

ICC Marketing Code Revision

ICC Sweden comments

20230630

ICC Sweden is happy to provide feedback to the ongoing Code revision. As a general comment we would like to point out the need of ensuring the Code's universal applicability and the importance of avoiding too detail-oriented regulations, especially in areas where typically other legislation is already in place. The Code's role should not be to go beyond already complex legislation. Rather than complicating the Rules with too detailed provisions, we believe that the current model of producing additional/commentary frameworks based on the general provisions in areas in need of further guidance is a good one to build on. Data/integrity, influencer marketing, and AI should all be potential areas to look at in a near future.

Please see our collected comments below, which have been prepared in close dialogue with the ICC Sweden Marketing & Advertising Committee. These comments have also been added to the clean draft text document, together with minor text edits.

Suggested structural change

We support moving the Code's scope/applicability section from the Introduction. However, we don't think it should go into the General Provisions Chapter as this risks raising the question of applicability (e.g. for Chapters and Frameworks). Current parts of the Introduction vary in their nature, from more theoretical descriptions and background information, to concrete instructions for marketers on how to use the Code. We therefore suggest breaking out the more concrete parts into a new Chapter. That way the General Provisions will only consist of the actual articles, which will make it easier to use.

According to our proposal, the structure of the Code would be as follows (with no specific order within the given sections):

- Introduction: Responsible Marketing; Purpose; ICC Code's relation to other codes; Important changes; Updates, etc.
- Section 1: Definitions; Scope and application; Interpretation; Implementation; Responsibility (currently Article 26)
- Section 2: General Provisions
- Section 3: Detailed Chapters

Chapter: General Provisions and definitions on advertising and marketing communication

1. Definitions:

I. **Kidfluencers – Suggestion: Remove.**

Per definition, 'kidfluencer' is covered under the 'influencer' umbrella. It is important that the list of definitions is kept concise, and defining various formats of an already defined area (i.e. 'influencer'), goes too much into detail. We would instead like to suggest an addition to the 'influencer and influencer marketing', reflecting that influencers can be of all ages and, depending on who the influencer is, some influencer marketing may be expected to have larger effect on children and teens, in which cases, caution should be taken in line with the General provisions.

II. **Influencers and Influencer Marketing**

i. **Suggestion: add definition of 'influencer'**

There is currently no real distinction between the individuals and entities mentioned, i.e. influencers, creators, brand ambassadors, organisations, machine-created or controlled representation i.e. an avatar; and yet the last paragraph only seems to apply to "influencers". Under "Implementation" other actors are mentioned without a clarification whether they are influencers or not (e.g. bloggers, vloggers). The same goes for art 28. A clear definition and stringent language is important also to clarify the various actors' responsibility obligations under art 28.

ii. **Suggestion: Clarification/Additional writing**

Does this definition limit compensation to specifically being related to the promotion in question, or does it include other financial incentives? Keeping in mind current developments where entrepreneurs/employees share updates from the workplace/product line in their private media channels without specific compensation other than the ordinary salary. While most employees are no brand ambassadors, the actual commercial interest to publish content in private channels may vary widely across the organisation. Some functions would be reasonable to believe to have a larger incentive to market the company's products, such as share holders, CEOs, Marketing directors who would benefit from increased stock prices or bonus systems.

Suggested rewrite/addition: *[They include any human-controlled online profile that is active on any online social media platform. Content uploaded by influencers is defined as a marketing communication only if the influencer has received some form of compensation from the brand, whether financial or through other arrangements.]* **Employees uploading content to their private channels, should fall under the definition of influencer and the content should be defined as marketing communication if a financial incentive to do so exists. General salary payment does not constitute such incentive.**

III. **Addition: Claims**

Adding a definition of what constitutes a claim would be very helpful to rationalize the wording of the Provisions, as it would remove the need to continue the current

practice of listing all elements that may go into the Article in question. Defining 'Claims' as the balanced assessment of the overall impression of all elements of the published content, inter alia (non-exhaustive): statements, audio or visual treatments, materials, we believe would be a great way to streamline the text. This is further elaborated on in our comment under Article 6.

2. Implementation

- I. Suggested clarification added directly into the text

3. Scope and application

I. Suggestion: remove text

The current writing of the second bullet point does not correspond to the definition of influencer marketing where compensation in some form is a prerequisite. We have suggested striking parts of the text.

II. Minor text edits

4. Provisions

- I. **Article 1:** Suggestion to add writing regarding public trust and confidence in marketing **or commerce as such**, keeping ICC's overarching mission in mind.

II. Article 2:

- i. What does 'status' entail? Marital status? If this addition has been made to correspond better with the Diversity and Inclusion Paper, why is not beliefs, stereotyping or social background included? One suggestion would be to discard the listing of potential areas of discrimination, and refer to the Diversity & Inclusion Paper instead. That way the Code stays relevant also in relation to emerging areas, and avoids unnecessary obstacles if the Paper is updated before it is time for the next Code revision. However, this depends on where the scope of discrimination is originally defined.

Otherwise clarification of the meaning of 'status' is needed. We would also suggest adding 'stereotyping' to the provision.

Option 1:

"Marketing communications should respect human and animal dignity and should not incite or condone any form of discrimination. Marketers should be mindful of diversity and inclusion and show consideration for the adverse impacts of stereotyping and objectification."

Option 2:

"Marketing communications should respect human and animal dignity and should not incite or condone any form of discrimination, including that based upon ethnic or national origin, religion, gender, marital status, age, disability, or sexual orientation. Marketers should be mindful of diversity and inclusion and show consideration for the adverse impacts of stereotyping and

objectification."

- ii. Many current complaints pertain to issues around body image, and the negative effect marketing may have on consumers when only showing one type of bodies, etc. Although technically part of the 'stereotyping' umbrella, it may be useful to consider including 'body image' explicitly in the Provision as well.

- iii. **Suggestion: Consolidate Article 2 and Article 25**

The placement of Article 25 currently feels isolated and out of place. Since these are areas typically discussed under a CSR-umbrella, a consolidation would create a better harmony among the provisions.

III. Article 3:

- i. What does 'materials' refer to in this context? Also noting that 'claim' is not included here, but it is in Article 5. A choice should be made to either add claim here, or remove it from Article 5 in order to keep language unison. Depending on outcome of our suggested definition of claim, this question could become void, as the list of elements would be replaced by 'claims'.

IV. Article 4:

V. Article 5:

- i. Some text edits + 1 footnote proposed directly in the text.

VI. Article 6:

- i. We believe that it would be beneficial to define what constitutes a claim.
"Claim: the balanced assessment of the overall impression of all elements of the published content. This includes, without being exhaustive: statements, audio or visual treatments, materials."

Option 1:

Add a sentence under "Interpretation".

or

Option 2:

Add under "Definitions". If added under this section it would have the added benefit of streamlining the Code as the current lists of elements would be made superfluous.

- ii. Article 5 and 6 need to correspond regarding their applications. Now Descriptions and illustrations have been deleted from article 6, leaving only claims. We see a risk that article 6 is perceived as having a more narrow scope than article 5. We assume this is not intended. A solution could possibly be if both covered claims (defined broadly).
- iii. Second para, last sentence (*"In the absence of required substantiation the claim should **normally** be regarded as misleading."*). **Suggestion:** Remove 'normally'. We would argue that if it's a required substantiation that is missing, the claim is always to be seen as misleading.

Or:

If kept in the Code, there may be a need to elaborate on what would constitute an "unnatural" situation, e.g: *"In some cases, for example regarding a very competent professional group of consumers, they are not considered to be misled by a certain unsubstantiated claim."*

- VII. Article 7: Identification and transparency:**
- i. Add influencers' own brand/products.
 - ii. As a response to the increased use of integrated private/commercial and editorial/commercial channels, we suggest adding "This is especially important in relation to channels with mixed content".
- VIII. Article 8:**
- IX. Article 9:**
- X. Article 10:**
- XI. Article 11:**
- i. Avoid these types of long footnotes. We suggest either
Option 1:
Add a reference to the Paper in the provision, leaving out the detailed summary.

or
Option 2:
Include the summary of the principles in the main provision. We acknowledge that this option could cause a risk of fragmentation should the paper be updated, leaving the Code outdated on this specific matter. Our preference is Option 1.
- XII. Article 12:**
- XIII. Article 13:**
- XIV. Article 14:**
- XV. Article 15:**
- XVI. Article 16:**
- XVII. Article 17:**
- XVIII. Article 18: Influencer Marketing – 18.1 General Principles**
- i. 18.1 is overall a good section, but we would like to reiterate the comment made in relation to the definition of 'influencers and influencer marketing' that clarification is needed regarding when employees publish content about the company or product in their private channels. When does private become commercial?
 - ii. **Para 1 and 4: Suggestion to consolidate to something like the following:**
All influencer marketing communications should be designed and presented in such a way that it is immediately identifiable as such. Identification should be appropriate to the medium and message. Identification disclosures should be prominent, clear, easily legible and appear in close proximity to the commercial message where they are unlikely to be overlooked by consumers. Disclosures should not be obscured by other content. A disclosure on websites, in the terms and conditions at the end of a piece of content, or in

the 'see more' section is not sufficient. In the case of mixed content the marketing communication element should be made clearly distinguishable as such, and its commercial nature should be transparent.

iii. **Second para of 18.1: Suggestion to remove.**

This is repeating what is already mentioned, verbatim, in the definitions and scope. We do not see the need to repeat it here.

iv. **Suggested addition:**

A clear statement should be made regarding the strong need for truthfulness and moderation when using influencer marketing for sensitive products and services, such as alcohol, online gaming, consumer credits and environmental claims. Due consideration must be taken in these cases, especially when children and teens are the target audience.

XIX. 18.2: Kidfluencers

- i. Too detail-oriented, and diverges from other provisions by setting out from a kidfluencer protection angle, not consumer protection. We believe this text needs a general review, but would also want to specifically point out that the text on "protecting privacy" of the kidfluencer becomes self-contradictory, as the core purpose of the influencer channel is to reach a large audience.

XX. Article 19:

XXI. Article 20:

XXII. Article 21:

- i. 21.1: In relation to the last bullet point under General principles, (*"Children or teens should not be encouraged to advertise or promote a product themselves via their own social media channels, in exchange for a reward."*), we wonder how this plays out in relation to kidfluencers? The aim of the principle is good, but the relation children/teens–kidfluencers needs to be balanced, as well as the fact that children/teens are, in fact, allowed to do business as long as they have parental/guardian permission.

21.4: Suggestion to add "or teens" in the third paragraph.

21.5: Suggestion to clarify that this regards ICC's regulations. Also adding an inter alia, creating leeway should new frameworks in emerging areas be published before the next Code revision.

XXIII. Article 22:

i. **Suggestion: Narrow the Scope and Clarify:**

Art 22 is drafted in a highly comprehensive and detailed manner. It could well be described as a compromised version of the GDPR and in such aiming to cover all sorts of data processing (see for example art 22.2). The length and the extent of art 22 risk implying quite comprehensive and specific regulations on companies, and it should be analysed whether it is for ICC to establish such detailed rules. With the exception of the article on children and teens, there is no other General Provisions that have this length and level of detail. As this is a global code it must also be considered that it should be possible to apply in all jurisdictions.

We therefore suggest that art 22 should cover only the main principles and leave any finer details for Chapter C. As the topic of the code is about marketing and marketing communication, it might be wise to limit the scope of art 22 to the topic of the code.

Suggested drafting:

When collecting and processing personal data from individuals for the purposes of this code, care should be taken to respect and protect their privacy by complying with relevant rules and regulations.

All processing of personal data for the purposes of this code must:

- *respect and value the privacy of the individuals,*
- *be adequate, relevant and not excessive,*
- *be clear and transparent with individuals about their personal data collection, use and disclosure practices,*
- *respect individual's preference including the use of their personal data for marketing communications and that their personal data may not be transferred or made available to third parties for their marketing purposes,*
- *be protected from unauthorized access, modification, misuse, disclosure, or loss by the use of sufficient safeguards such as technical and procedural.*

ii. **Art. 22.1 Transparency of data collection:**

Like with kidfluencers, this provision goes into too much detail. One key audience of the Code is communication/marketing professionals, and we need to ensure that the provisions are suitably adapted to enabling and simplifying their work. Including provisions of e.g. technical testing we feel is unnecessarily detailed.

It is also very much Eurocentric, but goes even further than GDPR in relation to communication obligations. A balance must be struck between integrity and the right to communicate, the core of which is that if a consumer declines to receive marketing communications, that should be respected.

iii. **Art. 22.4: Children's Personal Data**

This is too detailed for the General provisions. We suggest changing the article to follow the lines of *"when relating from individuals known or reasonably believed to be children, due consideration and action need to be taken"*.

It should also be noted, that teenagers of today have email and phones and it is not uncommon, nor unethical, for teenagers to sign up for a general newsletter (marketing) via email. The suggested drafting (*"Personal data*

collected from children should not be used to address marketing communications to them, the children's parents or other family members without the consent of the parent") is perhaps not compatible with this. In several countries 13-year-old kids may give a legally valid consent regarding registering an account on a social media platform, where they will be exposed to marketing messages. As the marketer in both cases would need to abide by the stricter provisions connected to a younger audience, it is therefore worth considering if there is a difference between following an influencer on a platform and receiving marketing via email (after consenting to this).

As for profiling (Bullet point no 7: *"Marketers should not profile children or teens for advertising purposes"*), consider if this needs to be lightened up a little.

XXIV. Article 23: –

XXV. Article 24: –

XXVI. Article 25: Environmental behaviour

- i. This feels isolated at its current placement.

Suggestion: Move to Article 2 – Social Responsibility.

XXVII. Article 26:

- i. This too comes too late in the general provisions. As it is also more prescriptive, we suggest that this is moved to the proposed introductory chapter, together with definitions, scope and implementation.

XXVIII. Article 27: –

XXIX. Article 28: –

Additional comment:

1. **Cross-border communications – origin and jurisdiction – Suggestion: Rephrase**

Although this section is yet to be revised, the Swedish working group has discussed the principles of origin and jurisdiction and the implications the current wording has on the Code, and would like to comment as follows:

The section goes into unnecessary detail, and we are not sure it should really be ICC's role to favour either of the principles, especially given that it often varies between channels what principle applies. This is rather a question of legislation. We understand that ICC pointing out preference for a certain principle is supposed to serve as guidance for self-regulatory organisations. However, in reality actors under complaint have used the two principles depending on which serves their purpose best. If the text is kept in the Code, this should be taken into consideration

We suggest the section being kept to more general terms, i.e. inform of the two different principles that may apply depending on jurisdiction and include a statement on the Code's universal applicability ("The Code applies at all times and to all marketing communications, regardless of principles pertaining to origin/effect country. On top of this rule, there may be local regulations to adhere to").