[DE] German Federal Justice Ministry plans clear rules for influencers

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On 13 February 2020, the German Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection) published a draft law designed to create a legal framework for free recommendations by influencers and bloggers. The ministry intends to make it clear that comments on products made by influencers on social media free of charge and primarily for information and opinion-forming purposes do not need to be labelled as advertising.

The proposed regulations were drafted following several court decisions in recent years in which the commercial nature of influencer activities had been assessed in different ways. In particular, the courts had disagreed on whether recommendations for products and services made free of charge represented a commercial practice whose commercial nature must be identified under Article 5a(6) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act – UWG). As a result, in order to prevent uncertainty, some influencers have labelled all their social media posts as advertising. In the explanatory memorandum to the draft regulations, the Federal Ministry refers to the fact that such excessive labelling means that consumers can no longer reliably identify posts that do actually constitute advertising.

The draft law amends the Unfair Competition Act. For example, Article 5a(6) UWG will, in future, specify that a commercial practice should generally not be considered to have a commercial intent if its primary purpose is to provide information and shape public opinion and if it is not carried out in return for payment or any similar reward. According to the Federal Ministry, the proposed amendment is in line with case law concerning print media, and since it is designed as a presumptive example, it also permits a different assessment of a concrete case in special circumstances. The Ministry stressed that such a rule needed to be discussed in detail with the European Commission, since the German legislator’s freedom to amend the Unfair Competition Act was limited by the fact that it was designed to implement the Unfair Commercial Practices Directive (2005/29/EC).

Interested parties such as associations, companies, academics, influencers and journalists were invited to submit their views on the proposed regulations by 13

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March 2020. Their submissions are currently being analysed.

Pressemitteilung des Bundesministeriums der Justiz und für Verbraucherschutz vom 13. Februar 2020

https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/021320_Influencer.html

Press release of the Federal Ministry of Justice and Consumer Protection of 13 February 2020

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