



# COMPETITION LAW ALERT

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### WHAT/WHO ARE SOCIAL MEDIA INFLUENCERS?

Colloquially known as “*influencers*”, these people can be understood to be those who engage in influencer marketing (generally through social media platforms).

Influencer marketing is a form of marketing which involves endorsements and product placements from one company, the advertising undertaking, by an influencer (an individual via a social media account) through posts directed to their social media following. This can be an effective form of marketing for many reasons including:

- The targeted nature of the advertising allows the advertising undertaking access to an identified target audience.
- The advertisements are more relatable to individual consumers.

- These advertisements are cost effective.
- The re-sharing potential and reach for these advertisements is almost unlimited.

In addition to being beneficial to the advertising undertaking, it is beneficial for the influencer as they can get remunerated by the advertising undertaking for making these posts and obtain individual brand sponsorships in their personal capacity.

Due to the international reach of social media posts, influencers should be cautious when conducting themselves to ensure that they do not contravene any regional laws. In an African context, the laws of the Common Market for Eastern and Southern Africa (COMESA) are relevant.

### WHAT IS COMESA AND ITS SCOPE?

COMESA is a regional African economic community between 21 African countries throughout southern and eastern Africa. These member states are: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, eSwatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

In order to facilitate trade between member states, COMESA has enacted regional legislation which binds its members. One such legislation is the COMESA Competition Regulations of 2004 (Regulations).

The Regulations apply to all economic activities between natural or juristic persons within, or having an effect within, the COMESA region.

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CONTINUED

Although the advent of influencer marketing appeared much later than 2004 when these Regulations were promulgated, there are provisions that regulate the conduct of influencers. The primary provisions of which are summed up below.

### CONSUMER PROTECTION DON'TS

Article 27 of the Regulations provides that a person shall not, in trade or commerce, and in connection with the promotion of the supply of goods or services falsely represent that they have a sponsorship, approval or affiliation which they do not have.

This will be relevant where the influencer, while engaging in trade by receiving payment or goods/services in return for their advertisements, does not tag a particular post as an advertised post paid for by the advertising undertaking. This, according to the Regulations, could be considered to be misleading

in that a consumer should not be misled as to whether the particular advertisement (and the message behind it) is neutral or commercial in nature.

### COMPETITION LAW DON'TS

Article 19 of the Regulations provides that it is an offence for competing undertakings to reach an agreement or understanding to: fix prices, restrict the terms and conditions of sale, allocate customers, or collectively refuse to supply goods or services to a potential purchaser. These agreements are more commonly known as cartels.

Although competition law is usually associated with companies and other juristic persons, the Regulations (and particularly the provisions condemning cartels) apply to "*undertakings*". Undertakings are defined broadly enough to include any person involved in

the provision of services. This would include influencers and the advertising services they provide. This understanding seems to coincide with the COMESA Competition Commission's approach where it recently stated that visa processing companies acting on behalf of public bodies should be regarded as undertakings for the purpose of the Regulations. See the link to our article on this [here](#).

This means that influencers, if they receive remuneration or goods/services, could be regarded as undertakings for the purposes of the Regulations. If this is so, influencers, who compete with one another to provide advertising services for advertising undertakings, cannot come together and agree to set rates for their services, standardise conditions, allocate customers between them or collectively refuse to supply services.





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Because influencers can individually be regarded as undertakings in their own right, they are unlikely to be viewed as “employees” and will not fall into the exception that the Regulations provides for which excludes collective bargaining from the ambit of these cartel provisions.

### WHAT ARE THE DO'S?

Before getting to the do's, it is important to note that contravening the articles mentioned in the consumer protection or competition law sections above may result in the imposition of fines up to 10% of annual turnover of the units affected by the conduct within the COMESA region. This would of course be on top of any reputational harm that the influencers may suffer as a result. In an industry where your reputation and social presence are everything, this may have severe consequences.

In order to limit the risk of contravening the consumer protection and competition law articles referred to above, influencers should do the following:

- Always clearly tag the advertising undertaking that is sponsoring the advertisement to indicate that the content is of a commercial nature.
- Act independently from (and not consort with) other influencers when negotiating commercial terms such as price etc. with advertising undertakings.
- Avoid discussing competitively sensitive information such as future advertising undertakings' prices, conditions of services and advertising strategies with other influencers.

With this in mind, is this enough to influence you?

**NJERI WAGACHA AND REECE MAY**



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The Legal 500 EMEA 2022 recommended our **Competition Law practice** in **Tier 2** for competition.

The Legal 500 EMEA 2022 recommended **Chris Charter** as a leading individual for competition.

The Legal 500 EMEA 2022 recommended **Lara Granville** as a leading individual

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