

LEGAL ASPECTS FOR THE REGULATION OF SOCIAL COMMERCE IN PANAMA

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ABSTRACT

Social commerce is a new model of electronic commerce, which uses social networks to sell products and services directly to consumers. This is something new, and today it is having a great growth, due to the increase in the use of social networks and the impact of the Covid-19 pandemic, which contributed to merchants looking for new sales channels to obtain income. . Users spend more time on social networks such as Instagram, Twitter or Facebook to make various purchases of products or services that the accounts of these networks are publishing. Social networks are offering their resources to entrepreneurs and merchants to sell products or services, with different tools available and access to millions of users from Panama and the world, who are interacting and consuming the content they have every day; giving, an average profit for the exchange of goods and services. In the Republic of Panama, its legislation currently does not contemplate this new business model, which makes its organization, control and development difficult, causing the impediment that there are clear rules that help Panama have a safe and friendly environment for the realization of this new activity. For its regulation, it is necessary to create laws that focus on its development, thus avoiding situations such as tax evasion; as well as the protection of personal data, purchase guarantees, buyer reimbursements, billing, shipments of merchandise, advertising, giveaways and raffles, protection of intellectual property and related rights, among other aspects more than current Panamanian laws do not cover.

Keywords: e-commerce, law, regulation, social networks

INTRODUCTION

The “*Social Commerce*” includes all the processes of a sales transaction, from product promotion to after-sales service. Merchants use all kinds of creative publications to highlight their products in these media and provide consumers with more information about them. They offer expert advice and support to attract potential customers. Also, they encourage ratings and comments for feedback to improve brand awareness and exposure; obtaining more information about consumers, such as their tastes or preferences, the region where they live, their age, gender; different data provided by the tools available in social networks that greatly facilitate a better approach to their customers which generates higher sales.

Although social commerce and e-commerce share some similarities, they are certainly not the same. On the one hand, e-commerce interactions are managed through commercial websites and mobile apps. Whereas interactions in social commerce take place in the environment of social networks such as Facebook and Instagram, to name a few. E-commerce also typically involves multiple steps, making the buyer’s journey longer. With social commerce, a transaction is completed in just three steps.

The technical advantage of social commerce is that you don’t need to create your own online store or integrate it with social networks to make sales. Everything works within the framework of social media platforms. For this reason, social commerce is an independent distribution channel in addition to other types.

Because it is a new model of electronic commerce, Panamanian legislation is not adequate in regulating it, since social commerce has a short creation date; however, it has an exponential growth that was more marked by the pandemic of Covid-19, which prompted the traditional merchant and entrepreneurs to migrate their business to the digital age, taking advantage of social networks as a channel to sell their products and services. This caused that due to the immensity and diversification of social networks, the State cannot control and regulate in its entirety, the commercial activities of its nationals due to the large gaps and few regulations that Panamanian regulations have, which are focused on matters of traditional trade and electronic commerce of websites.

The State must watch over the correct and healthy commercial activity of its nationals, as well as those who intend to participate in social commerce to comply with a series of requirements, thus giving a projection of more confidence and security on the part of consumers, preventing in

this way the lack of transparency, the leakage of tax revenue, prevention of illicit and criminal activities.

CURRENT SITUATION OF SOCIAL COMMERCE IN PANAMA

It is well known that electronic commerce is increasingly booming, and the Republic of Panama does not escape from this reality. This indicates that what has accelerated its rapid growth is the adoption by the Panamanian population of Internet consumption and social networks, as well as the COVID-19 pandemic that had an impact on both the world economy and the Panamanian economy.

In the publication of *Martes Financiero* (2020), the relevance of social commerce is presented: Luis Manuel Hernandez, CEO founder of Pixel Ecom, a company that manages technology platforms for e-commerce and digital marketing, indicates that the crisis has forced companies that were not thinking digital to reinvent themselves and look for alternatives to take advantage not only of trade through own websites, but with the exposure of social networks to market their goods and services.

There are people serving customers through Whatsapp, others through Instagram, others through Facebook. This crisis put everyone equally and allows people to have access to all platforms.

In the same note, it indicates that in Panama there is at the close of January 2020 of 2.62 million internet users, according to Hootsuite's consolidated report, which compiles data from the Public Services Authority, Alexa and telecommunications operators.

On the other hand, *Metro Libre* (2019), in its headline "*In Panama there is no regulation on sales through Instagram*", exposes that:

Gabriel Perez, from the Authority for Consumer Protection and Defense of Competition, asserted that sales through social networks are not regulated by the ACODECO law, since the entity only carries out inspections to businesses that have physical offices in our country.

Perez emphasized that they are not in charge of inspecting people who undertake this business. However, whoever has been a victim of fraud or swindle in his purchase, may file a complaint with the Public Prosecutor's Office.

With the opinion of an official related to issues of commercial activities, we are oriented to

the following that at present there are activities and businesses that are not very well monitored.

CURRENT LEGAL BASIS FOR ELECTRONIC COMMERCE

Law 51 of July 22, 2008, published in Official Gazette No. 26090, *“Which defines and regulates electronic documents and electronic signatures and the provision of technological storage services for documents and certification of electronic signatures and adopts other provisions for the development of electronic commerce”*, as amended by Law 82 of November 9, 2012, establishes the regulatory framework or legal basis for the development of e-commerce in the Republic of Panama.

This regulation outlines the principles necessary to carry out electronic commerce in Panama. In its article 2, it defines different terms related to the law; however, it does not contemplate the concept of *“social commerce”*, nor its synonym, *“electronic commerce in social networks”*; it only defines the concept of electronic commerce as *“any form of transaction or exchange of information for commercial purposes in which the parties interact using the internet, instead of doing it by direct physical exchange or contact”*. This definition is very generic and broadly applicable.

When analyzing the content of the regulation, the mechanism or in the development of the activity, it is not clear by law how the commerce is developed by social networks (not to be confused with e-commerce), where the management, the procedure, the space where it is done is different from what is done in a common website. However, although this article is very general, it helps to have a basis for any activity that is carried out on the Internet, the Panamanian authority has legal authority to monitor and regulate it.

SOCIAL NETWORKS: ENVIRONMENT WHERE SOCIAL COMMERCE OCCURS

a. Operability

Social networks are part of the Internet; however, it has some particularities from the rest of the Internet. Social networks are considered private goods, we can understand this through the research carried out by El Universal (2021), where they express that *“social networks are not public services, unlike radio, television or telecommunications that use the radio electric spectrum, analysts agreed; they are private services of companies that have a global presence”*.

In Panama there is no legal norm that defines the legal figure of Social Network as such; that is why Spain was taken to understand what its legal figure is. In this sense, such services should be

considered as “*Information Society*”, as established by Spanish Law 34/2002, “*Law of Information Society Services and Electronic Commerce*”, where Agustinoy and Monclús (2019) summarize the following:

Said law constitutes the basic regulatory framework for these services, defining the minimum legal parameters that social networking services must comply with. Likewise, it should also be taken into account that the essential element on which social networks feed are precisely their users. These, through their profiles and communications, constitute the defining core of this type of networks. Thus, the personal data that users publish, share and consult on social networks is the essential fuel on which they are based.

In order to understand what an “*Information Society*” is, the Ministry of Information and Communications Technologies of Colombia (2021), defines it as:

One in which technologies that facilitate the creation, distribution and manipulation of information play an important role in social, cultural and economic activities must be person-centered, inclusive and development-oriented, in which everyone can create, consult, use and share information and knowledge, so that individuals, communities and peoples can fully employ their potential in promoting their sustainable development and improving their quality of life.

In the Republic of Panama, as mentioned, the figure of social network is not defined, that is why thanks to what is contemplated in the Law 34/2002 of Spain, gives us the clarification of what is its legal figure.

b. Terms of use

Users who want to access social networks must comply with the terms and conditions determined by the companies that own them, since they have total control over the operation and activities carried out in them. For example, when reviewing the “terms of use” page of Instagram, Facebook, Inc. (2021), indicates that “*the Instagram service is one of the Facebook Products that Facebook, Inc. provides to you. Therefore, these Terms of Use constitute an agreement between you and Facebook, Inc.*”

This tells us that Instagram is considered a product of Facebook Inc. which makes it a private property of the company. The service provided by this social network includes all the products,

features, apps, services, technologies and software to bring people and things they love closer together.

c. Compliance with laws

As a reference, the following will be used as stated in the section called “*Community Standards*” on Instagram by Facebook, Inc. (2021), which states the following:

On Instagram, activities or people that support or praise terrorism, organized crime or groups that promote hate are not accepted. Also prohibited are offers of sexual services and the sale of firearms, alcohol and tobacco products between individuals, as well as the purchase or sale of illegal or prescription drugs (even if they are legal in your region). The sale of live animals between private individuals is also prohibited, although physical stores may post such offers on Instagram. It is absolutely forbidden to coordinate the sale or poaching of endangered species or their parts.

The companies that own social networks such as Facebook, Inc. cooperate and contribute with the authorities of the countries to preserve and ensure that their systems are not used for illegal acts by the users that make it up, or prevention that is facilitated by them, violation of local laws of the countries where their users are. By accepting the terms and conditions of each social network, the user agrees to release the social network (the company that owns the social network) from liability for any intentional misuse of it.

COMMERCIAL ACTIVITY IN SOCIAL NETWORKS

For the realization of social commerce, it is necessary to understand what it refers to and how the activity is performed, being the basis of this, the act and its legality for a correct realization, for such reason, the terminology and regulations must be presented. The regulation seeks that those interested in participating in social commerce, comply with the law, and this is based on the Acts of commerce.

The question would be how Panamanian authorities can know if a Panamanian citizen is performing acts of commerce in national territory, using a social network such as Instagram. The Code of Commerce of the Republic of Panama, in its article 2, states that “*all acts that refer to mercantile traffic will be considered acts of commerce*”, in the same article, it is contemplated that acts of commerce will be those included in the aforementioned Code and any others of analogous nature.

The merchant is one of the main actors of commerce, and that is why the Code of Commerce in its article 28 defines him as *“the one who, having legal capacity, performs by profession and in his own name acts of commerce.”* With this we can understand that the merchant is the person who performs acts of commerce and makes them his profession, acting in his own name and on his own account.

On the other hand, the consumer. Law 45 of October 31, 2007, which dictates rules for consumer protection and defense of competition, in Article 33 defines Consumer as the *“natural or legal person who acquires from a supplier final goods or services of any nature.”*

It is important to identify the parties involved in the commercial activities to be carried out in social networks, because if it is not identified if one party is the trader or economic agent and the other party is the consumer, the law could not be applied correctly, so that there is order, security and equality of conditions.

TERMS AND CONDITIONS OF SALE IN SOCIAL NETWORKS

In e-commerce, the terms and conditions describe, the responsibility and commitment of the parties, the terms of delivery, shipping, refunds and payments, exclusions of liability and terms to give, to do and not to do that is established; also, it specifies the choice of law and jurisdiction that covers it; this will change the case of the legal system itself, so you will not find yourself negotiating some unknown foreign law that interprets the terms in case of legal problems.

On the website of the Ministry of Commerce and Industry of Panama, explains that:

The terms and conditions of use are a set of statements that make up a legal document by which you as a provider of commercial services over the Internet establishes the rights and obligations that your users will incur when interacting through your website. In this document you as a service provider must explain aspects such as:

- Accepted forms of payment
- Method of delivery of merchandise
- Product warranty
- Procedure for submitting claims
- Any other aspect relevant to your commercial activity.

The aforementioned is simple to apply if you have a website, as indicated in Law 51 of July 22, 2008, as amended by Law 82 of November 9, 2012, which specifies in its Article 71 one of

the functions that the General Directorate of Electronic Commerce has, which is to “*promote the voluntary and free registration of companies that carry out commercial transactions through the Internet, in accordance with the legislation in force*”.

The non-obligatory nature of the merchant that must register its online sales activity, prevents the consideration dictated by Law 51 of July 22, 2008, amended by Law 82 of November 9, 2012, the e-commerce that such law contemplates, is directly focused on websites and therein lies the problem of the presentation of aspects such as company data, terms and conditions, privacy policy, refunds, shipments, among others.

CONSUMER PROTECTION AND DEFENSE

In the commercial relationship, security and trust between the parties must always be present; however, in certain situations where consumers are vulnerable, there are the necessary tools to know what they can and cannot do, what guarantees they have and other aspects necessary for a reliable purchase.

a. Protection of personal data

The protection of personal data in the care, administration, storage and handling of data supplied by customers. Data protection is an area of the law that everyone involved in e-commerce must be aware of. If you intend to collect personal information about customers, you must comply with the provisions of Law 81 of March 26, 2019, “*On Personal Data Protection*”, Official Gazette No. 28743-A.

There is currently a correct mechanism regulated by law, where the service provider must clearly identify what type of personal information it will collect from the users who visit it, with whom it will share the information it collects and how it will use and store that information. All this is vital for a fair, safe and free electronic commerce; since, they provide the necessary basis so that there are no situations of fraud or other illegal acts that may affect consumers.

b. Consumer Protection and Defense

The Authority for Consumer Protection and Defense of Competition (Acodeco) is the authority in Panama that protects the consumer in electronic purchases, regulated by Law 45 of October 31, 2007, “*Dictates Norms for Consumer Protection and Defense of the Competition*”. As a fundamental principle, Acodeco will always be present in the relationship between an economic

agent and a consumer. With this law, the State is committed to ensure that the goods sold and the services provided in the market comply with quality, health, safety and environmental standards.

The consumer always seeks to be protected against the products and services he/she acquires that represent a risk to his/her life, health or safety; that is why Acodeco, with this legal basis, has the necessary tools so that the consumer can be protected in his/her economic interests, through equitable and fair treatment, in all consumer relations, and against coercive commercial methods or that imply lack of truthfulness or erroneous or incomplete information about the products or services.

The importance for consumers to be prudent when purchasing any product. They should make sure that the company or economic agent has an established physical address or duly accredited representatives in Panama. Every consumer who buys should demand his invoice or voucher that will guarantee his purchase and other documents, which may be used as a guarantee of the purchase. The consumer must have this, since if he/she files a complaint or denunciation this information will serve as evidence for his/her case.

RIGHT OF WITHDRAWAL OR CANCELLATION

It is one of the most important rights of the consumer, the consumer when exercising it must communicate this intention to the seller, who, having received this communication, must refund the price, which will be done using the same method of payment adopted for the purchase. In the Republic of Panama, Law 45 of October 31, 2007, does not oblige economic agents to return the money to the consumer dissatisfied with the purchase of a product, except in certain exceptions. The right of withdrawal only applies in Panama for those goods that are marketed at home, as stated in Article 71:

In cases of home sales of goods, the consumer has the right to revoke the acceptance during the term of three business days, counted from the date on which the good is delivered or the contract is entered into, whichever occurs last, without any liability whatsoever. This right cannot be waived or renounced.

In other cases, even if the consumer has not used the merchandise, the economic agent is not obliged to receive it and much less to return the money. Similarly, the law does not state anything about withdrawal, in purchases made over the Internet.

As a reference, the Royal Legislative Decree 1/2007, of November 16, 2007, approves the revised text of the General Law for the Defense of Consumers and Users and other complementary laws, which provides for such right. Article 68 of the regulation states that:

The right of withdrawal from a contract is the power of the consumer and user to leave without effect the contract concluded, notifying the other contracting party within the period established for the exercise of that right, without the need to justify its decision and without penalty of any kind.

This practice is being very common in different parts of the world, for example, in the neighboring country Colombia, in Law 1480 of 2011, includes the retraction in electronic commerce, in Article 47:

In all contracts for the sale of goods and provision of services through financing systems granted by the producer or supplier, sale of timeshares or sales using non-traditional or distance methods, which by their nature should not be consumed or have not begun to be executed before five (5) days, the right of withdrawal by the consumer shall be understood as agreed. In the event that the power of withdrawal is used, the contract shall be terminated and the money that the consumer had paid shall be refunded.

In Panama, as mentioned above, there is no right of withdrawal in our legislation, except for door-to-door sales, but such sales are not the same as e-commerce sales, much less sales through social networks.

ADVERTISING IN SOCIAL NETWORKS AND THE USE OF PROFILES FOR ITS DEVELOPMENT

The growing knowledge of the user through his profile in a social network with the consequent use of personal information falls within the area of personal data protection, it should not be forgotten that the exploitation of social networks for advertising purposes will also be subject to the own regime of the regulations governing advertising. Article 59 of Law 45 of 2007, expresses an important aspect of the management of advertising stating that:

Advertising must clearly indicate the conditions of the offers, promotions, discounts, rebates, discounts, special conditions or similar circumstances offered. All advertisers are obliged to comply with what is offered in the terms contained in the advertisement. Advertisements of articles that imply that the product has qualities, characteristics or benefits that it lacks will not be allowed. Consumers affected by misleading advertising

shall have the right to terminate the sales contract, each party returning what it has received.

This means that, even though there is no indication of advertising on social networks as such, the merchant must be aware that the publication placed on the social network has the purpose of attracting the consumer with the advertisement, with the purpose of acquiring the good or service.

The constant uses that are made in social networks, today induces to clarify the few doubts as to whether a profile on Instagram or twitter its publications have the purpose of inducing the purchase by users. These doubts, however, are given with respect to the possibility that the profile of a particular user can equally be considered as an advertising medium. According to Agustinoy and Monclús (2019), we can understand that:

In some cases, the answer will be quite clear, for example, in the case of celebrities who use their profile to promote this or that brand that sponsors them. This conclusion may be extended to the profile of a particular user if it is being used for the purpose of clearly transmitting an advertising message in the sense established by Spanish law (if, for example, through such profile a user communicates messages of a commercial nature referring to a certain product or establishment).

In traditional advertising, the revision of texts and advertising materials is generally carried out quite exhaustively, especially since any modification to a television commercial or a printed brochure entails considerable expense. However, through social networks, content is generated very quickly (this is, in fact, one of the main advantages of the advertising use of social networks), so the possibility of error can increase. In this regard, it is important to insist on the relevance of complying with the provisions of Article 59 of Law 45 of 2007, especially in view of the economic consequences that may befall the merchant.

GIVEAWAYS AND RAFFLES

The term Giveaway, the Digital Strategy Agency, on its website arimetrics.com, defines it as *“a prize or gift that brands award to the winner of a contest generally conducted on social networks and through which brands seek the achievement of a specific goal or objective.”* Examples include sharing content, tagging a friend, liking, commenting, guessing the answer to a question, completing a form, among others. Followers and users are simply asked to perform undemanding actions.

The “*Giveaways*” is regulated by Article 4 of Decree Law No. 2 of February 10, 1998, which states that it corresponds to the J.C.J. (Gaming Control Board), in each particular case, when the game is given by means of luck and chance. It is clear that the same regulation in Article 5 mentions that the J.C.J. must authorize the activity when it is carried out in the territory of the Republic of Panama; however, it establishes that it is also supervised and regulated by the authority if bets are originated abroad, through electronic means, as well as other means of remote communication.

For this reason, the giveaways and sweepstakes that the accounts in social networks carry out must be authorized by the J.C.J.; otherwise, something illegal would be carried out, giving the authority the responsibility to sanction for such act.

INTELLECTUAL PROPERTY

In e-commerce this is of great importance, since the improper use of an intellectual property can have serious repercussions to its author that would affect his finances, his image, his professionalism; because, in its great majority, everything that is observed on the internet and social networks is under someone’s authorship. It is, therefore, your implication in understanding why it is so important, since, in today’s digitalized world, it also has rules, and they must be respected.

Nowadays, companies depend more and more on their ideas, creations, knowledge and innovations. In Panama, one of the first regulations concerning ownership was Law No. 15 of August 8, 1994, Official Gazette No. 22598, “*Whereby the Law on Copyright and Related Rights is approved and other provisions are enacted*”, and Law 64 of October 10, 2012, Official Gazette No. 27139-B, “*On Copyright and Related Rights*”. With these norms, legal tranquility was given to the authors of our country, so that their property over these intangible assets is guaranteed, giving a commitment to ensure their compliance.

CRIMES COMMITTED ON SOCIAL NETWORKS

It is important to mention the existence of new criminal modalities products of the digitalization of our society, where people use anonymity and maintain a dynamic along with these evolutions, new types of crimes are created that the penal code must contemplate.

In a publication of the newspaper Metro Libre (2020), it indicates that in Panama crimes with the use of technology have increased by 130%. Figures of the Public Ministry show that from January to October 2020, a total of 2,888 cases related to the crime of swindling have been

registered, for which they urge the population to file the pertinent complaints.

In the same journalistic note, the prosecutor of Computer Crimes, Ricaurte Gonzalez, mentions the following:

There is a lot of identity theft, it is not a crime itself. That is to say, that another person uses your data through technology, using the same phone, your social network, with your profile image that presumes it is you and thus be able to commit the crime by reaching your contacts.

There are new modalities of cyber crimes, which the Criminal Law does not contemplate and what causes those authorities cannot prosecute such facts remaining in impunity. It is, therefore, that the draft bill N°257 *“That creates the police unit specialized in computer crimes in the Republic of Panama and modifies the Criminal Code”*, presented on January 26, 2021, proposed by the H.D. Raúl Fernández, which in its explanatory memorandum highlights that “the present law seeks to typify new cybercrime conducts, so that we not only have an entity specialized in combating cybercrime, but also have the appropriate regulations to punish such actions”.

With the presentation of this draft bill, it is possible to understand the importance and impact of this issue, which is presented to the National Assembly for discussion, which is necessary, not only for a serious or protected electronic commerce for the parties involved, but also for the entire population in general.

CONCLUSIONS

It is notable that the regulation of social commerce is an issue that can generate debate, since it is a new business model, where there is little information about it and lacked a solid legal basis, so that the Panamanian authorities can provide oversight and supervision, ensuring free trade, trust and security among stakeholders.

The existence of ventures that are dedicated to trade through Instagram or other social network, without any kind of compliance or report to the State in its operation, finances, legality, will surely affect the consumer; since it can fall into a scam, breach of product warranty by the seller or if the seller is in Panamanian territory so that Panamanian law can be applied.

An important pillar is the confidence and security for the exchange of goods and services to

be fair and prevail a commitment between the seller and buyer. The regulation by the authorities, give faith to the guarantee that the dynamic and changing commerce needs, counting with an appropriate norm for its realization, organization and regulation, that is friendly with the generation of new enterprises and consumers willing to participate in social commerce.

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