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DISCLOSURE REQUIREMENTS FOR INFLUENCER  
MARKETING IN THE U.S. AND GERMANY

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*This article compares the requirements for influencer marketing in the U.S. and Germany with a particular focus on the disclosure of commercial intent and material connections to sponsors. By analyzing different scenarios, the article shows that in the U.S. and Germany essentially similar rules apply. However, under German law a more complex analysis is required if influencers promote products without receiving any consideration or if they not even promote products but rather themselves to increase the number of followers. For example, the influencer bears the burden of proof that no consideration has been received under German law. In addition, German law does require the disclosure of the concrete purpose (e.g., free product v. consideration received) while U.S. law is less specific in this regard. While the material rules applying might be similar, the enforcement regime is entirely different. The respective U.S. law is enforced by the FDA as a public authority; the German law by private parties. The article compares both approaches and discusses the advantages and disadvantages such as more specific guidance provided by the FDA or private enforcement not being limited by authority resources.*

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## INTRODUCTION

With the growing popularity of so-called influencers on social media platforms such as Instagram, legal issues regarding the disclosure of payments and other considerations for publishing social media posts have been raised in several countries such as Germany and the U.S. This is not only relevant for product endorsements but for anything posted on social media extending the network of the influencer’s commercial account.

In Germany, starting with several cease and desist letters addressed to influencers a few years ago, there has been uncertainty for influencers about how and when to disclose payments, other considerations, and – more broadly – any commercial intent under unfair advertisement law and media law. After several judgements by German regional courts and higher regional courts, the German Federal Court (Bundesgerichtshof – BGH) finally clarified the disclosure requirements for commercial social media posts under German Law in four decisions. These clarifications are accompanied by modifications made by the German legislature to unfair advertisement law, in effect since May 28, 2022.

Competitors and private organizations are entitled to enforce these provisions. Under U.S. law, the disclosure requirements for commercial posts are found in Sections 5(a) and 12 of the FTC Act (15 U.S.C. §§ 45(a), 52) and are enforced by the Federal Trade Commission (FTC) as a public authority. The clarity of these requirements seem to be less of an issue. In this context, the (non-binding) Endorsement Guides of the FTC are particularly relevant. Non-compliance with the Guides might constitute a deceptive practice and thus may be governed by the FTC Act.

This article compares both German and U.S. approaches by applying each to different scenarios. The comparison not only sheds light on the actual disclosure requirements in two important jurisdictions but can also be seen as an example of different ways of enforcing the law while highlighting their respective advantages and disadvantages. The scenario of an endorsement by an influencer with and without receiving consideration is discussed (Scenario 1). This article also addresses the endorsement of an influencer's own products (Scenario 2) and the "endorsement" of the influencer's account, itself without featuring any particular (other) services or products (Scenario 3). After describing these three scenarios, the article first discusses the German (and European) approach to endorsements in social media (Section II). The article then analyzes the U.S. approach (Section III). Finally, both approaches are compared and significant differences and advantages are discussed (Conclusion).

The article identifies a broader scope of German law; while U.S. law focuses particularly on the disclosure of material connections, German law has a broader focus on any commerciality. In Scenarios 1 and 2, disclosure is generally required under U.S. and German law unless there has been no consideration paid in Scenario 1. Under German law, the burden of proof of having received no such consideration lies with the influencer. Under U.S. law, a product of a very low value given to the influencer might require no disclosure at all. In Scenario 3, under both German and U.S. law, no disclosure is required. However, this scenario is considered more complex under German law. If a disclosure is required, both jurisdictions have similar requirements, including a prominently placed and visibly designed disclosure notice. However, German law requires more details on the concrete purpose (compare the Scenarios and different kinds of consideration).

In addition, this article shows that both enforcement regimes provide an effective response to the challenges raised by influencer marketing. Enforcement by

the FTC as public authority allows for better guidelines and control but is naturally limited by the resources of a single authority. The FTC focused on advertisers rather than the influencers themselves. In contrast, enforcement by private parties under German law has been focused on the influencers, has rapidly sensitized influencers and produced a greater number of court decisions with important guidance.

## I DIFFERENT SCENARIOS

Influencer marketing<sup>1</sup> through posts on social media, endorsing products or services, may be an endorsement from various perspectives and under different circumstances.<sup>2</sup> This article focuses on three different scenarios (described below) to illustrate disclosure obligations for endorsements in the field of influencer marketing. “Influencer” as used in this article refers to a self-employed<sup>3</sup> individual publishing posts including text, pictures, and videos on social media, some of which are paid by advertisers.

### A. *Scenario 1-A: Paid Endorsement Not Disclosed*

Influencer A publishes on her verified Instagram account a post containing a picture that shows her with a healthy and innovative food product. The text below the picture states “For my perfect start into the day #health #powerfood #fitness <https://promoted-powerfood-company.com/buy-powerfood>.” The picture contains a so-called tap tag covering the area where the food product is shown in the picture. When a user clicks on such a tag, the respective company’s name is displayed and after a second click, the user is redirected to the company’s Instagram profile. The post is not explicitly labeled as advertising. A has been paid a fixed amount for

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<sup>1</sup> See, e.g., Jan Trzaskowski, *Identifying the Commercial Nature of Influencer Marketing on the Internet*, 65 SCANDINAVIAN STUD. L. 81, 82-84 (2018); Catalina Goanta & Sofia Ranchordás, *The Regulation of Social Media Influencers: An Introduction*, UNIV. GRONINGEN FAC. L. RSCH. PAPER SERIES, No. 41/2019, at 3-8, <https://ssrn.com/abstract=3457197>; Christine Riefa & Laura Clausen, *Towards Fairness in Digital Influencers’ Marketing Practices*, 8 J. OF EUR CONSUMER MKT. L. 64, 64-65 (2019); Rich Wilson, *Influencer Marketing: Standing out in Your Digital Communities*, 39 LEGAL MGMT. 9 (2020); EUR. COMM’N, *BEHAVIOURAL STUDY ON ADVERTISING AND MARKETING PRACTICES IN ONLINE SOCIAL MEDIA* 32-33 (2018), [https://ec.europa.eu/info/sites/default/files/osm-final-report\\_en.pdf](https://ec.europa.eu/info/sites/default/files/osm-final-report_en.pdf).

<sup>2</sup> E.g., Goanta & Ranchordás, *supra* note 1, at 9 (discussing influencer marketing and different business models on social media).

<sup>3</sup> See Trzaskowski, *supra* note 1, at 86, 98 (distinguishing employed and self-employed influencers).

publishing this post after she agreed with the advertising company to promote the product in a post.

*B. Scenario 1-B: Endorsement for Free Product*

Other than in Scenario 1-A, A did not receive any payment, but instead, she received the endorsed product for free.

*C. Scenario 1-C: Endorsement Without Any Consideration*

Other than in Scenario 1-A, A received neither payments nor the product for free and did not conclude any contracts with an advertiser.

*D. Scenario 2: Endorsement of Own Products*

Other than in Scenario 1-A, A promotes products she sells on her own website.

*E. Scenario 3: Endorsement of the Influencer Herself*

Influencer A publishes a post on her verified Instagram account with a photo showing her in front of a mirror and in her non-branded training outfit. The photo is accompanied by the text “Shoutout to everyone who is training hard – every single day – to become better, stronger and healthier. Learn more about the positive effects of weight training on my website: <https://influencer-website.com> #mirrorselfie #fitnessselfie #weighttraining”.<sup>4</sup> The post does not contain any tap tags or product endorsements. The website [influencer-website.com](https://influencer-website.com) does not show any advertisements or promotions of particular goods or services.

## II

### THE GERMAN APPROACH

First, this article analyzes the German<sup>5</sup> approach based on several provisions of unfair advertisement law and unfair media law.

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<sup>4</sup> Cf. Bundesgerichtshof [BGH] [Federal Court of Justice], Sep. 9, 2021, I ZR 90/20, Neue Juristische Wochenschrift [NJW], Influencer I (Ger.), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2021-9&Seite=7&nr=122152&pos=237&anz=283> (however, significantly amended; the original post contains tap tags).

<sup>5</sup> See Rossana Ducato, *One hashtag to rule them all? Mandated disclosures and design duties in influencer marketing practices*, in THE REGULATION OF SOCIAL MEDIA INFLUENCERS 232, 245-52 (Catalina Goanta & Sofia Ranchordás eds., 2020) (discussing the Italian way in this regard); Sophie C. Boerman, Natali Helberger, Guda van Noort & Chris J. Hoofnagle, *Sponsored Blog Content: What do the Regulations Say? And what do Bloggers Say?*, 9 J. INTEL. PROP. INFO. TECH. & ELEC. COM. L., 146, 148-51 (2018) (discussing the Dutch approach).

### A. Background

German law follows an enforcement approach mostly based on private enforcement and litigation.<sup>6</sup> While several acts stipulate the different or similar obligations of providers, such as influencers, all of these obligations can be enforced by competitors and some private organizations under the Act on Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG).

Along with § 5a(4) UWG, § 6(1)(1) Telemedia Act (Telemediengesetz – TMG) and § 22(1)(1) Interstate Media Treaty (Medienstaatsvertrag – MStV) oblige (telemedia) providers including influencers to label advertising as such if the commerciality is not apparent from the circumstances.<sup>7</sup> In addition, specific provisions in § 3(3) UWG in connection with the Annex (so-called black list) prohibit (deceptive) advertorials (no. 11) and traders to create the impression that they are consumers (no. 22). Some of these provisions implement EU legislation, which has to be taken into account when interpreting them. Section 5a(4) UWG is in part based on Art. 7(2) Unfair Commercial Practices Directive 2005/29/EC (UCP Directive). Section 3(3) UWG in connection with Annex no. 11, 22 of the UWG are also based upon the UCP Directive and its Annex. Section 6(1)(1) TMG and § 22(1)(1) MStV<sup>8</sup> implement Art. 6(a) Directive 2000/31/EC (e-Commerce Directive).

Pursuant to § 1, the UWG aims to protect competitors, consumers, and other market participants against unfair commercial practices. The requirement under § 5a(4) UWG that the commercial intent of a commercial practice must be apparent is consistent with this aim. However, this particular provision implements the UCP Directive, and lays a focus on consumer protection as the UCP Directive does according to its Art. 1(1) (“The purpose of this Directive is to contribute to the

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<sup>6</sup> The enforcement of media law is with specific public authorities under, for example, §§ 105, 106 MStV. In addition, other public authorities are competent with regard to violations with relevance for more than one EU member state. Cf. Commission Regulation 2017/2394, 2017 O.J. (L 345) 1 (EU).

<sup>7</sup> Additionally, § 22(1)(1) MStV requires a clear separation of advertising from other content. See also Hans-Jürgen Ahrens, *Influencer Marketing – Regulierungsrahmen und Konsequenzen seiner Anwendung (Teil 1)* [Influencer Marketing - Regulatory Framework and Consequences of its Application (Part 1)], 120 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 1211, 1218 (2018).

<sup>8</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2022, I ZR 35/21, *Influencer III*, ¶ 74, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2022-1&Seite=5&nr=126840&pos=172&anz=277>.

proper functioning of the internal market and achieve a high level of consumer protection [...]”). All the named provisions of UWG, TMG, and MStV generally aim to protect consumers or recipients against deception about the commercial background<sup>9</sup> and to protect their autonomy.<sup>10</sup> Such protection against deception is relevant as consumers may face a noncommercial post more openly than they would an apparent commercial post.<sup>11</sup> However, the policy considerations differ in the details of the different acts. For example, § 22(1)(1) MStV might be considered as protecting in particular the independence of telemedia providers.<sup>12</sup>

### *B. Disclosure of a Commercial Intent Under UWG, TMG, and MStV*

The UWG requires a commercial practice (§ 2(1)(2) UWG), extending the definition of Art. 2(d) UCP Directive.<sup>13</sup> Commercial practices whose commerciality is not apparent might violate § 6(1)(1) TMG and § 22(1) MStV. A commercial violation of these two provisions is relevant under §§ 3a, 3 UWG. A practice might also be a violation of Annex no. 11, 22 of § 3(3) UWG or § 5a(4) UWG and thus prohibited under § 3 UWG. However, to the extent provisions of TMG or MStV are exhaustive, Annex no. 11, 22 of § 3(3) UWG and § 5a(4) UWG

<sup>9</sup> BGH, I ZR 90/20, *supra* note 4, at ¶ 70 (discussing specifically § 5a(6) UWG, the predecessor of § 5a(4) UWG); Tristan Radtke & Fabian-Philipp Camen, *Des Wortlauts letzter Schluss? Für mehr Rechtssicherheit bei der Kennzeichnung kommerzieller Influencer-Beiträge* [The final interpretation? For more legal certainty in the labeling of commercial influencer posts], 66 WETTBEWERB IN RECHT PRAXIS [WRP] 24, ¶¶ 4, 5 (2020); BGH, I ZR 35/21, *supra* note 8, at ¶ 74, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2022-1&Seite=5&nr=126840&pos=172&anz=277>.

<sup>10</sup> Ducato, *supra* note 5, at 238.

<sup>11</sup> BGH, I ZR 90/20, *supra* note 4, at ¶ 70; Bundesgerichtshof [BGH] [Federal Court of Justice], Sep. 9, 2021, I ZR 125/20, ¶ 36, (Ger.) <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122155&pos=0&anz=>; Radtke & Camen, *supra* note 9, at ¶ 4.

<sup>12</sup> Cf. Karl-Nikolaus Peifer, *Influencer Marketing – Rechtlicher Rahmen und Regulierungsbedürfnis (Teil 2)* [Influencer Marketing - Legal Framework and Need for Regulation (Part 2)], 120 GRUR 1218, 1224 (2018) (discussing editorial independence under German media law in general).

<sup>13</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Sep. 9, 2021, I ZR 126/20, ¶ 52, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2021-9&Seite=7&nr=122158&pos=236&anz=283>; Case C-391/12, RLvS Verlagsgesellschaft mbH, ECLI:EU:C:2013:669, ¶¶ 37-39 (Oct. 17, 2013) (emphasizing that the UCP Directive requires the practice to be connected with the business of the trader oneself or, in case of the promotion of another company’s business, that the trader has to act in the name or on behalf of the other company; if a practice is not covered by the UCP Directive broader national law might still apply).

do not apply (compare § 1(2) UWG and Art. 3(4) UCP Directive).<sup>14</sup> Any of these violations entitle market participants, such as direct competitors, to injunctions and – with less relevance in practice – damages (§§ 8-9 UWG).

### 1. *Commercial Practice*

First, a commercial practice is required. A commercial practice is—basically—any act or omission of a person in favor of his own<sup>15</sup> or another’s company,<sup>16</sup> which has a direct and objective connection with the conclusion of a contract about goods or services (cf. § 2(1)(2) UWG and Art. 2(f) UCP Directive).<sup>17</sup> A relationship of the endorsing influencer to the company selling the promoted goods can indicate a commercial practice.<sup>18</sup> The requirement of a *direct* connection has been recently added to the UWG while being already included in the UCP Directive.<sup>19</sup> The German legislature explicitly added this language to clarify that the practice of an

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<sup>14</sup> Gesetzentwurf [Bill], Deutscher Bundestag: Drucksache [BT] 19/27873, at 31-32, (Mar. 24, 2021), <https://dserver.bundestag.de/btd/19/278/1927873.pdf> (Ger.); BGH, I ZR 90/20, *supra* note 4, at ¶ 46, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122152&pos=0&anz=1>; BGH, I ZR 126/20, *supra* note 13, at ¶ 75. Cf. Trzaskowski, *supra* note 1, at 94.

<sup>15</sup> See Case C-105/17, Evellina Kamenova v. Okrazhna prokuratura - Varna, ECLI:EU:C:2018:808 (Oct. 4, 2018) (discussing the requirements for being considered a “trader,” which is necessary for the UCP Directive and its transformation into national law to apply to the person).

<sup>16</sup> See generally Riefa & Clausen, *supra* note 1, at 66 (discussing the different relationships of influencers as potential traders with social media platforms and users); Ducato, *supra* note 5, at 234-37.

<sup>17</sup> The UCP-Directive is insofar more specific as it requires, under Art. 2(d) and Art. 3(1), a connection “with the promotion, sale or supply of a *product to consumers*” (emphasis added) and it covers practices in favor of another’s business only narrowly and is therefore not likely to apply to Scenarios 1-A, -B and -C; Cf. Case C-391/12, RLvS Verlagsgesellschaft mbH v. Stuttgarter Wochenblatt GmbH, ECLI:EU:C:2013:669, ¶¶ 37-39 (Oct. 17, 2013). As a consequence, national law can apply irrespective of the UCP Directive.

<sup>18</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 5, 2020, I ZR 234/19, ¶ 25, (Ger.) <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2020-11-5&nr=112970&pos=5&anz=8>; BGH, I ZR 126/20, *supra* note 13, at ¶ 23, (Ger.) <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122158&pos=0&anz=1>.

<sup>19</sup> The language of the UCP Directive does not require a “direct *and objective* connection” (emphasis added) but only a direct connection. Art. 2(f) UCP Directive. However, the CJEU seems to require an objective perspective when interpreting the direct connection. Cf. RLvS Verlagsgesellschaft mbH, *supra* note 17, at ¶ 44; See also Recital 7 UCP Directive. Overall, to the extent the UWG transforms the UCP Directive into national law, the “direct and objective connection” has to be interpreted in accordance with the UCP Directive.

influencer promoting services or goods without receiving any consideration might not constitute a commercial practice.<sup>20</sup>

As in Scenario 1-A, an influencer might promote certain services or goods of another company for consideration. Such promotion might happen by so-called “tap tags,” by referring directly to the company’s website or by just mentioning the specific company or its brands in general. This act in favor of the company and the influencer herself<sup>21</sup> is directly and objectively connected to the performance of the contract between the advertiser and the influencer<sup>22</sup> as well as to the potential conclusion of a contract between the consumer and the advertiser. The same applies if the influencer receives other consideration instead, such as the product for free in Scenario 1-B.<sup>23</sup> This applies regardless of the value of the product<sup>24</sup> and also in cases where the granted product would only encourage the influencer to publish a post endorsing the product.<sup>25</sup> In general, it does not make a difference whether the influencer has drafted the post herself.<sup>26</sup>

If the influencer does not receive any consideration for promoting the good or service as in Scenario 1-C, a connection between the publishing of the post and the sale of goods or services is less evident.<sup>27</sup> However, depending on the totality of the circumstances, there might still be a connection within the meaning of the

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<sup>20</sup> Gesetzentwurf, *supra* note 14, at 31-32. See Christian Alexander, *Transparenz beim Influencer-Marketing – BGH-Rechtsprechung und UWG-Neuregelungen* [Transparency in influencer marketing – BGH case law and UWG amendments], 66 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 77, 83 (2022) (criticizing this requirement and implying that the eCommerce-Directive requires already a direct connection). As such promotion of one’s own business is covered under the prevailing UCP Directive, the amendment by the German legislature has to be interpreted in accordance with the UCP Directive.

<sup>21</sup> Alexander, *supra* note 20, at 79 (calls this a “Doppelförderung”, i.e. a double promotion).

<sup>22</sup> BGH, I ZR 90/20, *supra* note 4, at ¶ 38.

<sup>23</sup> BGH, I ZR 35/21, *supra* note 8, at ¶¶ 43, 60.

<sup>24</sup> *Id.* at ¶¶ 66, 75-76.

<sup>25</sup> *Id.* at ¶ 65. See also Bernd Holznagel & Sarah Hartmann, *Teil 3 – Rundfunk und Telemedien*, in HANDBUCH MULTIMEDIA-RECHT [HANDBOOK MULTIMEDIA LAW] ¶ 215 (Thomas Hoeren et al. eds., 57th ed. 2021) (arguing that products granted for free are to be treated the same under § 2(5)(b) TMG as a financial consideration).

<sup>26</sup> Trzaskowski, *supra* note 1, at 96.

<sup>27</sup> See Trzaskowski, *supra* note 1, at 96 (arguing in favor of a commercial nature of posts under European Law if a product has been sent to an influencer “without prior interaction”).

UWG<sup>28</sup> if the post has a so-called “advertising surplus”<sup>29</sup> in favor of the company selling or manufacturing the promoted product. Enthusiastic praise of the product<sup>30</sup> and including links to the website of the promoted company<sup>31</sup> indicate such an advertising surplus. In Scenario 1-C, positive language in combination with the link and tap tag suffice to establish such an advertising surplus. Accordingly, there is a commercial practice in this scenario.

In Scenario 2, the influencer promotes products she sells on her own website. In such a case, the promotion encourages users to buy the products through her website. Publishing such a post directly and objectively connects to potential contracts between the influencer and customers about the sale of the influencer’s products.<sup>32</sup> It constitutes so-called self-advertising (see also § 2(2)(7) MStV),<sup>33</sup> which is covered by § 2(1)(2) UWG.

Particularly interesting to assess is Scenario 3, in where the influencer seems to promote nothing. She just posts an update to keep her followers informed of her life and potentially gain new followers and website visitors. However, the interest of the influencer in getting more followers lead German courts to a different assessment: Each posting aims at generating more followers and thus makes the respective influencer a more promising candidate for future advertising deals with

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<sup>28</sup> The UWG goes insofar as in the other scenarios discussed before beyond the scope of the UCP Directive. *Cf.* Deutscher Bundestag: Drucksachen [BT]19/27873 (Ger.), at 34-35; Case C-391/12, RLvS Verlagsgesellschaft mbH, ECLI:EU:C:2013:669, ¶¶ 39-44 (Oct. 17, 2013); BGH, I ZR 126/20, *supra* note 13 at ¶ 52; Alexander, *supra* note 20, at 82.

<sup>29</sup> This is not in conflict with the prevailing (*cf.* also § 1(2) UWG) eCommerce Directive, BGH, I ZR 90/20, *supra* note 4, at ¶ 48, (Ger.); BGH, I ZR 126/20, *supra* note 13, at ¶ 39. *See also* Alexander, *supra* note 20, at 83 (arguing that Art. 3(4) UGP-Directive which stipulates the priority of the eCommerce-Directive does not apply because there is no commercial practice; however, it is important to note that the eCommerce-Directive has still priority over national law in these cases). *See also* DIE MEDIENANSTALTEN [THE MEDIA AUTHORITIES], LEITFADEN DER MEDIENANSTALTEN – WERBEKENNZEICHNUNG BEI ONLINE-MEDIEN [GUIDELINE OF THE MEDIA AUTHORITIES - ADVERTISING LABELING IN ONLINE MEDIA] 6 (June, 2021), [https://www.die-medienanstalten.de/fileadmin/user\\_upload/die\\_medienanstalten/Service/Merkblaetter\\_Leitfaeden/ua\\_Leitfaden\\_Medienanstalten\\_Werbekennzeichnung\\_Online-Medien.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Service/Merkblaetter_Leitfaeden/ua_Leitfaden_Medienanstalten_Werbekennzeichnung_Online-Medien.pdf).

<sup>30</sup> BGH, I ZR 90/20, *supra* note 4, at ¶ 61.

<sup>31</sup> *Id.* at ¶ 67.

<sup>32</sup> Within the meaning of both the UWG and UCP Directive, Ducato, *supra* note 5, at 241.

<sup>33</sup> Martin Gerecke, *Kennzeichnung von werblichen Beiträgen im Online-Marketing* [Labeling of promotional contributions in online marketing], 120 GRUR 153, 155-56 (2018).

companies.<sup>34</sup> Accordingly, every posting is somehow connected to future contracts about goods and services in connection with the promotion of products by the influencer. While the post is objectively in connection with such later contracts, it requires several (uncertain) steps from publishing the post to obtaining such contracts (e.g., a non-endorsement post shared and liked by followers; connections of the followers see such post and might decide to follow the influencer; the influencer is in a better position for advertising deals; an advertising deal is concluded; an advertising post promotes a particular product available for sale to consumers) and therefore they are not *directly* promoted within the meaning of § 2(1)(2) UWG, Art. 2(f) UCP Directive.<sup>35</sup> Such assessment of this scenario is also in accordance with the intent of the German legislature as elaborated above. Even if publishing such a post would be considered a commercial practice contrary to the view taken here,<sup>36</sup> the commercial intent would be apparent and therefore no disclosure would be required.<sup>37</sup>

To sum up, only Scenarios 1-A to -C and Scenario 2 meet the first prong (§ 2(1)(2) UWG).

<sup>34</sup> Cf. BGH, I ZR 90/20, *supra* note 9, at ¶ 42 (with further references); LG München I [Munich Regional Court I], Apr. 29, 2019, 4 HK O 14312/18, Cathy Hummels, ¶¶ 39-40, <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-7496?hl=true>. Keine unzulässige Schleichwerbung in Posts von Influencern durch Verlinkung, Apr. 29, 2019 GBVI. Munich.

<sup>35</sup> Cf. EUR. COMM'N, Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices 2.2 (May 25, 2016), <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2019-N-7496?hl=true> (emphasizing that a commercial practice must be directly linked to the promotion of a product to fall under the UCP Directive). *Contra* Alexander, *supra* note 20, at 83; Stefanie Will, *Werbung durch Influencer* [Advertisements by influencers], 85 ARCHIV FÜR MEDIENRECHT UND MEDIENWISSENSCHAFT [UFITA] 137, 154-56 (2021) (Ger.) (criticizing the amendments in § 2 UWG by the legislature).

<sup>36</sup> Including “commercial communication” (Art. 2(f) eCommerce-Directive) as the pendant for a commercial practice under the eCommerce-Directive (and the TMG). *See also* BGH, I ZR 126/20, *supra* note 13, at ¶ 104, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2021-9&Seite=7&nr=122158&pos=236&anz=283> (ruling that §§ 6(1)(1) TMG, 22(1)(1) MStV do not require a consideration in case of self-advertising); Gesetzentwurf [Bill], Deutscher Bundestag: Drucksachen [BT] 19/18789, at 34 (Ger.) (legislature’s reasoning on amending § 2(1)(5)(b) TMG).

<sup>37</sup> *See* BGH, I ZR 125/20, *supra* note 11, at ¶¶ 37-39 (referring to a large sum of followers, verification of a profile, and professional pictures making the intent of the influencer to act in favor of its own business apparent); BGH, I ZR 126/20, *supra* note 13 at ¶¶ 69-74 (emphasizing in particular the knowledge of Instagram users about the business practices of influencers).

## 2. *Disclosure Obligations According to § 6(1)(1) TMG, § 22(1)(1) MStV, and the UWG*

In the second step, every commercial practice must comply with the requirements of the UWG and through § 3a UWG with provisions such as § 6(1)(1) TMG, § 22(1)(1) MStV. Generally, disclosure of the commerciality of a practice is not required if consumers are able to identify the commerciality “clearly and unambiguously at first sight”.<sup>38</sup> The law distinguishes between the different commercial purposes by referring to “*the* commercial purpose” (emphasis added) in § 5a(4) UWG (e.g., whether in favor of one’s own or another’s company and whether the influencer receives a consideration).<sup>39</sup> However, Art. 7 UCP Directive—partly the basis for § 5a UWG—covers the omission of other material information as well. It could cover the non-disclosure of a material connection (as under U.S. law).<sup>40</sup>

In Scenarios 1-A and 1-B, there are no clear and visible indicators whatsoever for the commerciality of the practice in favor of the advertising company. An obligation to disclose the commerciality of the practice follows from § 5a(4)(1) UWG,<sup>41</sup> § 6(1)(1) TMG, and § 22(1)(1) MStV. The mere reference to a company via “@”-reference is likely insufficient.<sup>42</sup> The influencer could fulfill the disclosure obligation, for example, by including “paid product ad:”<sup>43</sup> at the beginning of the post.<sup>44</sup> A similar hashtag might also suffice<sup>45</sup> when it is not “hidden” among several other hashtags<sup>46</sup> and does not require a further click to be displayed. However, with regard to a tagged product, a disclosure within the picture’s description is sufficient only if the disclosure is clearly referring to the tag and is sufficiently

<sup>38</sup> BGH, I ZR 125/20, *supra* note 11, at ¶ 34.

<sup>39</sup> BGH, I ZR 90/20, *supra* note 4, at ¶¶ 54, 92; Radtke & Camen, *supra* note 9, at ¶ 22.

<sup>40</sup> Trzaskowski, *supra* note 1, at 97.

<sup>41</sup> See generally BGH, I ZR 90/20, *supra* note 4, at ¶¶ 74-77 (explaining the different views by scholars on whether the “commercial communication” purpose in § 5a(4) UWG requires more than the “commercial practice” under § 2(1)(2) UWG).

<sup>42</sup> See also Ducato, *supra* note 5, at 244.

<sup>43</sup> Radtke & Camen, *supra* note 9, ¶ 27 (arguing that “ad” might also be used in a German post as it is understood by German users of social networks).

<sup>44</sup> E.g., DIE MEDIENANSTALTEN, *supra* note 30, at 3. See also Riefa & Clausen, *supra* note 1, at 69-71 (overview of what is considered sufficient in different EU member states).

<sup>45</sup> But see Riefa & Clausen, *supra* note 1, at 69-70.

<sup>46</sup> See Oberlandesgericht Celle [OLG Celle] [Higher Regional Court of Celle] June 8, 2017, 13 U 53/17, ¶¶ 11-12 (Ger.).

highlighted (e.g., special print of the letters or separate paragraph).<sup>47</sup> Scenario 1-B is a good example of how there might be several ways of disclosing commerciality. The influencer could include language in the first sentence of the post (e.g., “*Thanks to Y for providing the product X*”). In some cases, a post with a similar contractual background as in Scenarios 1-A and 1-B might constitute editorial content and might thus be prohibited as a deceptive advertorial under the stricter § 3(3) UWG in connection with Annex no. 11 of the UWG.<sup>48</sup>

With regard to Scenario 1-C, the TMG does explicitly consider the post non-commercial. The obligation under § 6(1)(1) TMG (and the e-Commerce Directive) is based on the term “commercial communication.” This term is defined in § 2(1)(5) TMG, Art. 2(f) e-Commerce Directive and explicitly exempts “communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.” Such posts as in Scenario 1-C are still compiled independently, even though they are different from the typical case this provision should cover, i.e., independent tests by third parties.<sup>49</sup> Similarly, the MStV considers such posts not to be advertisements.<sup>50</sup> Pursuant to § 2(2)(7) MStV, advertisements in favor of another company require a consideration. Nevertheless, the more specific provision in § 5a(4) UWG as amended recently applies.<sup>51</sup> In general, a commercial intent has to be disclosed if the non-disclosure is likely to cause the average consumer to take a transactional decision that he would not have taken

<sup>47</sup> See BGH, I ZR 90/20, *supra* note 4, at ¶ 85.

<sup>48</sup> Cf. Helmut Köhler, *Anhang zu § 3 III [Annex to § 3 III]*, in UWG, ¶ 11.2 (Helmut Köhler et al. eds., 40th ed. 2022). See also Trzaskowski, *supra* note 1 (discussing this in detail, including the implications on the applicability of the UCP Directive in general in such cases); Case C-391/12, RLVs Verlagsgesellschaft mbH v. Stuttgarter Wochenblatt GmbH, ECLI:EU:C:2013:669, ¶¶ 37-39 (Oct. 17, 2013) (discussing the trader requirements for the applicability of the UCP Directive). However, the requirement of “paid” content is interpreted broadly and includes benefits such as providing the product for free, Case C-371/20, Peek & Cloppenburg v. Peek Cloppenburg KG, ECLI:EU:C:2021:674, ¶ 42 (Sept. 2, 2021); Cf. Helmut Köhler, *Anhang zu § 3 III [Annex to § 3 III]* in UWG, ¶ 11.2 (Helmut Köhler et al. eds., 40th ed. 2022).

<sup>49</sup> Mario Martini, § 2 TMG, in BECKOK INFORMATIONS- UND MEDIENRECHT [BECKOK INFORMATION AND MEDIA LAW], ¶ 29 (Hubertus Gersdorf Boris P. Paal eds., 34th ed. 2021).

<sup>50</sup> Nevertheless, surreptitious advertising under § 2(2)(9) MStV could be considered; cf. Gerecke, *supra* note 33, at 155. However, this likely applies only to broadcasting.

<sup>51</sup> Cf. BGH, I ZR 90/20, *supra* note 4 at ¶ 48 (discussing the priority of the TMG and MStV over the UWG); BGH, I ZR 126/20, *supra* note 13 at ¶¶ 75, 86-87. See also Will, *supra* note 35, at 156-59 (criticizing the amendments in § 5a UWG made by the legislature).

otherwise.<sup>52</sup> However, the provision requires no disclosure of a commercial intent if the influencer did not receive any consideration,<sup>53</sup> but imposes the burden of proof of the absence of a consideration on the influencer.<sup>54</sup> In Scenario 1-C, as the influencer can demonstrate that she did not receive any consideration, no disclosure of commerciality is required.

For a self-advertisement as in Scenario 2, all obligations under § 22(1)(1) MStV, § 6(1)(1) TMG, and § 5a(4)(1) UWG apply. Even the stricter § 3(3) UWG in connection with Annex no. 22 might be considered as it could be argued that the influencer is creating the impression that she is not “acting for purposes relating to [her] trade, business, craft or profession,” or is falsely representing herself as a consumer.<sup>55</sup> Accordingly, a disclosure is required. The influencer could easily include the information that the product is her own product (e.g., “For a perfect start to the day, *try my new product*”) to satisfy the disclosure requirement.

### 3. *Obligations for Advertisers*

Advertisers are in any case liable for violations of the disclosure requirements if they commission influencers to publish an advertising post.<sup>56</sup> The UWG itself does not explicitly provide for measures to avoid liability. Brtka and Witzmann recommend that advertisers contractually oblige “their” influencers to comply with the disclosure requirements, train them and implement a system to monitor their posts.<sup>57</sup>

## III THE U.S. APPROACH

Second, this article analyzes the U.S. approach based upon the FTC Act and the agency’s subsequent enforcement of the Act.

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<sup>52</sup> § 5a(4)(1) UWG.

<sup>53</sup> § 5a(4)(2) UWG.

<sup>54</sup> § 5a(4)(3) UWG.

<sup>55</sup> Riefa & Clausen, *supra* note 1, at 66.

<sup>56</sup> § 8(2) UWG; BGH, Oct. 7, 2009, I ZR 109/06, ¶¶ 22, 25 (Ger.); Hans-Wolfgang Micklitz Martin Schirmbacher, § 6 *TMG*, in *RECHT DER ELEKTRONISCHEN MEDIEN [LAW OF ELECTRONIC MEDIA]*, ¶ 52 (Gerald Spindler & Fabian Schuster eds., 4th ed. 2019); Roman Brtka & Markus Witzmann, *Der Einsatz von Influencer-Marketing in Social Media* [The use of influencer marketing in social media], 13 *GRUR-PRAX* 657, 660 (2021); Gerecke, *supra* note 33, at 159.

<sup>57</sup> Brtka Witzmann, *supra* note 56, at 660. *See also* Jens Matthes, *Comment on BGH, Oct. 7, 2009, I ZR 109/06*, 111 *GRUR* 1167, 1172 (2009).

### A. Background

The enforcement of rules for unfair advertising practices is within the purview of the FTC as a(n) (independent)<sup>58</sup> federal agency. The FTC’s “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (16 CFR Part 255) (Endorsement Guides) are thus highly indicative of what the FTC might consider a deceptive or unfair advertising practice. Under Sections 5(a) and 12 of the FTC Act (15 U.S.C. §§ 45(a), 52), the FTC is empowered to prevent persons and corporations, such as advertisers and endorsers, from “unfair or deceptive acts or practices in or affecting commerce,” which include the dissemination of false advertisements.<sup>59</sup>

Actors other than the FTC generally have no standing under federal law. Neither the FTC Act itself nor the Endorsement Guides grant individuals standing.<sup>60</sup> While violations of the FTC Act might also be actionable under § 43(a) of the Lanham Act,<sup>61</sup> extensive affirmative disclosure requirements cannot be established under this section of the Lanham Act in general,<sup>62</sup> notwithstanding any applicable state law.<sup>63</sup> This article will focus on the FTC Act. In recent years, the FTC published announcements and documents informing and reminding

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<sup>58</sup> See, e.g., Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439 (2021) (discussing the current unitary executive debate).

<sup>59</sup> See also Tamany Vinson Bentz & Carolina Veltri, *The Indirect Regulation of Influencer Advertising*, 75 FOOD & DRUG L.J. 185, 192 (2020) (discussing First Amendment protection of influencers).

<sup>60</sup> E.g., *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973); *Naylor v. Case McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978); *Broadspring, Inc. v. Congo, LLC*, No. 13-CV-1866 (JMF), 2014 U.S. Dist. LEXIS 116070, at \*36 (S.D.N.Y. Aug. 20, 2014); *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 639 (S.D.N.Y. 2018). *But see*, Bentz & Veltri, *supra* note 59, at 193 (discussing several cases in which violations of the FTC Act have been considered, but which settled in the end).

<sup>61</sup> E.g., *Manning Int’l Inc. v. Home Shopping Network, Inc.*, 152 F. Supp. 2d 432, 437 (S.D.N.Y. 2001).

<sup>62</sup> *McNeilab, Inc. v. Am. Home Prods. Corp.*, 501 F. Supp. 517, 532 (S.D.N.Y. 1980); *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 640 (S.D.N.Y. 2018). *Cf.* *Clark Consulting, Inc. v. Fin. Sols. Partners, LLC*, 05 Civ. 06296 (SAS), 2005 U.S. Dist. LEXIS 28642, at \*23 (S.D.N.Y. Nov. 17, 2005).

<sup>63</sup> *Cf.* Bentz & Veltri, *supra* note 59, at 194 (discussing several cases under state law in which influencers have not been held liable).

influencers about disclosure requirements.<sup>64</sup> The FTC's focus lies in preventing deceptive commercial practices and ensuring fair competition.<sup>65</sup>

### *B. Non-disclosure as Deceptive Practice*

The starting point for any action by the FTC is either an unfair advertisement, which will be considered an unfair or deceptive practice,<sup>66</sup> or an otherwise unfair or deceptive practice.<sup>67</sup> The standard for establishing an unfair practice is found in 15 U.S.C. § 45(n), which requires deceptive practices be “[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], [that] the representation, omission, or practice is material.”<sup>68</sup> The FTC often bases its actions on 15 U.S.C. §§ 45(a), 52 and considers the non-disclosure of material facts of an endorsement a deceptive practice.<sup>69</sup> The Endorsement Guides as well as the FTC's reasoning in previous cases (most often in the form of consent orders) provide helpful guidance for what is considered a deceptive practice.

#### *1. Endorsement*

The Endorsement Guides define an endorsement as “any advertising message [...] that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”<sup>70</sup>

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<sup>64</sup> Press Release, Fed. Trade Comm'n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>; Press Release, Fed. Trade Comm'n, FTC Releases Advertising Disclosures Guidance for Online Influencers (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers>. See also Bentz & Veltri, *supra* note 59, at 187-88.

<sup>65</sup> Cf. 15 U.S.C. § 45(a)(1).

<sup>66</sup> 15 U.S.C. § 52.

<sup>67</sup> 15 U.S.C. § 45(a).

<sup>68</sup> *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 168 (2d Cir. 2016) (numbers in brackets as cited by the court).

<sup>69</sup> E.g., Complaint ¶¶ 47-48, *FTC v. Genesis Today, Inc.*, Case No. 1:15-cv-62 (W.D. Tex. Jan. 26, 2015), <https://www.ftc.gov/system/files/documents/cases/150126lindduncmpt.pdf>. See also, Fed. Trade Comm'n, THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (2017) [hereinafter *Endorsement FAQ*] <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (under “What is the legal basis for the Guides?”).

<sup>70</sup> 16 CFR § 255.0(b).

There is a strong focus on the honesty of *opinions*<sup>71</sup> rather than on the honest disclosure of *commercial intent* as under German law.<sup>72</sup> In addition, the provisions require there to be a “sponsoring advertiser.”<sup>73</sup>

With that in mind, we first consider Scenario 1-A, in which the influencer is paid by a sponsoring advertiser for her social media post which promotes the product and does not disclose this fact. The consumers may likely believe that it is the influencer’s unbiased opinion she expresses in her social media post even though such expressions may actually be influenced by the advertiser’s payment. Such promotion might be carried out by referring to the brand in a description, in the picture or by using a tap tag.<sup>74</sup> In sum, there would be an endorsement in this scenario.<sup>75</sup>

In Scenario 1-B, the influencer receives the product for free from the sponsoring advertiser. Because of this consideration, her post meets the requirements of an advertising message and is also an endorsement.<sup>76</sup> When the product received is cheap, it is debatable whether influencers are still obliged to disclose this information. However, the fact that the influencer received a gift at all may be information whose omission is likely to mislead consumers.<sup>77</sup> Accordingly, the FTC recommends disclosing the receipt of even very small gifts or non-financial benefits in most circumstances.<sup>78</sup>

If, as in Scenario 1-C, the influencer is genuinely convinced of the product and writes a positive review without receiving any consideration from the advertiser,

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<sup>71</sup> Cf. 16 CFR § 255.1.

<sup>72</sup> See *supra* text in Section II.B.1.

<sup>73</sup> See also, *Endorsement FAQ*, *supra* note 69 (“The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.”).

<sup>74</sup> Cf. Complaint ¶ 5, Lord Taylor, LLC, FTC Docket No. C-4576, (May 23, 2016), <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmpt.pdf>.

<sup>75</sup> Cf. *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 639 (S.D.N.Y. 2018).

<sup>76</sup> See also third paragraph of Example 8 under 16 CFR § 255.0. Cf. Complaint ¶ 7, Lord Taylor, LLC, FTC Docket No. C-4576, (May 23, 2016). See also Complaint at 19, *FTC v. Nobetes Corp.*, Case No. 2:18-cv-10068 (C.D. Cal. Dec. 3, 2018), [https://www.ftc.gov/system/files/documents/cases/172\\_3119\\_nobetes\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/172_3119_nobetes_complaint.pdf).

<sup>77</sup> Cf. § 255.5 (Endorsement Guides).

<sup>78</sup> Cf. *Endorsement FAQ*, *supra* note 69 (under “When Does the FTC Act Apply to Endorsements?”; under “Do I need to list the details of everything I get from a company for reviewing the product?”).

there is no *sponsoring* advertiser.<sup>79</sup> In this scenario, there is no endorsement, and accordingly, no related disclosure obligation.<sup>80</sup> This is significantly different from German law, under which extremely positive advertising messages may be seen as a commercial practice.<sup>81</sup>

The promotion of products sold by the influencer herself, as in Scenario 2, again conveys an advertising message. Depending on the circumstances, consumers might believe this reflects the opinions of the influencer as a consumer rather than as an advertiser. However, this implies that the endorsing party and the sponsoring advertiser can be the same party in different roles under the language of the Endorsement Guides. While this is not entirely clear under the Endorsement Guides, even though the FTC FAQ seems to suggest this,<sup>82</sup> non-disclosure might be deceptive under the three criteria described above when the consumers are likely to believe that the influencer is endorsing the products of another company.<sup>83</sup> For example, in the complaint of *FTC v. Genesis Today, Inc.*, the FTC highlighted the financial interest of an endorser who endorsed the products of a company which the endorser controlled.<sup>84</sup>

While there has been a discussion under German law about whether every post of a commercial influencer's account has *per se* commercial character,<sup>85</sup> the FTC will likely not consider such posts as in Scenario 3 to be endorsements. As in Scenario 2, there are doubts as to whether there is actually a sponsoring advertiser in this case. Furthermore, the post does not directly convey an advertising message, but rather contains opinions about the life and lifestyle of the influencer (instead of opinions about the influencer's account itself) which might convince users

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<sup>79</sup> See also Example 8 under 16 CFR § 255.0(e); *Endorsement FAQ*, *supra* note 69 (from “Isn’t it common knowledge [...]”).

<sup>80</sup> See also, *Kramer v. Unitas*, 831 F.2d 994, 998 (11th Cir. 1987) (stating if one “merely introduced the company” this would not be considered as endorsement in context of common law fraud claims).

<sup>81</sup> See *supra* text in Section II.B.1.

<sup>82</sup> *Endorsement FAQ*, *supra* note 69 (“[...] you could simply say you were ‘paid.’ (That wouldn’t be good enough, however, if you’re an employee or co-owner.) [...],” emphasis added and quotation marks adapted).

<sup>83</sup> Cf. Complaint at 12, *FTC v. Aura Labs*, Case No. 8:16-cv-2147 (C.D. Cal. Dec. 2, 2016), [https://www.ftc.gov/system/files/documents/cases/161212\\_aura\\_labs\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/161212_aura_labs_complaint.pdf) (discussing employees who did not disclose their material connections to their endorsed employer).

<sup>84</sup> Complaint ¶¶ 41-45, *FTC v. Genesis Today, Inc.*, (W.D. Tex. Jan. 26, 2015), <https://www.ftc.gov/system/files/documents/cases/150126lindduncmpt.pdf>.

<sup>85</sup> See *supra* text in Section III.B.1.

to follow her.<sup>86</sup> The Endorsement Guides cover similar fact patterns but do not require disclosure in such scenarios; accordingly, the FTC will likely consider such practice as not deceptive. Thus, FTC requirements may be more straightforward and intuitive for influencers than requirements under German and EU law.

## 2. Disclosure

Scenarios 1-A and 1-B both feature endorsements and thus must be in compliance with the requirements of the Guides. For Scenario 2, similar disclosure requirements apply.

The Endorsement Guides require that endorsements “reflect the honest opinions [...] of the endorser.”<sup>87</sup> Thus, “when the advertisement represents that the endorser uses the endorsed product, the endorser must have been a *bona fide* user.”<sup>88</sup> Along with further requirements, material connections “between the endorser and the seller of the advertised product [...] must be fully disclosed.”<sup>89</sup> In its FAQ, the FTC clarifies the disclosure requirement: the influencer does not need to disclose the exact amount of the consideration.<sup>90</sup> However, when the consideration consists of two elements, e.g., early access to a video game and additional payments, the substantial (monetary) compensation must be disclosed.<sup>91</sup>

The FTC recommends clear language such as “Company X gave me this product to try,” “Ad,” or “#ad.”<sup>92</sup> Just referring to the advertiser with an “@” reference is not sufficient.<sup>93</sup> The influencer should position the language such that it is easy for users to notice the disclosure information.<sup>94</sup> For example, placing the

<sup>86</sup> See also, *Endorsement FAQ*, *supra* note 69 (from “No. Some bloggers who mention products in their post [...]”).

<sup>87</sup> § 255.1(a).

<sup>88</sup> § 255.1(c).

<sup>89</sup> § 255.5.

<sup>90</sup> *Endorsement FAQ*, *supra* note 69 (from “Do I need to list the details of everything I get [...]”).

<sup>91</sup> Cf. Complaint ¶ 11, Warner Bros. Home Ent. Inc., FTC Docket No. C-4595 (Nov. 17, 2016), [https://www.ftc.gov/system/files/documents/cases/161811warner\\_bros\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf).

<sup>92</sup> *Endorsement FAQ*, *supra* note 69.

<sup>93</sup> See, e.g., Complaint at 10-12, FTC v. Teami, LLC, Case No. 8:20-cv-518 (M.D. Fla. Mar. 5, 2020), [https://www.ftc.gov/system/files/documents/cases/complaint\\_4.pdf](https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf); Complaint, Lord & Taylor, LLC, FTC Docket No. C-4576, (May 23, 2016); Complaint ¶ 14, Creaxion Corp., FTC Docket No. C-4668, (Feb. 8, 2019), [https://www.ftc.gov/system/files/documents/cases/c-4668\\_172\\_3066\\_creaxion\\_complaint\\_cre-ip-compl\\_new\\_lineup\\_9-26-18.pdf](https://www.ftc.gov/system/files/documents/cases/c-4668_172_3066_creaxion_complaint_cre-ip-compl_new_lineup_9-26-18.pdf).

<sup>94</sup> *Endorsement FAQ*, *supra* note 69.

language before the “more” link on Instagram,<sup>95</sup> not hiding the language in a long video description<sup>96</sup> and not placing it as a hashtag among several other hashtags.<sup>97</sup>

Accordingly, in Scenario 1-A, a description starting with “Ad:” or an easily visible “#ad” might suffice. In Scenario 1-B, the language might be included in the sentence (e.g., “*Thanks to Y for providing the product – For my good start into the day #health #powerfood #fitness*”). In Scenario 2, it might look like “*Check out my product X for a good start into the day #health #powerfood #fitness.*” These requirements are in essence similar to those under German law, e.g., with respect to the clear visibility of the disclosure notice. However, German law requires a more specific disclosure of the commercial context.

Unlike the requirements under German law, there is no explicit exception to a disclosure when a material connection or paid consideration is evident from the circumstances. However, in such cases the fact has been arguably “disclosed” within the meaning of § 255.5.

### 3. *Obligations for Advertisers*

According to § 255.1(d) Endorsement Guides, “advertisers are subject to liability for false or unsubstantiated statements made through endorsements.” The importance of this provision can be demonstrated by several cases. In *Lokai Holdings, LLC v. Twin Tiger USA, Inc.*, the plaintiff sued the *advertiser* for the influencers’ endorsements.<sup>98</sup> In *FTC v. Teami, LLC*, the FTC pursued an injunction and equitable relief against the seller of an endorsed product when endorsers failed to sufficiently disclose the material connection.<sup>99</sup> In several other cases, advertisers have been targeted rather than influencers themselves when advertisers failed to sufficiently oblige influencers to disclose the material connection.<sup>100</sup> In *CSGO Lotto, Inc.*, the parties agreed that the respondents have to implement a

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<sup>95</sup> Complaint ¶ 16, *FTC v. Teami, LLC*, Case No. 8:20-cv-518 (M.D. Fla. Mar. 5, 2020), [https://www.ftc.gov/system/files/documents/cases/complaint\\_4.pdf](https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf).

<sup>96</sup> Complaint ¶ 8-9, *Warner Bros. Home Ent. Inc.*, FTC Docket No. C-4595, (Nov. 17, 2016), [https://www.ftc.gov/system/files/documents/cases/161811warner\\_bros\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf).

<sup>97</sup> *Endorsement FAQ*, *supra* note 69.

<sup>98</sup> *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 639-40 (S.D.N.Y. 2018).

<sup>99</sup> E.g., Complaint at 10-12, *FTC v. Teami, LLC*, Case No. 8:20-cv-518 (M.D. Fla. Mar. 5, 2020), [https://www.ftc.gov/system/files/documents/cases/complaint\\_4.pdf](https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf).

<sup>100</sup> E.g., Complaint, *Lord & Taylor, LLC*, FTC Docket No. C-4576 (May 23, 2016), <https://www.ftc.gov/system/files/documents/cases/160523lordtaylormpt.pdf> (Complaint).

monitoring program of endorsers. As in several other cases,<sup>101</sup> the monitoring program includes:

- “Providing each such endorser with a clear statement of his or her responsibilities to disclose clearly and conspicuously, and in close proximity to the endorsement, [...] the endorser’s unexpected material connection [...]”;
- “Providing each such endorser with a clear statement of his or her responsibilities to disclose clearly and conspicuously, and in close proximity to the endorsement, [...] the endorser’s unexpected material connection [...]”;
- “Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of endorsers with material connections [...]”;
- “Immediately terminating and ceasing payments to any endorser with a material connection” who fails to comply with its obligations (upon notice); and
- “creating reports [...]”<sup>102</sup>

Stipulation of a monitoring program demonstrates the important role of the advertiser when it comes to social media campaigns and endorsements. A mere contractual obligation for the influencer to “comply with the FTC guidelines on disclosures [...]” without reasonable monitoring is not sufficient.<sup>103</sup>

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<sup>101</sup> *E.g.*, Decision and Order, Warner Bros. Home Ent. Inc., FTC Docket No. C-4595 (Nov. 17, 2016), [https://www.ftc.gov/system/files/documents/cases/161811\\_c-4595\\_warner\\_bros\\_do.pdf](https://www.ftc.gov/system/files/documents/cases/161811_c-4595_warner_bros_do.pdf); Decision and Order at 3-5, Machinima, Inc., FTC Docket No. C-4569 (Mar. 16, 2016), <https://www.ftc.gov/system/files/documents/cases/160317machinimado.pdf>; Decision and Order at 4-5, Creaxion Corp., FTC Docket No. C-4668 (Jan. 31, 2019), [https://www.ftc.gov/system/files/documents/cases/c-4668\\_172\\_3066\\_creaxion\\_decision\\_and\\_order\\_2-8-19.pdf](https://www.ftc.gov/system/files/documents/cases/c-4668_172_3066_creaxion_decision_and_order_2-8-19.pdf).

<sup>102</sup> Decision and Order at 4-5, CSGOLotto, Inc., FTC Docket No. C-4632 (Nov. 28, 2017), [https://www.ftc.gov/system/files/documents/cases/1623184\\_c-\\_csgolotto\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/1623184_c-_csgolotto_decision_and_order.pdf).

<sup>103</sup> *Cf.* Complaint ¶ 9, Legacy Learning Sys., Inc., FTC Docket No. C-4323, (June 10, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110610legacylearningcmpt.pdf>.

The FTC's focus on advertisers is not unusual among government agencies. For example, the Food and Drug Administration (FDA) also has a particular focus on marketers when reviewing drug advertisements.<sup>104</sup>

### CONCLUSION AND FINAL COMPARISON OF BOTH APPROACHES

The juxtaposition of the two approaches not only highlights the actual disclosure obligations in both countries, but also illuminates the relative advantages and disadvantages of enforcement either by a public authority or by competitors, and organizations.

#### A. *Requirements for Influencer Marketing*

When comparing the actual provisions across the different scenarios, there appear to be more similarities between U.S. and German law than differences. This is so even though German law focuses primarily on the disclosure of a commercial intent, while U.S. law concentrates on the disclosure of material connections. However, under German law, a material connection might indicate a commercial intent. Accordingly, German law has a broader scope, which explains why Scenarios 1-C and 3 may be assessed differently and require alternative reasoning than under U.S. law.

In Scenarios 1-A, 1-B and Scenario 2, both U.S. law and German law require the disclosure of material connections or of a commercial intent, respectively. For Scenario 1-B, there is no requirement of a minimum value of the product, but this might be relevant under U.S. Law. For Scenario 1-C, German law explicitly imposes the burden of proving no receipt of consideration on the influencer. Under U.S. law, influencers and advertising companies might be in any case required to provide certain information when the FTC requests it during an investigation. For Scenario 3, the details of how to assess this issue under German law are still not entirely clear and continue to be discussed by scholars. However, the result seems to be clear: in most scenarios, no disclosure is required. This is in line with the requirements under U.S. Law.

Disclosure requirements in both Germany and the U.S. are quite similar, e.g., regarding the wording of the disclosure notice and the position of such wording. The Endorsement Guides by the FTC are a helpful and concrete guideline lacking

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<sup>104</sup> Cf. Bentz & Veltri, *supra* note 59, at 190.

a *sufficient* counterpart in Germany.<sup>105</sup> German law clearly requires a disclosure of the concrete advertising purpose and may be considered stricter when it comes to highlighting disclosure information within a post’s description. A post which complies with U.S. law accordingly may require some modifications to comply with German law.

*B. Enforcement by Private Parties Compared to Enforcement by a Public Authority*

While the FTC is the primary enforcer of U.S. federal law regarding influencer marketing, the main<sup>106</sup> actors under German law are private parties.<sup>107</sup> Under German law, public media authorities may also enforce specific obligations. Additionally, the Consumer Protection Cooperation Regulation (EU) 2017/2394 provides for enforcement of intra-Union and widespread violations of consumer protection regulation including endorsement disclosure obligations by public authorities. The German approach is increasingly more of a hybrid.<sup>108</sup>

In the U.S., the FTC enforces the applicable law mostly against bigger companies and other relevant players – instead of the influencer themselves.<sup>109</sup> This means less enforcement in a quantitative sense, but not necessarily in a qualitative sense. The enforcement against advertisers might be more effective by covering practices conducted by several influencers at the same time.<sup>110</sup> Furthermore, the high number of settlements may effectively encourage respondents and other parties to comply with the requirements. The FTC is in a solid position to control its enforcement practice and focus on the most “important” cases. Nevertheless, it *has*

<sup>105</sup> See DIE MEDIENANSTALTEN, *supra* note 29.

<sup>106</sup> See, e.g., Boerman et al., *supra* note 5, ¶ 4 (discussing self-regulation in Europe and the U.S.); INTERNATIONAL CONSUMER PROTECTION AND ENFORCEMENT NETWORK, ONLINE REVIEWS ENDORSEMENTS – ICPEN GUIDELINES FOR DIGITAL INFLUENCERS (June 2016), <https://icpen.org/sites/default/files/2017-06/ICPEN-ORE-Guidelines%20for%20Digital%20Influencers-JUN2016.pdf>.

<sup>107</sup> See Leonid Guggenberger & Tristan Radtke, *Die Missbräuchlichkeitskontrolle von Unterlassungsansprüchen – Rechtsdurchsetzung unerwünscht?* [*The Abuse of Rights Control of Injunctive Relief – Legal Enforcement Undesirable?*], 77 JURISTENZEITUNG [JZ] 338 (2022) (Ger.) (discussing advantages of different types of enforcement and criticizing the current German system of private law enforcement under the UWG).

<sup>108</sup> See EUROPEAN COMMISSION, *supra* note 1, at 53 (emphasizing the advantages of combining different remedies).

<sup>109</sup> See Bentz & Veltri, *supra* note 59, at 187.

<sup>110</sup> Bentz & Veltri, *supra* note 59, at 189.

to focus on such important cases to make most effective use of its limited financial and personnel resources. In addition, it provides comparably well-designed guidelines that give influencers, and advertising companies, comprehensible materials to help them satisfy the legal requirements.<sup>111</sup>

In Germany, the competitors and competent organizations are free to enforce almost any violation which affects them.<sup>112</sup> This mostly covers, but is not limited to, economically relevant violations. Anyone can be subject to the claims of competitors and competent organizations, including influencers and small or big companies. While the FTC focuses particularly on advertisers, in Germany, often (and many) influencers are sued instead of the advertising companies. There have been at least eleven German district court cases<sup>113</sup> and probably many more settlements. As a consequence, it would seem the German influencer community has been sensitized rapidly. The applicable law is relatively concrete compared to U.S. law, yet there are no comparably comprehensive guidelines. Instead, influencers and advertising companies have to rely on the law as interpreted and concretized by the courts. This system may encourage parties other than large corporations to comply with requirements but may at the same time make compliance more difficult.

Overall, under both German and U.S. systems, influencer marketing and disclosure obligations have been addressed and “solved” in some way. Both approaches provide guidelines clarifying the obligations of influencers and advertisers over time. One could say that both approaches passed the challenge posed by this developing area of law, but in different ways.

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<sup>111</sup> Take the extensive FAQ on exact disclosure requirements as one example and the guidance on monitoring programs by advertisers as another example.

<sup>112</sup> See, e.g., Ducato, *supra* note 5, at 252 (emphasizing the high number of influencer cases registered by German courts).

<sup>113</sup> Cf. Radtke & Camen, *supra* note 9, ¶¶ 7-9.