

# Current tax information for our clients

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## Tax challenges in working with influencers

Digital transformation has changed marketing. Alongside advertising in print media, via placards and in traditional video media (such as TV and film), the internet has increased its significance as an advertising platform considerably in recent years across all business sectors. Global investments in online advertising amounted to 261 billion US dollars in 2018 and have continued to rise noticeably since then.

Internet advertising presents a number of advantages, particularly in its wide reach and vast scope of design possibilities. Advertising online – this could be conventional advertising under a new guise, for example commercials, pop-ups and banner adverts on home-pages, in apps and advertising emails, or it may be new advertising formats such as search engine advertising and, in particular, personal advertising known as 'influencer marketing'.

Influencers are popular, well connected multipliers of information who use their individual popularity to promote advertising messages. With their profiles and channels on

social media platforms such as Instagram, Facebook, LinkedIn, YouTube, Twitter, Twitch and TikTok, they can reach a large base of internet users. Furthermore, they often exploit their popularity by attending events where they pursue their marketing activities.

The benefits of working with influencers lie especially in the authenticity of their advertising messages, the connection of the product with the influencer's individual online content and the improved communication with a certain target group.

Due to the reach of many influencers and the rising economic significance of influencer marketing, the tax treatment of this sector has lately come into the focus of tax and social security administrations, e.g. the German Artists' Social Security Fund [Künstlersozialkasse].

### 1. Tax matters

In summer 2020, the German Federal Ministry of Finance [BMF] published an information leaflet for influencers entitled 'I am an influencer. Do I have to pay taxes?'

[Ich bin Influencer. Muss ich Steuern zahlen?] For businesses, however, there has been no public statement from the German tax authorities to date regarding influencer marketing.

The question thus arises – what do business partners of influencers need to bear in mind?

For companies who engage influencers for advertising purposes, this publication offers some important guidance. For instance, BMF explicitly states that it will issue **requests for information** to the business partners of influencers – businesses are required to comply with these requests under Section 90 of the German Tax Code [AO]. It is therefore recommendable to be prepared for this, i.e. to correctly document business relationships and marketing activities.

Needless to say, **handling tax matters consistently** within the company is also important.

### Income tax

Companies often distribute **giveaways**, samples and test products to influencers. Trips and events are also frequently organised in Germany and abroad and, as part of this, influencers are offered goods and services for free or at discounted rates.

Complimentary mobile phones, makeup and hotel stays – anything that an influencer receives in exchange for (or in expectation of) advertising placement is usually not a tax-free gift, but could rather qualify as a benefit in kind that is subject to income tax within the meaning of Section 8 (2) of the German Income Tax Act [EStG].

The tax authorities may, however, challenge whether these product distributions and other related costs can be treated as **tax-deductible business expenses** by the business supplying them. Businesses should thus be aware of what the influencer has done with the product/service offered to them. Has it been used? Has the product or service been promoted or not? Has a photo, a post, a blog mention or an affiliate link been created? Was the article retained after the test or returned unused? All of this may have a bearing on the tax treatment and should be **documented**.

Furthermore, we have noted a tendency of the tax authorities to include distributed products within the scope of the 30% flat-rate taxation set out under Section 37b EStG, which is to be borne by the company instead of the influencer. In this case, it is important to check whether the criteria to apply this provision have actually been met. In addition, it should be kept in mind that a uniform application of the flat-rate taxation on all benefits in kind granted by the company is required. The value of the goods and the extent to which the respective influencer works for

the business can also be relevant for tax treatment in this context. For instance, Section 37b (1) EStG is applicable only if the individual benefit in kind has a value of EUR 10,000 or less – and only up to a total value of EUR 10,000 per influencer per year.

It can also make a difference for businesses if they are working with an **influencer resident abroad** – in this case **withholding tax requirements under Section 50a EStG** may arise.

Influencers engaged may also be **employees** of the business. It is not unusual for influencers to draw inspiration for their online content from their full-time job. This could give rise to employer obligations for the business, e.g. to withhold payroll tax and social security contributions. Therefore, it should be analysed whether payments to an employed influencer could qualify as wage income.

### German Artists' Social Security Fund [Künstlersozialkasse]

There is some debate about whether influencers engage in an activity which would typically trigger contribution obligations under the German Artists' Social Security Act [KSVG]. The German Artists' Social Security Fund, at any rate, explicitly includes influencers in its list of artistic activities.

However, classification as an artistic activity does not necessarily lead to a requirement for social security contributions. Some influencers owe their popularity to their profession as actors or musicians, for instance. In such cases, are the payments made to influencers fully attributable to their artistic/media activities? Or are these payments (at least in part) made for the right to use a name or because of the vast reach of some individual influencers? In these cases, the decisive factor will be whether the influencer

plays a creative role in the advertising campaign or the advertising simply uses their name.

### VAT

From a VAT perspective, the fundamental question arises as to whether distributing giveaways, samples and test products to influencers is not taxable, whether these goods and services represent benefits in kind and are to be taxed as such, or whether they are provided as consideration in the context of an **exchange of goods and services**. In particular, it must be taken into account that the remuneration can also be provided in the form of supply of services, e.g. advertising services. In the next step, this initial classification has an impact on the determination of an appropriate tax base and correct invoicing and taxation. To be able to apply VAT correctly, a detailed understanding of the contractual relationship and the actual structure is decisive.

If there is an exchange of goods and services, businesses should pay additional attention to the influencer's tax situation and check whether VAT was shown correctly on the influencer's invoice: Which kind of service is provided by the influencer? Is the service provided electronically? Is the service provided within Germany or abroad? Is the influencer providing the service considered a small business? To minimise risks in connection with **input VAT deduction** from the invoices of the influencer, it may be wise to invoice by VAT **credit note**.

## 2. Legal matters

The legal framework must also be clarified – should **contracts** be concluded with influencers? Or is it better to send product samples to a selected group without a contract? Who documents any resulting advertising activities?

In particular, the issue of influencers marking content as an advertisement has occupied German courts for several years. In the absence of relevant laws explicitly regulating influencers' advertising activities, the obligation to disclose content as an advertisement is governed by provisions under the German Act Against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb], the German Telemedia Act [Telemediengesetz], the Interstate Broadcasting Agreement [Rundfunkstaatsvertrag] and/or the Interstate Treaty on the Protection of Minors in the Media [Jugendmedienschutz-Staatsvertrag], which are applicable to varying extents. The legal provisions to be applied depend on the kind of publication media (video, image/text or just text) and the platform used (e.g. YouTube, Instagram or blog). To make influencers and contracting parties aware of their duty to label advertisements, which results from a wide range of applicable regulations, the German association of media authorities, [Medienanstalten], has published guidelines on 'Advertising Identification of Social Media Offers' (available at <https://www.die-medienanstalten.de>). Their 'identification matrix' broadly sets out when and how content is to be flagged as an advertisement. As this is naturally a much simplified and abstract presentation of a complex legal framework, the typical result of this matrix is that the content is to be labelled as an advertisement.

In our consulting experience, however, the circumstances of some individual cases do in fact allow this obligation to flag an advertisement to be disregarded. Indeed, the question of whether an influencer's content is to be labelled as an advertisement or not depends

on the specific design of the content.

In this way, influencers and businesses may in some cases be able to profit from the considerable benefits of influencer marketing in a legally compliant manner without putting themselves at risk of administrative penalties or warning notices from competition authorities.

### 3. Practical recommendations

Businesses who are already working with influencers or are considering such a move in the future should assess the overall business environment and consider the legal and tax implications in their overall plan.

The individual formats of influencer marketing can be highly varied and innovative. To ensure correct tax treatment in these cases from the beginning to avoid any additional costs later, it is crucial for businesses to involve and consult their tax department or tax advisor right from the planning phase.

Since there have thus far been few court decisions or instructions from authorities regarding taxes in the still very new area of influencer marketing, it is critical that businesses properly document their chosen tax approaches. It may even be advisable to consult with the tax authorities in advance.

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Your direct contact persons at KPMG AG Wirtschaftsprüfungsgesellschaft are always at your disposal to answer any question you may have.

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