



ELSA the Netherlands
Moot Court
Competition

CASE OF THE COMPETITION

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Contact

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Elena Paulsen, Bennet Classen and Others v Authority for Consumers and Market

1. The applicants are Elena Paulsen, Bennet Classen, Chris Mueller, Anne-Sophie Loew, and Omar Hafeez. The respondent is the Authority for Consumers and Markets (hereinafter ACM).
2. Elena Paulsen (hereinafter Elena) is a 16-year-old dancer and musician who started making TikTok videos in 2019; because she was an early member of the community, she quickly gained a significant number of followers. Her big break came in March 2020: Her followership grew to several million overnight as a result of a viral TikTok dance that she filmed while in quarantine. Her sudden fame was quickly noticed by a large number of companies who reached out to her asking for a marketing cooperation. Shortly after this, she entered into a brand deal with Chocotella, a company producing a vegan and palm-oil free chocolate spread. Chocotella pays Elena EUR 500 per month, part of which she uses to create new videos. The left-over money, she keeps in a bank account to finance studies at a top Business University once she graduates from High-School.
3. Bennet Classen (hereinafter Bennet), 20 years old, has been entertaining his followers on his YouTube-channel 'Super-Ben' by filming challenges, pranks and other activities with his friends. Throughout the past two years he has maintained a relatively stable followership and has recently hit 8 Million followers on his YouTube channel. He has also maintained numerous partnerships with firms, through which he generated an income of EUR 300.000 in the year of 2019. Following his many successes, Bennet has dropped out of his University Studies to focus on his Social Media accounts. He has also hired a personal assistant that supports him in the editing of his videos and pictures. However, he notices that his follower involvement has decreased in the past months while he is struggling to find new video ideas for his channel. Since February 2020, he has been seeking for new ways to revive his channel and attract more attention.
4. Christopher 'Chris' Mueller (hereinafter Chris) is a 22-year-old Sociology student and hobby-make-up-artist who has attracted significant attention during the period of lockdown with make-up tutorials on TikTok and Instagram. What started as a "fun idea" to pass free time and find distraction in times of a global pandemic has become a way for Chris to socialize and express himself. In June 2020, Chris released a signature eyeshadow palette, after realizing that many followers inquired about the products Chris uses. Recently, Chris has also opened a YouTube account. Furthermore, identifying as non-binary, Chris is a role model to many teenagers who struggle to come to terms with their gender identity. Chris addresses LGBTQ topics frequently in videos and hopes to empower followers and to contribute to the normalization of queerness.
5. Anne-Sophie Loew (hereinafter Anne-Sophie), 17 years old, is the best friend of Elena. Though, for a long time, she was not interested in Social Media, she appeared in several of Elena's videos and soon noticed that she gained more and more followers on her private Instagram and TikTok accounts. Her personality resonated with many of Elena's followers and, realizing her popularity, she decided to open a YouTube channel. In May 2020, Elena and Anne-Sophie posted a 'best friends' challenge on Anne-Sophie's channel which was extremely well-received and afforded her 500.000 followers virtually

overnight. Since then, she has continued to post Vlog's on YouTube and now close to 1.5 Million followers.

6. With 25 Million followers, Omar Hafeez (hereinafter Omar) has the second biggest TikTok account in the Netherlands. He is now 19 years old and entertains his followers with humorous short videos. Like Elena, his TikTok account blew up internationally over-night after he posted a funny, but controversial, video in December 2019 imitating the President of the United States. Since then, he has enjoyed much attention amongst teenagers and young adults.
7. The applicants met each other at the Teen Stars Award in June 2020, having all been nominated for an award. They immediately got along well and decided to film several collaborations shortly after. Soon, they had established themselves as the 'coolest group of friends there is' among teenagers and became known as the 'Fantastic Five'. Though they do not have any common Social Media account, they collaborate on their individual accounts, tag each other in their posts and use their hashtag #Fantastic5 in the captions. Their individual and aggregate followers increased tremendously as a result and many brands are eager to collaborate with them.
8. With Social Media taking up a majority of the applicants' time, they are looking for more ways to transform their hobby into a secure job. They realize that they are often not paid their money in time or not at all. Furthermore, when comparing their marketing deals, they noticed considerable disparities in the amounts of remuneration. When Elena found out that, in a cooperation with Bennet, Chocotella paid him twice the amount she received, she was furious – their cooperation was essentially identical and still she did not receive the same amount of money.
9. YouTube has increasingly demonetized Chris' content discussing matters of sexuality. Even though he began to avoid explicit language and imagery, the issue continued. In his opinion, this considerably hampers the public debate on LGBTQ matters. He sent multiple complaints to the administrators, but the platform did not react to his complaints.
10. In light of all their complaints, the applicants decided to join forces to achieve a greater bargaining power. They were inspired by collective bargaining agreements in various other sectors of the economy.
11. Connected by their situation, they also advise each other in questions relating to the management of their Social Media accounts. Bennet, the most experienced of the five, recommends them to seek support from Influence, the leading influencer marketing agency in the Netherlands. The agency advises all of them to set clear pricings for their marketing deals, following which, they all raise their prices to EUR 200, – per post. They are aware that they are amongst the most demanded influencers in the Netherlands and therefore deem that this is an adequate price.
12. However, their alliance is not positively received by all. "All they do is advertise each other", Lenny Kros (hereinafter Lenny), a fellow influencer, complains. "The public doesn't see it, but this is a massive business that they are drawing up. They just cooperate to gain likes and followers. I don't

think they are actually friends. Other YouTubers like me could never attract so much attention by themselves, let alone money.”

13. Furthermore, a number of companies are aggrieved by the rise in prices. Among them is also Chocotella, which hoped to extend its contract with Elena due to expire in April 2021. “Individually, they would not have been able to increase the prices to such a high amount”, says a speaker of Chocotella, “but because they cooperated on this endeavor, they were able to set it at such a high amount”. Like Chocotella, many other companies feel strongly about the lost opportunity of a great marketing deal.
14. Together with Lenny, Chocotella and a number of other companies file a complaint with the ACM, which issues a warning to the YouTubers. However, the ‘Fabulous Five’ refuse to change their behavior. They are outraged: “We accept marketing deals because we like the products and we want to share them with our community. We ask for money because we realized that we need additional resources to create content while being able to afford a living. But generally, Social Media is not a business for us, we just do it for fun and because we enjoy spending time with each other and with our community.” The ACM issues a fine, to which the applicants appeal, and a case is brought before the District Court of Rotterdam.
15. The Court is unsure about the case and refers the following preliminary question to the CJEU:

Is an agreement such as “Fantastic-five” concluded among Elena, Bennet, Chris, Anne-Sophie, and Omar in breach of Article 101 or Article 102 TFEU? And if this is indeed the case, under what conditions would such an agreement be allowed?