[DE] Federal Supreme Court rules on influencers' advertising obligations

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In three rulings published on 9 September 2021, in relation to the well-known German social media influencers Leonie Hanne, Cathy Hummels and Luisa-Maxime Huss (case nos. I ZR 90/20, I ZR 125/20 and I ZR 126/20), the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided whether influencer posts should be labelled as advertising.

The proceedings were instigated by an association in competition, which had accused the influencers of engaging in surreptitious advertising pursuant to Articles 8(1)(1), 8(3)(2), 3(1) and 5a(6) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG). According to these provisions, unless an exemption applies, a case can be brought against an entrepreneur who engages in an unlawful commercial practice such as failure to identify the commercial intent of a commercial practice.

The first case (no. I ZR 90/20) concerned a post by Luisa-Maxime Huss, a fitness influencer who uses her Instagram account to post images and video clips of sports exercises, fitness tips and nutrition advice, as well as operating a commercial fitness website offering exercise classes in return for payment. In one of her Instagram posts, she had presented a brand of raspberry jam, along with a so-called "tap tag", which when tapped took the user to the jam manufacturer's website. However, the post had not been labelled as advertising, even though she had been paid for posting it.

In this case, the BGH decided that the post was a commercial practice, within the meaning of Article 2(1)(1) UWG, because the depiction of the jam worked in the manufacturer's favour and the defendant had been remunerated. However, it ruled that the link to the company using a "tap tag" was not, on its own, sufficient to constitute a commercial practice. Rather, it was the overall impression of the post, which was "overly commercial", presenting products without any critical distance or only in a positive light, that made it a commercial practice. In this case, Article 5a(6) UWG had been infringed because the failure to label the post as advertising meant that its commercial intent, which was not clear from the circumstances, had not been sufficiently identified. The BGH also found that the post had breached Article 22(1)(1) of the *Medienstaatsvertrag* (state media treaty – MStV), which requires telemedia, such as the Instagram app, to make

advertising clearly recognisable as such and distinctly separate from the other content of the offers provided. In the court's opinion, the influencer had rightly been ordered to remove the post without an advertising label.

The second case (no. I ZR 125/20) concerned beauty, fashion and lifestyle influencer Leonie Hanne, who posted pictures of herself on these themes. The defendant had posted some images without labelling them as advertising and had therefore been accused of surreptitious advertising. In the BGH's opinion, however, she had not infringed Article 5a(6) UWG because the commercial nature of her posts was clear from the fact that they advertised her own company's products. The court pointed to the fact that she had 1.7 million followers and that her account was mainly used for commercial purposes. Followers would therefore be expected to know that posts from her account would generally be advertising. The provisions of Article 6(1)(1) of the *Telemediengesetz* (Telemedia Act – TMG), concerning commercial communication in telemedia, and those of Article 22(1)(1) MStV, concerning advertising in telemedia, were market conduct rules specific to the telemedia sector. The media law assessments expressed in these specific provisions should not be undermined by the application of the general competition law provisions of Article 5a(6) UWG. The notion of consideration, provided for in Article 6(1)(1) TMG and Article 22(1)(1) MStV, only applied to the promotion of third-party companies and not self-advertising.

In the final case (no. I ZR 126/20), the influencer Cathy Hummels had failed to label posts as advertising, although she always marked her posts with the note "paid partnership". Here also, the court ruled in the influencer's favour. Although her posts constituted commercial practices, they were always advertising her own company, so she had not violated Article 5a(6) UWG. The commercial intent was clear from the circumstances, according to the BGH.

Labelling obligations for influencers are currently a subject of fierce debate in Germany, from both media law and competition law perspectives. Most of the discussion is centred on how big a channel needs to be before it can be regarded as commercial, the definition of advertising, and when and how posts should be labelled. The BGH's decisions have provided some clarity on the subject, but the answers to these questions will continue to depend on the circumstances of the individual case.

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 90/20)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122152&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 90/20)

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 125/20)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122155&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 125/20)

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 126/20)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122158&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 126/20)