving claims in a clear and conspicuous way, and what information should be included for price comparisons with recommended retail prices (Advertising Standards Authority, 2016[47]). In order to avoid misleading consumers, the guideline suggests that businesses should not overstate the availability of products with advertised prices and the higher price in the price comparison advertisements should be charged within a reasonable time period.

2.3.3. Tips for businesses

Businesses should make price comparison in a clear and understandable manner, with clearly disclosing material conditions on the offer. The compared price should reflect the

price at which products have actually been sold or offered for sale over a significant time period. Creating an artificial price that has never been available is deceptive.

The advertised price should be the price that consumers can actually pay for the product. Businesses should not use disclaimers to counter false or misleading pricing claims in ads. Businesses should clearly state any variable compulsory and optional charges aside from the initial price advertised to consumers, early in the transaction process. Any optional fees should not be presented as mandatory to consumers. From the consumer's perspective, it would be useful to find information on any applicable fees in close proximity to the headline prices and with appropriate prominence.

3. Ad identification

3.1. Relevant principles

The *E-commerce Recommendation* provides that advertising should be recognisable as an ad. That way, consumers can be aware of commercial nature and source of the of the information in the advertisement. Knowing whether information about a product comes from an independent, impartial third party, or from a business selling that product, affects consumer decisions about how to evaluate the information presented.

More specifically, the principles articulate that:

- *Advertising and marketing should be clearly identifiable as such. (para.13)*
- *Advertising and marketing should identify the business on whose behalf the marketing or advertising is being conducted where failure to do so would be deceptive. (para. 14)*

3.2. Overview of the issue

Current trends in online advertising often tend to blur the line between advertising and other content (Federal Trade Commission, 2015[48]). This type of advertising is often called "native advertising", which is designed to blend into other independent editorial content.

Native adverting is not new, but it has become more prevalent, especially with the rise of ad-blocking technologies. Although there is no universally agreed definition of native advertising, it is essentially characterised as an online advertising that resembles the form and function of the editorial content of the media in which it is placed. The FTC (2015[49]) defined it as "*content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online*".

Native advertising can appear in a variety of forms. It can include, for instance, a commercial message posted in news media sites, online magazine, social media and other content sites, or non-paid search engine results, through text or video format. Developments in artificial intelligence and machine learning are enabling new types of interactive and personalized native formats (see, for instance, Pollitt (2018[50])).

Consumers tend to face difficulties in distinguishing an independent editorial content from advertising in, for instance, news articles (Tangeland and Alfnes, 2016[51]), search ads and other editorial contents (Federal Trade Commission, 2017[52]). For example, the study by the Korean Federal Trade Commission suggests that over 85% of respondents in the study could not identify the paid-for-search ads (Korean Fair Trade Commission, 2018[53]).

A study by the European Commission on social media marketing (2018[54]) found that consumers face difficulties in identifying native advertising as commercial, and in distinguishing them from unpaid posts by users in social media. These difficulties include:

- "socially wrapped" ads, where the ad seems posted or shared by the user's connections (family, friends, acquaintances) or by companies, celebrities or people followed by the user;

- prize winning competitions or polls, especially where the subject is not a product but a person or news fact; and
- a lack of familiarity with the social media environment for light or new users.

In the behavioural experiments conducted for this study, one-third (33-36%) of experiment participants did not recognise native advertising shown in the experiment. In addition, experiment participants were not better able to identify native ads as commercial when the disclosure label was present than when it was absent. Less than one third of participants even remembered seeing the disclosure label when asked. In the context of that study, more salient disclosure labels increased identification of ads, depending on the clarity of the actual wording of the text of the label. Thus, the study concluded that both increased salience (attention) and clarity (comprehension) of the label are necessary to increase the effectiveness of currently used disclosure labels (European Commission, 2018[54]).

Without being able to recognise an ad as an ad, consumers find it difficult to determine whether to interact with the presented material, make decisions about the weight to give to the information conveyed about a product or service, and make well-informed purchasing decisions. Such ads can mislead consumers into believing that contents they are seeing are independent, impartial, or not from the sponsoring advertiser itself, when in fact the contents are paid advertisements. This means that misleading representations or omissions about the commercial nature of adverting are problematic, even if the underlying claims are truthful and non-misleading.

3.3. Examples of good practice

Enforcement and policy initiatives

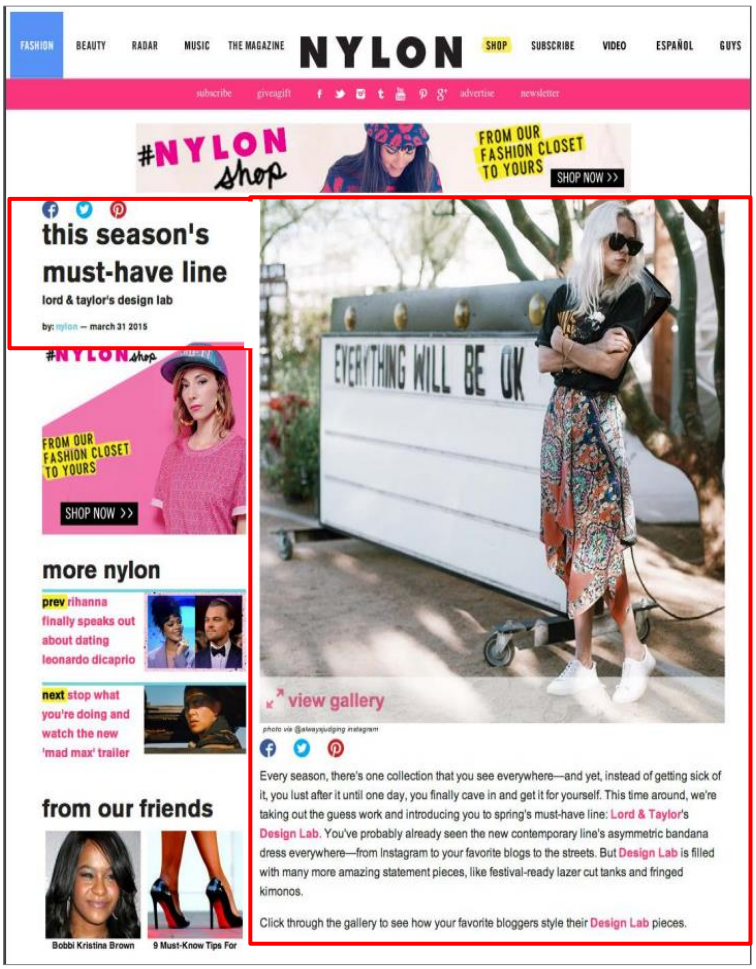
The FTC (2015[49]) released Enforcement Policy Statement on Deceptively Formatted Advertisements (the "Native Advertising Statement"), which sets forth how the agency applies established consumer protection principles to native advertising. An FTC enforcement policy statement generally describes when the agency will use its discretion to take corrective action or the means by which such action will be pursued. It may also provide an interpretation of a law or rule and may be based on the agency's cumulative expertise with a practice or industry.

The FTC Native Advertising Statement stresses that disclosures of native adverting should be presented in a clear and prominent manner, on all devices and platforms that consumers may use to see the advertisements. It also highlights that when assessing effectiveness of disclosures, it should be considered from the perspective of an average or reasonable consumer, based on the ad's net impression, taking into account not just text, but also such issues as the use of images, sound and placement.

After issuing the enforcement policy statement, the FTC brought several cases challenging native advertising practices that run afoul of the Native Advertising Statement's legal principles. In its first enforcement action, the FTC settled charges against retailer Lord & Taylor, which alleged that the company deceived consumers by paying for native advertisements, including a seemingly objective article in an Instagram post of an online publication, without disclosing that the posts actually were paid promotions. As seen in Figure 9 below, the paid article started with a headline saying "this season's must-have line" and provided further descriptions of the advertised product, without indicating the nature of the advertisement. The FTC alleged that Lord & Taylor placed a Lord & Taylor-edited paid article in Nylon, a pop culture and fashion publication that did not clearly

convey that it was an advertisement or provide information that Lord & Taylor was the advertiser. The FTC's settlement with the company prohibits Lord & Taylor from misrepresenting that paid commercial advertising is from an independent or objective source (Federal Trade Commission, 2016[55]).

Figure 9. Paid article with insufficient disclosures about their commercial arrangement



Note: The right side of the article (in the red line) is a paid ad featuring the brand's product.

Source: The Federal Trade Commission (2016[56])

The FTC recently brought a case against Creaxion Corporation, which allegedly used social media posts and online magazine articles to advertise their mosquito repellent by falsely representing them to be independent statements from impartial publications (Federal Trade Commission, 2018[57]). The advertising company posted an online article featuring its repellent product, and the article resembled a format of other independent content in the magazine and it was not easily identifiable as ads for consumers (see Figure 10 below).

Figure 10. Example of misleadingly formatted advertisement in the online magazine

Source: Federal Trade Commission (Federal Trade Commission, 2018[58])

Similarly, the Israel Consumer Protection and Fair Trade Authority recently opposed a settlement against a popular newspaper in Israel that also operates an internet news platform. The news platform allegedly published articles that included advertising content disguised as informative or editorial content without revealing to the consumer that it is actually an advertisement. The settlement proposed that on the homepage, within the vicinity of the advertisement's headline, there should appear the information symbol 'i' formatted in a way that when the cursor hovers over it, a pop-up will appear that will explain the nature of the content. The Authority opposed this settlement on the grounds that advertising in the form of an article, essay or news bulletin must include an explicit indication that it is an advertisement. This case is pending court proceedings (Israel Consumer Protection and Fair Trade Authority, 2019[59]).

To date, a number of consumer authorities undertook studies on the issue of consumer identification of online advertising. For instance, the FTC (2017[52]) identified several factors that could improve consumers' ad recognition, including the use of distinctive background colour and borders, increasing the text size of ad labels and use of text colour, better placement of disclosures, and use of clear and consistent terminology.

The behavioural experiments in the EC study showed, however, that trying to make a native ad seem less native, by highlighting the border in red, did not help experiment participants to better recognize it as an ad. Such a measure, though increasing the salience of the ad itself, did not send a clear, unambiguous message that "this is an ad". Thus, the study suggests that a clear, explicit mention to the commercial intent and/or paid nature of the ad is necessary for any measure to be effective (European Commission, 2018[54]).

Examples of business guidance

In connection with the Enforcement Policy Statement noted above, the FTC also provided a practical guideline for businesses on native advertising, which highlights the importance of placing and proximity of disclosures, as well as clear, prominent and consistent wording and other disclosure design (Federal Trade Commission, 2015[48]).

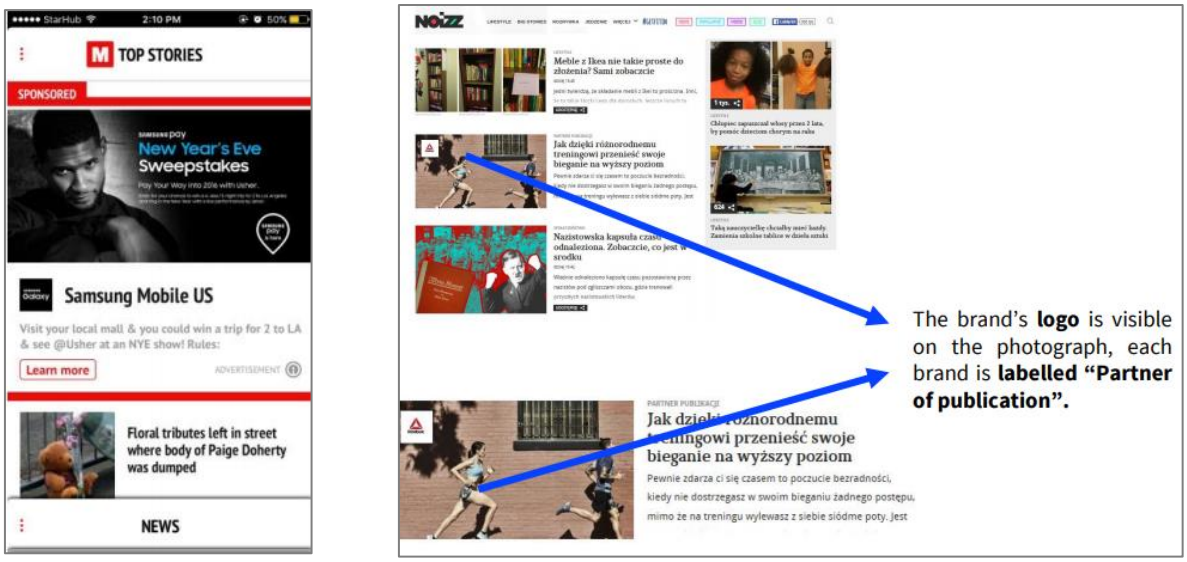
Nordic Consumer Ombudsmen released a joint position statement on covert marketing including paid-for content in an editorial style. The position paper highlighted the importance of disclosure placement in order to ensure consumer's ad recognition, as well as clear separation from other materials. The joint position paper advised businesses to ensure that advertising be clear to the audience where it begins and ends (Norway Consumer Authority, 2016[60]).

A number of business organizations have released guidelines on native advertising. For instance, the International Chamber of Commerce released high-level principles on native ads, one of which suggests that when posting native advertising, businesses should provide prominent and understandable disclosures to consumers. More specifically, the ICC guide provides that sponsored content should be identified as such through presentation of the sponsor's name and/or logo at the beginning, during and/or at the end of the programme or publication content (International Chamber of Commerce, 2015[61]).

The IAB (2013[62]) developed business guidance on native advertising, which provides recommendations to ensure appropriate disclosures and transparency in native advertising. It suggests that a businesses should, regardless of a context, enable a reasonable consumer to distinguish between paid advertising and editorial content.

Furthermore, IAB Europe (2016[63]) provides more specific recommendations on native advertising formats in light of applicable EU rules. The guide states that native ads should, at a minimum, include a label in order to clearly convey that the content is for a commercial purpose and has been paid for. According to the guide, the identity of the advertiser should be clearly disclosed through, for instance, a label or the use of visual cues including brand logo and name. As shown in Figure 11 below, the guide offers a number of tips on how to make clear and prominent disclosures through, for instance, the use of labels, brand logos and other visual demarcations in advertising.

Figure 11. Suggested disclosures on native advertising



Source: IAB Europe (2016[63])

3.4. Tips for businesses

To make advertising identifiable as such, businesses should take care in designing advertisements, including native advertising content and disclosures. Businesses should avoid giving the impression that what is really an ad is content provided by an independent or impartial third party.

In order to assess whether the ad is clearly distinguishable as such, it is essential to consider the perspective of the average or reasonable consumer, and to consider the impression that the text, images, placement, and other design elements have on such a consumer.

In order to prevent deception, a disclosure may be necessary to ensure that consumers can identify the nature and source of the advertising. Businesses should present disclosures in a clear and conspicuous manner to avoid misleading consumers. Disclosures should not be buried in fine print nor in a pop-up icon.

An effective disclosure must attract enough attention from consumers to see it, and it should be so clear that consumers will immediately understand it. When designing disclosures, it is necessary to examine the overall appearance of paid advertising, and consider whether consumers can immediately understand when they are seeing the ad and where the advertisement begins and ends. Businesses should design disclosures to enable consumers to identify the commercial nature of the ad and the identity of the advertiser through, for instance, use of appropriate wording and visual cues including colour, logos and labels. The placement and proximity of disclosures also matters.

4. Endorsements

4.1. Relevant principles

When consumer endorsements are used in online advertising, the *E-commerce Recommendation* provides that:

- *Endorsements should be truthful, substantiated, and reflect the true opinion or honest view of the endorsers. (para.17)*
- *Any material connection between businesses and endorsers, which might affect the weight or credibility that consumers give to an endorsement, should be clearly and accurately disclosed. (Ibid.)*

4.2. Overview of the issue

Various types of endorsements – from experts, celebrities, and "ordinary" consumers – have always been used in advertising. Online advertisers on blogs and online video and social media platforms have increasingly used consumer endorsements as a key component of online campaigns. In particular, they use social media influencers – users that have a large following on social media platforms – to advertise products and services. This has raised concerns that many advertisers do not disclose payments or other commercial arrangements clearly and conspicuously, making it difficult for consumers to assess the weight and credibility of the social media endorsements and the products or services they recommend.

If online content does not properly disclose a commercial relationship between an advertiser and an endorser, consumers may be misled into believing that the endorsement represents the endorser's impartial or authentic view, rather than promotional content. Consumers may be more likely to place genuine trust in a service or product recommended by a social media influencer than a product and service from a party they know is compensated by an advertiser.

Advertisers, publishers and other online content providers have flexibility as to how to ensure that an endorser, including a social media influencer, make clear and prominent disclosures of any material connections between the endorser and the advertiser. In many cases, clear and conspicuous disclosures are necessary for consumers to understand that there is a commercial arrangement in place or identify the content as a paid endorsement.

On the other hand, ill-designed information disclosures can be useless or counterproductive for consumers (OECD, 2010[64]). The effectiveness of disclosures need to be evaluated from the perspective of an average or reasonable consumer. Consideration is required for what information should be disclosed and how best to communicate with consumers in order to make it clear that consumers are seeing paid-for-endorsements.

In addition, a study by the European Commission (2018[54]) identifies a number of common commercial practices in consumer endorsements in social media. For instance, the study highlights a practice called "extrapolation of social endorsements", where a user's positive interaction with specific product is linked or transferred to different but related post (i.e. the brand in general), which creates the impression that the user also takes a positive view towards the brand. The study suggests that this practice may not necessarily provide useful

information to consumers since they may not properly assess whether the positive stance is toward a specific product or a brand in general.

4.3. Examples of good practice

Enforcement and policy initiatives

The Italian Competition Authority (AGCM) sent letters in relation to specific posts on Instagram to seven main influencers and eleven companies selling famous brands. The letters urged both influencers and brands to publish posts with disclosures about the commercial nature of the content in a clear and transparent manner. In the letters, the AGCM has stressed that the prohibition of hidden advertising has a general validity and therefore must be respected in communications delivered through social networks. Therefore, influencers cannot make consumers believe they are delivering independent views when actually promoting a specific brand (Italian Competition Authority, 2017[65]).

The AGCM also sent out a second set of moral suasion letters in 2018, and influencers were alerted that they cannot pretend to act spontaneously and without bias, when in fact they are promoting a brand. The Authority stressed that tagging photos with references to the Instagram profile or the website of a brand conveys an advertising effect, while the lack of disclosures may make the commercial nature of the communication less clear to consumers. Therefore, the AGCM requested that the commercial nature of all advertising content delivered through social media be made apparent. The use of hashtags such as #advertising, #sponsored, #paidad is recommended, in the case of products given for free to influencers (Italian Competition Authority, 2018[66]).

The DGCCRF of France took action against a social media influencer specialised in fashion and beauty, who published videos on YouTube and other content on social media, in which products were advertised. The content was not appropriately labelled as advertising although the influencer had received in-kind and financial remuneration from the brands. The DGCCRF stressed that advertising must be honest, truthful and not misleading (Direction Générale de la Concurrence de la Consommation et de la Répression des Fraudes, 2019[20]).

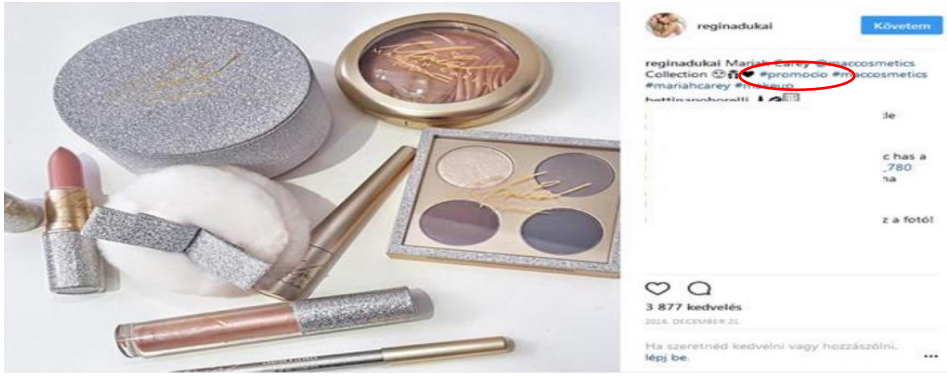
The Competition and Markets Authority (CMA) of the United Kingdom agreed with Social Chain Ltd not to post or arrange undisclosed advertising. The CMA's investigation found that Social Chain used its own social media accounts, and arranged for widely followed social media personalities, to promote films, games and takeaway and dating apps, without readers being informed that the content was paid-for advertising (Competition and Markets Authority, 2016[67]).

In addition, the CMA released an open letter to businesses engaging in advertising and marketing in order to ensure that the use of online reviews and endorsements comply with consumer protection law. The letter recommends that businesses paying for promotions on social media or other communication tools should disclose the material connection, through providing labels or instructing anyone involved in the publication of paid endorsements (Competition and Markets Authority, 2016[68]). In relation to this, the CMA also produced a summary note on paid endorsements to be complaint with the consumer protection law (Competition and Markets Authority, 2016[69])

The Hungarian Competition Authority accepted the commitments offered by GoldenEye Kreatív Kft and Magyar Telekom Nyrt., according to which the communication practice has changed and accepted the commitments of influencers and their commercial

partners/agency in two further cases. The commitments require the use of one of the following hashtags in posts; "#advertisement", "#announcement", or "#supported by" (Hungarian Competition Authority, 2017[70]). Figure 12 below reproduces the Instagram post of one of the social media influencers in which the influencer already added the hashtag "#promocio (promotion)" after the authority launched its investigation.

Figure 12. Promotional content posted in Instagram

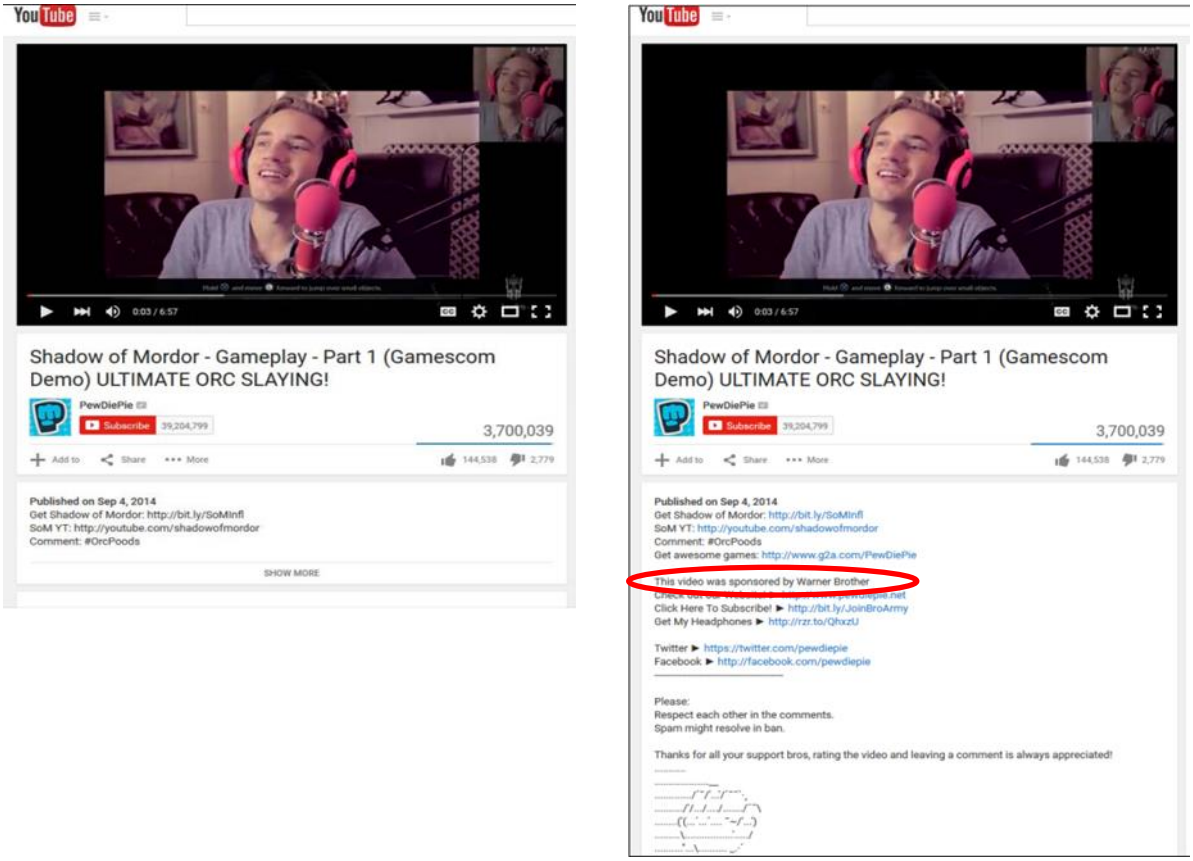


Note: The hashtag "promocio" (in the red circle) means "promotion" in English.

Source: Hungarian Competition Authority (2017[71])

The FTC has brought many enforcement actions involving online endorsements on video and social media platforms. In 2016, for example, the agency settled charges against Warner Bros. for failing to disclose adequately that it paid online "influencers" thousands of dollars to post positive gameplay videos on YouTube and other social media. The FTC alleged that Warner Bros. did not instruct the influencers to include sponsorship disclosures clearly and conspicuously in the video itself where consumers were likely to see or hear them. Instead, according to the complaint, Warner Bros. instructed influencers to place the disclosures in the description box appearing below the video. As a result, the vast majority of sponsorship disclosures appeared "below the fold," visible only if consumers clicked on the "Show More" button in the description box (see Figure 13 below). In addition, when influencers posted YouTube videos on Facebook or Twitter, the posting did not include the "Show More" button, making it even less likely that consumers would see the sponsorship disclosures (Federal Trade Commission, 2016[72]).

Figure 13. Sponsored video posted by a social media influencer



Note: YouTube Description Box before "Show More" link clicked (left), and after the link clicked (right) in which the sponsorship disclosure becomes visible (in the red circle).

Source: Federal Trade Commission (2016[73])

FTC staff also sent 90 letters to prominent social media influencers on Instagram advising them to clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media. In addition to providing background information on when and how marketers and influencers should disclose a material connection in an advertisement, the letters each highlighted that consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click "more," which many may not do. The staff's letters informed recipients that when making endorsements on Instagram, they should disclose any material connection above the "more" button. The agency followed up on these letters by issuing warning letters to a group of 21 of the social media influencers previously contacted. The warning letters explain why specific social media posts may not comply with the Guides and include requests that the recipients respond to the FTC (Federal Trade Commission, 2017[74]).

Concerning the responsibility of online platform on user endorsements, the German Federal Court of Justice decided in the case of a hotel review site that the review site had not actively promoted or disseminated the user review, but rather had a neutral role in relation to it. Given this situation, the court concluded that the review site would only be liable for the content of the user review if it had breached specific duties to carry out checks (German Federal Court of Justice, 2015[75]).

Examples of business guidance

In June 2016, International Consumer Protection and Enforcement Network produced a series of guidelines for businesses involved in online reviews and endorsements. The guidelines consist of guidance for review administrators (2016[76]), traders and marketers (2016[77]), and digital influencers (2016[78]). These guidelines provide the basic principles for paid endorsements, highlighting the importance of clear and conspicuous disclosures on the nature of the online content. For instance, the guidelines provide that traders, marketing professionals, and digital influencers should disclose paid-for content clearly and conspicuously. They are also recommended to be open about other commercial relationships that are relevant to the content.

The Danish Consumer Ombudsman published a guidance paper for influencers regarding covert marketing in social media. The guidance paper clarifies under which circumstances the mentioning of a product is advertising, how commercial posts should be labelled and how an influencer should communicate about gifts from traders. It furthermore clarifies in which situations a person or a trader could be responsible for violating the prohibition on covert advertising. According to the guidance, the mentioning of a specific product can be advertising, if a trader wants an influencer to advertise the product. This is regardless of the type of relationship between the influencer and the trader (e.g. whether they have a specific agreement or whether the trader has any influence on how the influencer frames the ad) (Danish Competition and Consumer Authority, 2017[79]).

The FTC has also provided guidance to businesses on endorsements in social media, stemming from its Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides") (2009[80]), which sets that endorsers must disclose all "material connections" clearly and conspicuously. According to the guides, such connections could include not only monetary payment, discounts and other financial benefits, but also family or business relationships, and friendships. The 2009 Guides made clear that new forms of online advertising, such as blogs and word-of-mouth advertising, were subject to this standard. The Guides are not regulations, but if advertisers do not follow them, the FTC may decide to investigate whether the practices are unfair or deceptive under the FTC Act.

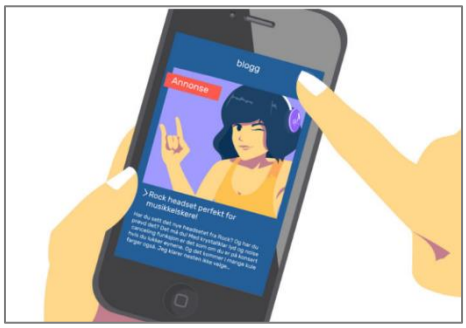
Following the Endorsement Guides, the FTC has issued several different iterations of business guidance, updating its "frequently asked questions" (FAQs) about endorsements in 2015 and 2017 to take into account developments in online advertising. For example, the 2015 update provided guidance on online video disclosures, social network "linking," social media contests, and the wording and placement of disclosures (for example, the agency explained that if a blogger got the product for free, and $100 for a positive review, it's not enough to merely say the product was free). In 2017, the FTC issued a further update, which provided additional guidance on disclosing connections between advertisers and social media reviewers, the effectiveness of different hashtags for disclosure purposes, built-in disclosure tools on some social media platforms, and guidelines for effective disclosures on specific social media platforms such as Instagram and Snapchat (Federal Trade Commission, 2017[81]). The FTC has also provided business guidance through its Business Center blog posts (see, for instance, Federal Trade Commission (Federal Trade Commission, 2017[82]) and through an "influencers 101" Twitter chat. The FTC also developed an infographic on social media endorsements (see Figure 14 below).

Figure 14. Recommendations for social media influencers on disclosures

Source: Federal Trade Commission (2017[83])

The Norway Consumer Authority developed a business guidance specific to labelling for paid contents in social media (Norway Consumer Authority, 2018[84]). The guide explains how to place labels in social media in accordance with consumer protection law, and provides tips for disclosures through appropriate placing, clear wording and other visual cues such as background colour and border, and presence of logo or image. The guide also delivers good examples of labelling in a variety of social media platforms, such as Instagram, Facebook and Twitter (see Figure 15 below).

Figure 15. Good example of appropriate labelling in social media

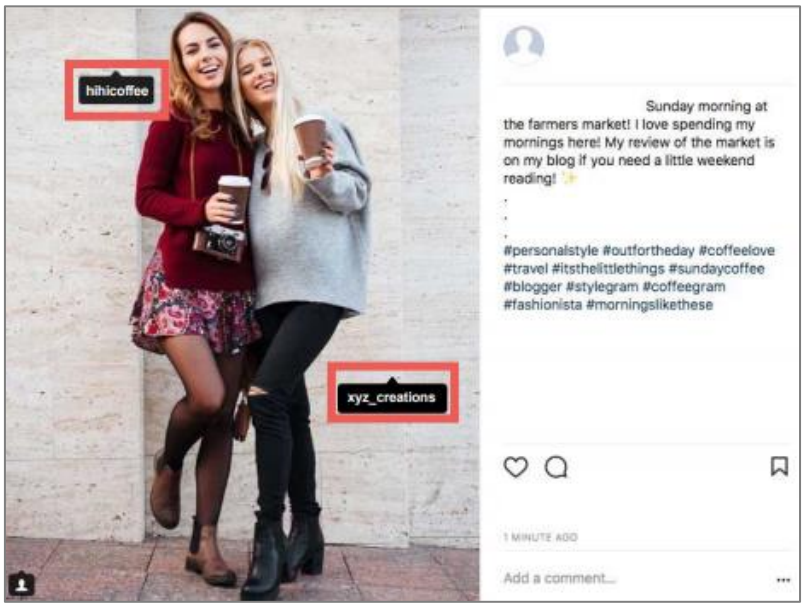


Note: The label "Annonse" in the picture means "advertisement" in English.
Source: Norway Consumer Authority (2018[84])

The Hungarian Competition Authority provided a guideline designed for influencers in social media. The guideline aims to assist social media influencers through providing recommended practices when posting sponsored contents in social media. The guide recommends, for example, that the promoted company or brand name should be placed at the beginning of the post and the indication of the commercial arrangement should be presented in the same style on the same platforms. It also provides that the differences among social media platforms and the characteristics of the environment in which the content appears should also be taken into account (Hungarian Competition Authority, 2018[85]).

Industry groups have also developed guidelines for paid endorsements, in particular those in social media. For instance, Ad Standards, the advertising industry's self-regulatory body in Canada, produced a guidance on disclosures for social media influencers (Ad Standards, 2018[86]). The guide provides a number of examples of 'Do's' and 'Don'ts' in disclosing material connection in social media posts. For instance, the guide suggests that simply tagging a brand in Instagram post may not be considered as a clearly indicative of a material connection (see Figure 16 below).

Figure 16. Example of inappropriate disclosure through tagging



Source: Ad Standars (2018[86])

In addition, the Committee of Advertising Practice released, in cooperation with the Competition and Markets Authority of the United Kingdom, recommendations for influencers (Committee of Advertising Practice and Competition and Markets Authority, 2018[87]). In order to comply with the consumer protection regulation, the guide recommends, for instance, the use of labels including "Ad" or "Advertising", rather than using "Sponsored", "Thank you [brand name]" or just mentioning the brand.

4.4. Tips for businesses

The examples above suggest that businesses should ensure that they properly disclose material connections in endorsements, and that a paid endorsement should be easily

identifiable as a promotional content. Clear and prominent disclosures can ensure transparency of the sponsored posts. Any form of paid endorsement, including text, posting pictures or tagging in images for a specific brand, should elicit a disclosure of the material connections behind the endorsement.

Disclosures should enable consumers to easily understand that an endorser has a material connection with the advertiser. Therefore, disclosures should clearly state any material connection between an advertiser and an endorser that could affect the weight or credibility of the endorsement. Such connection can take various forms, including monetary payment, discounts and other financial benefits, as well as family or business relationships and friendships.

Businesses should consider how to make disclosures clear and conspicuous. The examples above suggest that consumer recognisability of paid-for-content is likely to be improved by a number of factors, including the position (e.g. viewable without clicking or long scrolling), wording, text size and colour of the labels and other qualifying information. Other visual cues such as background colour and border, and the presence of a logo or image can also increase consumer ad recognition. Disclosures should not rely on clicking and not hide in a hard-to-find place. Built-in disclosures in social media platforms may not be enough for consumers to understand that they are seeing ads.

Businesses should present disclosures in the same language as the one predominantly used in the endorsement. It is useful that disclosures are presented in formats that can be easily readable on different types of devices. Attention should be made to maintain disclosures when advertising or marketing is republished in different platforms or media.

5. Protection of children or vulnerable consumers

5.1. Relevant principles

Some types of consumers, in particular children or vulnerable consumers, may be more susceptible to fraudulent or misleading marketing practices online.

In order to protect them from such business conduct, the *E-commerce Recommendation* provides that businesses should:

- *Take special care in adverting or marketing targeted toward children, vulnerable or disadvantaged consumers, and others who may not have the capacity to fully understand the information that they are presented. (para.18)*

5.2. Overview of the issue

Children or vulnerable consumers may have difficulty in identifying advertising, evaluating advertising claims, and understanding the nature of advertised products in online contexts such as video games, mobile applications and social media platforms. It might be particularly challenging for these categories of consumers to recognise that certain types of online advertising, such as "advergames" (i.e. advertisements featuring gaming content) and "brand channels" on platforms such as You Tube, are in fact advertising. They may have less ability to understand that native advertisements and social media endorsements are commercial, not editorial content.

There is also concern for the use of targeted ads toward children or vulnerable consumers, based on collected personal data about them. Although targeted advertising could bring benefits to consumers such as access to personalized content and recommendations, consumers' personal data may also have a negative impact if it is used to target certain groups of consumers, especially those who are vulnerable to deception such as children (Competition Bureau Canada, 2018[88]) (OECD, 1999[89]).

More specifically, OECD (2019[1]) discusses potential risks of use of personal data by businesses to target children and vulnerable consumers in online advertising. It suggests that identifying and targeting children online may be easier than ever in the current environment, and children may find it particularly difficult to identify online content with commercial messages as advertising. Other vulnerabilities could be exploited by businesses through better targeted online advertising, although there is no observation about such targeting of vulnerable consumers at scale.

To date, a number of countries have enacted laws against these advertising practices against children or vulnerable consumers (see, for instance, European Commission (2016[90]).

5.3. Examples of good practice

Enforcement and policy initiatives

A number of consumer authorities took action to protect children from illegal marketing practices. For instance, the Norway Consumer Authority took action against Donna Ioanna, a model agent, for its alleged marketing of model courses in social media towards children. The company allegedly contacted young girls, though social networking services such as

Instagram and Messenger with offers to enrol in modelling courses. The Authority considered this conduct as a direct purchase request to minors, and the children did not give consent to getting advertisements sent directly to them (Norwegian Consumer Authority, 2018[91]).

In May 2018, the FTC and the Food and Drug Administration (FDA) jointly issued 13 warning letters to manufacturers, distributors, and retailers for selling e-liquids used in e-cigarettes, which were available online, with labelling and/or advertising that resemble kid-friendly food products. The products at issue were marketed in packaging that resembled foods and drinks popular with young children, and have scents similar to the juice, cookies, or candies the packages mimic. Some of the products were cited for illegally being sold to minors. Figure 17 below shows examples of misleading packages of e-liquids used for e-cigarettes that mimic actual food products. (Federal Trade Commission, 2018[92]).

Figure 17. Examples of e-liquids misleadingly advertised like food products

Note: The products are nicotine-laced liquid for e-cigarettes that mimic food products packaging.

Source: Federal Trade Commission (2018[93])

The Italian Competition Authority tackled alleged misleading information regarding the costs of a videogame for children. The App – produced by the company Gameloft and available on the online stores iTunes, Google, Amazon – was proposed as "free" without any indication that the full use of the videogame required an in-app purchase at a later stage. The proceedings were closed following commitments by the App developer and the online stores aimed at clarifying the actual costs involved, as well as at enabling greater control over the payment tools associated with the device, in order to prevent unwanted purchases. The Authority took particular account of the decision by the parties to propose commitments that extended to the territory of the entire European Union (Italian Competition Authority, 2015[94]).

The Consumer Directorate General of Portugal took action against a telecommunications operator for using images of a child associated with aggressive language being displayed on its website for its promotion of an online game called "Clash Royale". The pages used wording such as "Destroy your friends without spending NET". In addition, there was also a video featuring a male and a minor child sitting at a public transport stop with a mobile phone playing the game. There was a moment when that adult, making sounds started a movement with the right arm under the child's neck and then with the fists closed, rubbed the child's head with his knuckles (see Figure 18 below). The whole content of the message

was not suitable for advertising an online game, given the use of the virtual game by minors (Consumer Directorate General of Portugal, 2019[42]).

Figure 18. Aggressive image used in ad for an online game

Source: Consumer Directorate General of Portugal minors (2019[42])

With regards to policy initiatives, the Nordic Consumer Ombudsmen clarifies that marketing directed at children and young people will be subject to stricter requirements under applicable consumer protection laws and a lower threshold for when the rules are considered to be violated. It provides a general rule that the younger the target group, the stricter the requirements will be. The position paper also requires any marketing directed at children and young people to include an indicator so that they can understand that they are exposed to advertisements. (Norway Consumer Authority, 2016[60]).

In relation to protection of children from online advertising, the United States Children's Online Privacy Protection Act (COPPA) and the FTC's COPPA Rule prohibits unfair or deceptive acts or practices in connection with the collection, use, and disclosure of personal information from and about children on the Internet. The law applies to operators of commercial websites and online services (including online advertising) targeted to children under 13. COPPA, for instance, requires websites to obtain verifiable parental consent before collecting, using, or disclosing personal information from children (Federal Trade Commission, 1998[95]). The FTC has brought approximately 30 enforcement actions under COPPA against companies that failed to abide by the rule. One example is the FTC's recent settlement with electronic toymaker VTech, for violating COPPA and failing to protect children's sensitive data in connection with its Kids Connect app, used with some of V-Tech's Internet-connected toys (Federal Trade Commission, 2018[96]).

More recently, the FTC obtained a landmark settlement and a $5.7 million civil penalty against the operators of the Music.ly app (now known as TikTok) for violating COPPA. The FTC alleged that the operators were aware that a significant percentage of users were younger than 13 and received thousands of complaints from parents that their children under 13 had created Musical.ly accounts. The FTC also alleged that the operators of the Musical.ly app violated the COPPA Rule by failing to notify parents about the app's collection and use of personal information from users under 13, obtain parental consent before such collection and use, and delete personal information at the request of parents (Federal Trade Commission, 2019[97]).

Examples of business guidance

The Committee of Advertising Practice and the Broadcast Committee of Advertising Practice published a guidance on protecting vulnerable consumers. The scope of the guidance includes advertising directed to children or those sharing protected characteristics (e.g. financial difficulty). Examples of the types of protections provided in the guide include restrictions on advertising for products like alcohol and gambling to those vulnerable consumers. In addition, the guide prohibits online advertising where vulnerable groups are disproportionately targeted as the likely audience for certain ads (Committee of Advertising Practice and Broadcast Committee of Advertising Practice, 2018[98]).

In addition, there are a number of examples of self-regulatory initiatives on online marketing directed to children. For instance, the Committee of Advertising Practice released a guidance on marketing targeted towards children. The guide recommends that online advertisements directed at children under 12 that are highly immersive or significantly integrated in the surrounding context provide 'enhanced' disclosure, through clarifying up-front the identity and commercial intent of the marketer. (Committee of Advertising Practice, 2017[99]).

Furthermore, there is other industry specific guidance in relation to marketing toward children. For example, the Toy Association developed a number of guides on compliance with COPPA and the marketing on, for instance, mobile apps (Toy Association, n.d.[100]). International Chamber of Commerce produced an interpretative guide on its Code of Marketing and Advertising Practice, which includes provisions specific to advertising directed to children. The overarching principle of the Code is that marketing communications must take into account how the communication is likely to be understood by the primary target audience. Specifically to children, the Code provides that adverting should not present prices in a way that children are misled to have unrealistic perception of the cost of the product (International Chamber of Commerce, 2016[101]).

In its guidance on labelling in social media, the Norway Consumer Authority noted that when children and adolescents are the target group for advertising in social media, special care should be devoted to clearly inform them of the nature of advertising in a way that children can understand. In relation to prohibition on directly exhorting children, the guide explains several elements to be considered to determine whether certain advertisements violate the provision. Such elements include; wording of the exhortation to buy or persuade parents, a way that the target ads are conveyed (directly or individually), and easiness to buy the product through advertisements (existence of a direct link in the ads, for instance) (Norway Consumer Authority, 2018[84]).

5.4. Tips for businesses

In order to avoid misleading children or vulnerable consumers, businesses should consider the likely user of an advertised product or service to identify whether and how to design the ad tailored to a special need for them to avoid misleading practices.

Businesses should take special care to ensure that, for advertising they target towards children or vulnerable consumers, they present it in such a way that such consumers can readily identify it as advertising. Businesses should design disclosures in such a way that these consumers can easily understand that they are seeing advertisements.

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