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kommens" abstellt und die unionsrechtlichen Erfordernisse folglich insoweit erfüllt, als eine Vollanrechnung im Ansässigkeitsstaat aufgrund eines DBA möglich ist. Scheitert aber eine volle Anrechnung nach dem DBA-Methodenartikel, bewirkt auch die österreichische Rechtslage eine Ungleichbehandlung, die – wenn man die Ausführungen des EuGH in *ACC Silicones* in diese Richtung interpretiert – möglicherweise durch die Notwendigkeit der Vermeidung der Mehrfachberücksichtigung der Quellensteuer gerechtfertigt werden könnte. Diesfalls müsste dem Gesetzgeber aber unterstellt werden, dass er mit der Einführung des § 21 Abs 1 Z 1a KStG konkret eine Verbindung zwischen steuerlichem Vorteil (= Anrechenbarkeit im Ausland) und Nachteil (= lediglich partielle Rückerstattung) herstellen wollte, was sich – wie gezeigt – zwar aus dem Gesetzestext, nicht aber aus den Materialien ableiten lässt. Zudem müsste dieses Ziel konsistent für In- und Auslandsfälle verwirklicht werden. Überdies sei festgehalten, dass die österreichische Verwaltungspraxis insofern nicht den unionsrechtlichen Anforderungen entspricht, als sie für die Quellensteuerrückerstattung nach § 21 Abs 1 Z 1a KStG eine Bestätigung der ausländischen Finanzverwaltung über die Nichtanrechenbarkeit verlangt. Die bloße Glaubhaftmachung der Nichtanrechenbarkeit im Ansässigkeitsstaat muss alleine schon deshalb genügen, weil sich die Angaben des Steuerpflichtigen im Wege des Informationsaustausches leicht überprüfen lassen und das Erfordernis einer Bestätigung der ausländischen Finanzverwaltung sohin unverhältnismäßig wäre.

Rita Julien / Karoline Spies*)

Article 17 OECD MC in the Age of Influencers

ARTIKEL 17 OECD-MA IM ZEITALTER VON INFLUENCERN

Die fortschreitende Digitalisierung hat dazu geführt, dass auch Unterhaltung und Werbung vermehrt online stattfindet. Influencern als Werbeträgern kommt hierbei eine immer bedeutendere Rolle zu. *Rita Julien* und *Karoline Spies* untersuchen in diesem Beitrag, ob und unter welchen Voraussetzungen Influencer mit Einnahmen aus der Produktplatzierung als Künstler (*„entertainer"*) iSd Art 17 OECD-MA gelten können. Insbesondere beim Live-Streaming oder der Online-Veröffentlichung von Videos ist eine Anwendung des Art 17 OECD-MA denkbar, sofern der Beitrag nicht rein informativ oder werbend ist, sondern auch unterhaltende Elemente beinhaltet.

I. Introduction

Among his repertoire of talents, Professor *Alexander Rust* is a brilliant conference speaker and trained pianist. Experts in international taxation might readily appreciate how such talents could give rise to questions[1]) under Art 17 of the OECD[2]) and UN Models[3]) (or Art 16 of the U.S. Model[4])).[5]) In addition to the multi-talented *Alexander Rust*, we believe

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1) Indeed, we would not be alone in opining that his conference presentations showcase a seldom achieved combination of extraordinary learning value and entertainment value, one that could defy the line drawing of the Commentary on the OECD/UN Models. Few speakers can capture attention in the way his crystal-clear explanations of international tax law do, no matter the complexity of the topic.

2) *OECD*, Model Tax Convention on Income and on Capital 2017 (2017); hereinafter: OECD MC.

3) *UN*, Model Double Taxation Convention between Developed and Developing Countries 2021 (2021); hereinafter: UN MC.

4) *U.S.*, United States Model Income Tax Convention 2016 (2016).

5) Art 17(1) UN MC is nearly identical to Art 17(1) OECD MC, except for two aspects: Art 17(1) UN MC still refers to *"artistes"* (rather than *"entertainers"*) and to Art 14 (in addition to Arts 7 and 15). Art 16(1)

that the multi-talented, multi-faceted creators who are producing a wide range of content of educational and entertainment value across various social media platforms will surely present new and varied borderline cases to consider through the lens of Art 17 OECD MC. Moreover, analyzing these cases provides the opportunity to revisit a well-known judgment on the interpretation of Art 17 handed down by the Austrian Supreme Administrative Court – one that *Alexander Rust* has taught in his classes on tax treaty law and therefore another way to pay tribute to the numerous contributions of the jubilarian to whom this special volume is dedicated.

The relevance and rise of social media influencers is evidenced both in terms of the amount of money influencers earn and in terms of the extent to which businesses increasingly rely on influencers as a part of their overall marketing strategy. To offer just a few examples and estimates: in the three years leading up to 2021, the CEO of *YouTube* reported having paid more than 30 billion USD to creators on its platform;[6]) one content creator, for example, *Ryan Kaji* (*Ryan's World*), *"one of the top kid influencers"*, has over 31 million followers and earned nearly 30 million USD in 2021;[7]) in fact, *YouTube* channels with *"sufficient size and popularity"* have *"generated the equivalent of 28,000 full time jobs in Canada"* alone;[8]) finally, in the short span of two years (2016 to 2018), *"influencer marketing"* as an industry increased *"from 1.7 billion USD to 4.6 billion USD"* [9]) and is expected to reach 16.4 billion USD in 2022.[10])

Across the globe, various tax administrations have taken note of social media influencers – including Australia,[11]) Canada,[12]) Denmark,[13]) Germany,[14]) India,[15]) Nigeria,[16]) and South Korea[17]) – and have begun issuing guidance on how to assess their business models and income for tax purposes or even launching audits and investigations. In addition to the questions of tax treatment under domestic law (such as personal income tax[18])

U.S. Model deviates to a larger extent, as the right for source taxation is subject to the additional requirement that the income derived from the source state by the individual entertainer exceeds an annual threshold of 30,000 USD. Throughout the analysis, Art 17(1) OECD MC is used, for ease of reference, leaving aside any specificities in the UN MC/U.S. Model or in individual tax treaties.

6) *Weigl/Vasilounis/West*, Canada: The Price of Fame: Income Tax Considerations for Social Media Influencers, VitalLaw Wolters Kluwer 19. 4. 2021.

7) *Geyser*, YouTube Money Stats – Just How Much Do the Top YouTubers Make? InfluencerMarketingHub 2. 6. 2022, available at https://influencermarketinghub.com/youtube-money-stats/ (last accessed 5. 12. 2022).

8) *Weigl/Vasilounis/West*, VitalLaw Wolters Kluwer 19. 4. 2021.

9) See e.g. *Borchers*, Social Media Influencers in Strategic Communication, International Journal of Strategic Communication 2019, 255, available at https://doi.org/10.1080/1553118X.2019.1634075 (last accessed 25. 11. 2022).

10) *Santora*, Key Influencer Marketing Statistics You Need to Know for 2022, InfluencerMarketingHub 4. 11. 2022, available at https://influencermarketinghub.com/influencer-marketing-statistics/ (last accessed 27. 11. 2022).

11) *Kassam*, Social-Influencer Freebies Worth Billions Present Tax Temptation, Bloomberg Law News 23. 5. 2019.

12) *Canada Revenue Agency*, Compliance in the Platform Economy, available at https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/sharing-economy.html (last accessed 24. 11. 2022).

13) *Kassam*, Bloomberg Law News 23. 5. 2019.

14) *German Ministry of Finance*, FAQ „Ich bin Influencer. Muss ich Steuern zahlen?" vom 30. 7. 2020, available at https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Steuerliche_Themengebiete/Social_Media_Akteure/2020-07-30-social-media-akteure-introartikel.html (last accessed 10. 12. 2022).

15) *Arora*, India: Recent Tax Developments, VitalLaw Wolters Kluwer 11. 8. 2022.

16) *Adeyemi/Adedokun*, Nigeria: Taxation of Social Media Activities in Nigeria, VitalLaw Wolters Kluwer 28. 9. 2021.

17) *Kassam*, Bloomberg Law News 23. 5. 2019.

18) For example, for personal income tax, one compliance and valuation challenge stems from the sheer amount of non-monetary (or in-kind) income that social media influencers receive. See e.g. *Kassam*, Bloomberg Law News 23. 5. 2019. According to the German Ministry of Finance, non-cash benefits in terms of free samples or invitations to events are, as a general rule, subject to income tax; it is however

and value added tax[19])), there are various international dimensions to consider.[20]) Thus far, guidance and research on the question of how to classify and treat influencers under tax treaties, in particular, appears to be in its infancy.[21]) What is clear is that influencers, depending on their business model and the income they receive, may fall within various allocation rules (e.g., Art 7, Art 12, and Art 17).[22]) Our analysis focuses on Art 17, both for the sake of delimitation and for the sake of contribution as uncertainty remains regarding whether Art 17 could apply to social media influencers. So far, the scholarship on this question seems to point in different directions: while *Kostikidis* argues that certain influencers could be covered by Art 17,[23]) German scholars are skeptical and seem to deny the applicability of Art 17.[24])

The potential issues within Art 17 of tax treaties, alone, are various, meriting an even longer discussion than is possible here. Those that may be faced by influencers include:

(1) the notion of *"entertainers"*, in particular the fine line between payments for providing entertainment versus those for providing more business-related advertising services (as discussed in section III.2.2.),

(2) the notion of *"entertainers"*, in particular the exclusion of certain support staff (e.g., camera technicians) from this notion, due to the dual role that most influencers play in the production process (as discussed in section III.2.3.),[25])

(3) the notion of a public performance, in particular the condition that it be in front of an audience, due to the largely online activities and events of influencers (as discussed in section III.3.), and

(4) allocation of income issues when influencers' activities are carried out across multiple states.[26])

admitted that the value of these non-cash benefits is usually not easy to establish for tax purposes (*German Ministry of Finance*, FAQ [link see FN 14]).

19) See e.g. *German Ministry of Finance*, FAQ (link see FN 14), discussing the potential applicability of the SME exemption, invoicing rules and the VAT treatment of free samples.

20) Practitioners, for example, are pondering, on behalf of existing or potential clients, the international issues that may be confronted. See e.g. *Weigl/Vasilounis/West*, VitalLaw Wolters Kluwer 19. 4. 2021, highlighting examples of international tax issues that influencers may face, including *"residence"* especially *"[i]f they travel extensively, foreign tax credits, cross-border sales tax issues if they sell and ship goods, accounting issues […] if income is earned in foreign currencies (including as barter transactions)"*.

21) An article by *Kostikidis*, dedicated to furthering the research and discussion on influencers and tax treaty law, is particularly helpful and is referred to throughout this paper. See *Kostikidis*, Influencer Income and Tax Treaties, BIT 2020, 359. In addition, there are a few German-language articles on influencers that address tax treaty issues. See *Brunckhorst/Sterzinger*, Ertragsteuerliche Beurteilung von Bloggern, Podcastern und YouTubern, DStR 2018, 1689 (1693); *Höppner*, Zur Besteuerung von Influencern in Inbound-Sachverhalten, PIStB 2021, 22 (28 to 30); *Heine/Trinks*, Besteuerung von Travel-Influencern, beck.digitax 2022, 230 (231).

22) See in more detail *Kostikidis*, BIT 2020, 359 (359 et seq).

23) *Kostikidis*, BIT 2020, 359 (359 et seq).

24) *Höppner*, PIStB 2021, 22 (28 to 30), denies the applicability of Art 17 by relying mainly on two arguments: (i) influencers would carry out a wide range of activities consisting of entertaining and non-entertaining activities (in particular recording, cutting and editing of the content); this combination of activities would render Art 17 inapplicable; (ii) remuneration received by influencers for product placement would not have a direct causal link to a performance, since influencers share content in order to increase their followers and, thereby, their personal market value; he however also admits that it is not entirely excluded that Art 17 might be applied by tax administrations. *Heine/Trinks*, beck.digitax 2022, 230 (231), merely refer to *Höppner* and state that there are no good arguments in favour of the application of Art 17 to travel-influencers. *Brunckhorst/Sterzinger*, DStR 2018, 1689 (1693), do not address Art 17 but instead focus only on Art 7.

25) Based on this argument (among others), *Höppner*, PIStB 2021, 22 (28 to 30), denies the applicability of Art 17 to influencers.

26) This topic could benefit from more guidance. For an initial proposal and further discussion, see *Kostikidis*, BIT 2020, 359 (376) (proposing that due to the *"economic peculiarities of influencer activities"*, their activities *"should be evaluated according to the likes, or similar indicators, such as views, shares, comments, etc., of the relevant photograph takers, i.e. the influencer photograph posts"*); *Roeleveld/Tetłak*, Article 17: Entertainers and Sportspersons, in *IBFD*, Global Tax Treaty Commentaries, section 4.2.4.1.

Against this background, the analysis below focuses on the three first points, namely those that grapple with the scope of Art 17 and, in this way, help to answer the question of whether or not it applies and which interpretation issues influencers who are active across borders may encounter.

II. Taxation of Entertainers Under Art 17 OECD MC

1. Cornerstones of Art 17 OECD MC

For purposes of this paper, the allocation rule for entertainers and sportspersons in Art 17(1) of the OECD Model (hereinafter: OECD MC) is of utmost interest.[27]) Summarized in a brief way, Art 17(1) preserves the right to tax of the source state – which, in this case, is the state where a given performance takes place – in cases of entertainer income.[28]) More precisely, this article stipulates that income derived by a resident of a contracting state as an entertainer (e.g., a musician) or a sportsperson from personal activities as such exercised in the other contracting state may be taxed in the other state. Therefore, Art 17(1) – in deviation from the more general rule in Art 7 for business profits – gives taxation rights to the source state even if the person performing has no permanent presence (i.e., permanent establishment) in the source state (also referred to as the *"performance state"* for the purposes of Art 17[29])).[30])

The main objective of this rule is to avoid non- or under-taxation: because the residence state of an internationally active entertainer faces administrative difficulties in taxing income earned from performances abroad, due to an information lag and due to the concern that entertainers might tend to under-declare (or not declare) their income in the residence state, the performance state is (also) permitted (but not obliged) to tax this income.[31]) This aim is reflected in OECD reports and in the 2017 OECD Commentary on Art 17.[32]) In practice, many (performance) states apply a withholding tax on income of non-resident entertainers, which has to be withheld by the payee (often coupled

and footnote 197 (citing the proposal of *Kostikidis*, writing that *"it may be […] appropriate to apportion the income as to the advertising effects",* though *"[t]his may be difficult to do in practice."*).

27) Art 17(2) is not addressed in this paper. Some influencers are forming LLCs or incorporating their business, so there is a chance that Art 17(2) could play a role for influencers. Nevertheless, it seems suitable at this stage to focus on the first-order issues of scope before considering the more specialized issues and potential avoidance strategies. Art 17(2) would come into play only if it is first determined whether Art 17(1) applies. The space of this contribution simply does not allow for an elaboration on all points, however interesting they all may be.

28) See *Cordewender* in *Reimer/Rust*, Klaus Vogel on Double Taxation Conventions[5] (2022) Art 17 para 3; *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 1.1.2.1.

29) See *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 2.

30) Remarkably, Art 17 applies irrespective whether the activities are of a business or employment nature. See para 1 OECD Commentary 2017 on Art 17 OECD MC. Hence, in case of employed entertainers taxing rights are attributed to the performance state, even if the 183-days-rule is not exceeded and/or even if the employer has no permanent establishment in the meaning of Art 15 in the source state.

31) See *Grams*, Artist Taxation: Art 17 of the OECD Model Treaty – A Relic of Primeval Tax Times, Intertax 1999, 188 (188 et seq); *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 3; *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 1.1.2.

32) *OECD Committee on Fiscal Affairs*, The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities, adopted by the OECD Council on 27. 3. 1987, paras 16, 19, 47 (e.g. establish a system by which the income of artistes is *"effectively taxed"*); *OECD Committee on Fiscal Affairs*, Issues Related to Article 17 of the Model Tax Convention, adopted on 26. 6. 2014, para 5 (it was noted *"that residence taxation should not be assumed given the difficulties of obtaining the relevant information, that Article 17 allows taxation of a number of high-income earners who can easily move their residence to low-tax jurisdictions and that source taxation of the income covered by the Article can be administered relatively easily"*); para 2 OECD Commentary 2017 on Art 17 OECD MC (referring to *"practical difficulties"*). As *Nitikman* rightly points out this claim was, however, not supported by any data or credible research (*Nitikman*, Article 17 of the OECD Model Treaty – An Anachronism? Intertax 2001, 268: *"There is essentially zero statistical data presented to prove the very assertion on which the reports are based, and at most the reports seem to be based on anecdotal rather than empirical evidence"*); similar *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 1.1.2.1. and footnote 8.

with liability if they fail to do so), in order to guarantee effective tax collection.[33]) Some authors also justify the right of the source state to tax under Art 17(1) based on the benefit principle: the state which provides the infrastructure needed for the taxpayers to execute their performance should have the taxation right.[34])

Art 17(1) was included as early as the OECD MC 1963. Since then, the main changes in the English version of the OECD MC relate to two aspects. First, the OECD MC 1963 used the term *"artistes"* in the title of the article and the term *"public entertainer"* in the text of Art 17(1) itself. The adjective *"public"* was deleted during the 1977 update. Since the 2014 update, the title refers to *"entertainers"* rather than *"artistes"*, which confirms that it is not the level of artistic quality that is decisive, but rather the entertainment character of the performance. Although there has been criticism of both the design and policy of Art 17,[35]) attempts for more substantial reform have not been successful so far.

The scope of Art 17(1) may be divided into the personal scope focusing on the persons covered (i.e., *"entertainer"* and *"sportsperson"*) and the objective scope focusing on the income within scope (i.e., *"income […] from that resident's personal activities as such exercised in the other Contracting State"*).[36]) Both requirements will be at the heart of this discussion and further explored in section III.2. If the scope is met, taxation rights are allocated to the state where the performance activity is carried out (*"exercised"*). In other words, the source state permitted to tax is the state in which the entertainer is physically present and personally performing. Therefore, for the purpose of Art 17(1), the residence state of the payee or the place where the audience is physically located is, as a general rule, irrelevant for the allocation of taxation rights.[37])

The term *"entertainer"* is not exhaustively defined in the OECD MC. According to prevailing opinion, the term has an autonomous meaning independent from any definition under domestic law.[38]) Although there is no express definition, Art 17(1) provides some illustrative examples of which professions should be covered by the term, namely *"theatre, motion picture, radio or television artiste"*. In addition to the term *"entertainer"*, the income within scope has led to extensive discussions in literature.[39]) According to prevailing opinion, only income (and expenses) causally linked to the individual entertaining performance in the source state may be taxed there.[40]) In cases of lump-sum payments having a connection to more than one performance (e.g. sponsorship income linked to a series of public appearances), the attribution of income to different source

[33]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 5. A withholding system has also been recommended by the OECD in order to guarantee effective taxation (*OECD Committee on Fiscal Affairs*, The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities, para 47).

[34]) See in particular *Kostikidis*, BIT 2020, 359 (362); in a similar vein (but adopting a more critical stance), see *Kreisl*, Treatment of Artistic Income where there is no Public Performance according to the OECD Model, in *Loukota*, Taxation of Artistes and Sportsmen in International Tax Law (2007) 137 (144); *Wagner*, The Historical Background of Art 17 OECD Model, in *Loukota*, Taxation of Artistes and Sportsmen, 63 (68). Rightly criticizing the relevance of the benefit principle for the purposes of the international allocation of income in general, as it is difficult *"to put into operation"*, see *Schön*, International Tax Coordination for a Second-Best World (Part I), WTJ 2009, 68 (75 et seq).

[35]) See in particular *Grams*, Intertax 1999, 188 (188 et seq), and *Nitikman*, Intertax 2001, 268 (268 et seq). A summary on the criticism can also be found here: *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 1.1.2.3.

[36]) See also *Kostikidis*, BIT 2020, 359 (363); *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.nos. 30 to 44 and 52 et seq.

[37]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 3.3.1.

[38]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 31.

[39]) With further references to literature and case law *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.nos. 52 et seq; *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, sections 4.2.3 and 4.2.4.

[40]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.3.1.

states is a disputed issue.[41]) Also in cases of remuneration for mixed activities (entertaining and non-entertaining), complexities may arise.[42])

Of these various debated issues, the key issue addressed in this paper is the classification of advertisement and promotional activities under Art 17. The (non-)application of Art 17 to persons who are promoting products in public for remuneration – in the traditional economy sometimes referred to *"testimonials"*, in the digital world nowadays sometimes referred to as *"influencers"* – has led to (diverging) case law and administrative guidance around the world.[43]) This might lead to legal uncertainty, and, in some cases, to double (non-)taxation. Two examples are illustrated in the next sub-section (section II.2.), before diving into the research related to the scope of Art 17 (section III.).

2. Selected Case Law and Administrative Guidance on Art 17 OECD MC

2.1. Decision by the Austrian Supreme Administrative Court

In 2015, the Austrian Supreme Administrative Court issued a decision on a case involving Art 17, the facts of which may resemble the situation of influencers.[44]) A famous U.S. resident who worked, inter alia, as an actor, model and promotional figure (hereinafter *"star"*, abbreviated as *"PP"* in the domestic proceedings) took the stage at a public event (*"Open Air Party"*) in Austria in 2006. The main purpose of the event was to advertise a certain brand of prosecco. The star's performance of approximately 30 minutes consisted of giving an interview, making a few dance moves, waving and advertising the drink (by e.g. signing a few beverage cans and promoting its taste). The star's appearance at the event was embedded in musical performances (by other artists) and the dance performances of 50 dancers. The star received a remuneration of about 650,000 EUR. According to the parties to the agreement, the star had been engaged for advertising purposes on the basis of her media value, which was mainly due to her status as the *"most known party girl in the world"*. The media reported that around 20,000 fans watched the star's performance.[45])

The Austrian tax authorities considered the performance to be an entertaining activity in the sense of Art 17 of the DTC Austria – USA (1996). As a consequence, Austria retained the taxation right for the income derived from the aforementioned performance and the payment was subject to a withholding tax of 20 % according to Austrian domestic income tax law. The star (claimant) appealed, arguing that the performance did not qualify as an entertaining activity since she had not performed as an artist, but as a *"testimonial"*. The agreement had a business purpose, namely the exploitation of her popularity for the benefit of the beverage. Hence, Art 7 or 14 DTC Austria – USA (1996) should apply and, therefore, Austria should not have the right to tax her income. The position of the Austrian tax authorities was upheld both by the lower instance body[46]) and the Supreme Administrative Court.

The Supreme Administrative Court concluded in its decision of 30. 6. 2015 that the claimant's performance indeed qualified as an entertaining activity in the sense of Art 17 DTC Austria – USA (1996), thus granting Austria, as the performance state, the right to tax.

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41) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.nos. 99 et seq; *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 4.2.4.

42) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 4.2.3.1.

43) For examples from case law, see *Topete*, Analysis of the Case Law on the Scope of Article 17 of the OECD Model: Issues Resolved and Yet to Be Resolved, BIT 2017, section 3; *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.nos. 95 to 102.

44) VwGH 30. 6. 2015, 2013/15/0266.

45) On the facts of the case, compare in more detail VwGH 24.6. 2009, 2009/15/0090. This judgment deals with the same fact pattern, but addresses questions of domestic law only (in particular the potential liability of the payee of the remuneration).

46) UFS 20 8. 2013, RV/2462-W/12 (decision not available to the public).

Before starting its legal reasoning, the court emphasized that the claimant in general appears as an actor in various areas, including in the film, television and music business, and that she undisputedly attracted a broad audience for the event in question. Then the court continued by recalling that the term *"entertainer"* in Art 17 does not require a performance to be of a certain quality, duration or the like. In other words, the artistic level of the performance is immaterial.[47]) Rather, Art 17 would require only that a person carries out an activity in her personal capacity as an entertainer. Instead of analyzing the individual performance of the star and its entertaining character in detail, the court subsequently focused on the event in more general terms.[48]) It held that in view of the overall picture of the performance in question in terms of its planning, execution and media presentation and marketing, the relevant authority could safely assume that the claimant performed as an entertainer in the meaning of Art 17.[49]) Interestingly, the court emphasized at this point of the judgment that the claimant was staged as the main attraction for the audience. According to the court, attracting and entertaining an audience as in the given case would fulfill the typical characteristic of an entertaining activity within the meaning of Art 17.

As regards the advertising function of the event, the court took the position that the advertising purpose of a performance does not preclude its entertaining character if the entertaining character from an objective point of view remains preserved. In this respect, the court emphasized that the claimant intentionally used her reputation as a celebrity to contribute significantly to the entertainment value of the event.[50])

Put in short, the Austrian Supreme Administrative Court seems to assume that the more famous the person performing and the larger the event, the less "artsy" and entertaining the activity needs to be in order to be covered by Art 17.[51]) If one tries to abstract the court's reasoning in very general terms, anyone who reaches a certain level of fame and who takes the stage in public could almost inevitably fall under Art 17.[52]) Moreover, the court paid more attention to the perspective of the audience visiting the event, which presumably felt entertained, rather than the parties to the agreement, which organized the event and the performance for advertising purposes.

The decision was received with much attention in literature and was partly criticized.[53]) In particular the court was criticized for providing only a thin legal reasoning.[54]) More in detail, *Lang/Siller/Zolles* rightly point out that the court referred to three different arguments for applying Art 17, namely

- the prior work of the star as an entertainer,
- the star's fame which attracted the audience, and
- the entertaining character of the event.

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47) *Kostikidis*, BIT 2020, 359 (365).

48) For a critical perspective, see *Lang/Siller/Zolles*, Chapter 21 Austria: Entertainers under Article 17, in *Kemmeren* et al, Tax Treaty Case Law around the Globe 2016 (2017) 245 (249).

49) See also *Zorn* (judge at the Austrian Supreme Administrative Court) as quoted in *Siller/Zolles*, SWI-Jahrestagung: Werbeauftritt als künstlerische Tätigkeit, SWI 2016, 443 (444).

50) The fact that the German (authentic) version of Art 17 in the Tax Treaty between Austria and the U.S. (1996) used the term *"Künstler"* (which is to be translated as *"artist"*) cannot change the result. In this respect, the Supreme Administrative Court emphasized that in the English version of the treaty – which is equally authentic – the term *"entertainer"* was used (rather than *"artist"*). In the court's opinion, this makes it clear that the entertainment element is decisive and also implies that the concept of art (in qualitative terms) covered by Art 17 is rather broad.

51) With a similar view *Renner*, Werbeauftritt als künstlerische Tätigkeit nach dem DBA Österreich – USA, SWI 2015, 474 (477); *Rief* as quoted in *Siller/Zolles*, SWI 2016, 443 (444).

52) In a similar vein, *Topete*, BIT 2017, section 3.4.

53) *Renner*, SWI 2015, 474; *Bendlinger*, Ist jeder Auftritt eine „Kunst"? ÖStZ 2016, 58; *Löser*, Let me entertain you …, ÖStZ 2016, 46; *Siller/Zolles*, SWI 2016, 443; *Lang/Siller/Zolles* in *Kemmeren* et al, Tax Treaty Case Law, 245; *Topete*, BIT 2017, section 3.4.; *Kostikidis*, BIT 2020, 359 (365).

54) *Bendlinger*, ÖStZ 2016, 46 (59).

However, the court did not clarify the relation between these conditions. Hence, it is unclear how to apply the reasoning to other cases.[55]) Following this judgment, it was for example discussed in Austria whether the (paid) participation and appearance of an actor or politician in a special loge at the Viennese Opernball could be covered by Art 17, since the guest is famous, the event as such is entertaining, visited by many people and the guest needs to wave for photos and give interviews.[56])

Admittedly though, the OECD Commentary provides similarly nebulous indicia. On the one hand, it emphasizes *"look[ing] at what the individual actually does in the State where the performance takes place"*;[57]) and that the *"reference to an 'entertainer' or sportsperson' includes anyone who acts as such, even for a single event"* (emphasis added).[58]) Following this reasoning, it should be the individual (entertaining) performance which makes a person an entertainer for the purposes of Art 17, not the overall (other) activity the person is carrying out.[59]) The fact that a person is famous and the reasons for this fame should therefore be immaterial when assessing Art 17.[60]) On the other hand, the OECD Commentary asserts in another paragraph in rather general terms that a film actor who appears in a television commercial should be covered by Art 17,[61]) without specifying that the advertisement needs to have an entertaining character. Here, it is unclear if the OECD Commentary simply presumes that commercials are inherently entertaining or if its position is, rather, driven by the star power of a film actor in that case.

Thus, even though this is not made explicit, the OECD Commentary could be read as implying that it is not the individual activity in the performance state alone that matters when assessing the applicability of Art 17, but rather, it seems, that the overall picture is relevant: if a person, who is famous for being an entertainer (such as an actor), appears on a stage at an entertaining event, this is more likely to be covered by Art 17, even if the actor's own individual performance is not very entertaining.[62]) Arguably, an assessment of the specific performance in question and its entertaining character, irrespective of the profession and fame of the person performing, seems to be more coherent and convincing, but, that said, the OECD Commentary could be construed as also supporting the reasoning of the Austrian Supreme Administrative Court.[63])

2.2. Guidance by the U.S. IRS

Approximately seven years before the above-mentioned star took the stage at the 2006 event in Austria, the U.S. IRS Office of Associate Chief Counsel issued a Field Service Advice (FSA) memorandum on similar facts.[64]) It reached a different conclusion.

The issue was whether a taxpayer, who was a model and actor, was an *"entertainer"* for the purposes of Art 16 U.S. Model (i.e., the functional equivalent Art 17 OECD MC) *"with respect to services performed [by the taxpayer] under [an] Agreement"* with a corporation (referred to as *"Corp B"* in the memorandum). The *"Agreement"* between the taxpayer

[55]) *Lang/Siller/Zolles* in *Kemmeren* et al, Tax Treaty Case Law, 245 (249).
[56]) *Siller/Zolles*, SWI 2016, 443 (445 et seq).
[57]) Para 4 OECD Commentary 2017 on Art 17 OECD MC.
[58]) Para 9 OECD Commentary 2017 on Art 17 OECD MC.
[59]) *Bendlinger*, ÖStZ 2016, 46 (62); also the one-time performance as artist is thus covered (*Schwenke/Wassermeyer* in *Wassermeyer*, DBA [suppl 158, 2020] Art 17 para 21).
[60]) Presumably arguing in a different direction and considering fame as relevant, *Kostikidis*, BIT 2020, 359 (370).
[61]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.
[62]) According to *Zorn* (judge at the Austrian Supreme Administrative Court), the same person will not be covered by Art 17, if she holds a yoga seminar due to the lack of a stage and a broad audience. See *Zorn* as quoted in *Siller/Zolles*, SWI 2016, 443 (444).
[63]) Similar *Dommes* as quoted in *Siller/Zolles*, SWI 2016, 443 (444 et seq).
[64]) *U.S. IRS*, Field Service Advice Memorandum, FSA 199947027 (30. 9. 1999). As the Memorandum explains, FSA does not constitute precedent, nor is it *"binding on Examination or Appeals"* and *"it is not a final case determination"*.

and *Corp B* included various services to promote the corporation's products, such as serving as *"a spokesperson to Corp B, including appearing at press conferences and granting interviews"*, *"as a performer and model in the production of materials advertising and promoting Corp B and its Products in all forms of media, electronic or otherwise, […] including but not limited to, television […] and radio commercials, […] magazines, newspapers, […] theatrical and cinema advertising, interactive and multimedia programming, […] video trailers, infomercials, how-to videos,"* etc, and *"to consider promoting and endorsing Corp B and its products in all public and professional appearances attended by Taxpayer A"* (emphasis added). It even included a requirement that the taxpayer perform the services *"in a competent and 'artistic' manner to the best of Taxpayer A's ability"*.

The U.S. IRS concluded in its memorandum that the taxpayer is *"generally not an 'entertainer' […] because the primary purpose of Taxpayer A's activities under the Agreement is generally not entertainment, but is instead the promotion, marketing and sale of Corp B Products"*. Comparing and contrasting the legal reasoning of the memorandum with that of the Austrian Supreme Administrative Court reveals some subtle differences on two points.

First, the reasoning of the Austrian Supreme Administrative Court gives the impression that the outcome revolved significantly around the star's general profession and fame (which it underscored, more than once); it was her fame achieved as a model and actor that attracted a large audience and, because it did, the event was, it seems, by default entertaining. In contrast, the fame of Taxpayer A was not addressed in the memorandum and, hence, did not seem to have played a role in the IRS's assessment.

Second, the Austrian court also opined that the event was, from an objective point of view, entertaining for the audience, hence relying on the perspective of the audience as a driving factor. By comparison, the arguments advanced by the star, which the court rejected, seem to encapsulate the approach found in the FSA memorandum. Her lawyers emphasized the primary purpose of the event and the star's performance. They urged that the entire reason for organizing the event and the performance was to promote the drink and, moreover, they successfully achieved this aim. Similarly, the legal analysis in the FSA memorandum focused on the primary purpose of the activities to be performed under the agreement, looking to the language of the agreement and thereby also factoring in the intentions of the parties. In this way, different perspectives were emphasized: on the one hand, the perspective of the audience; on the other, the perspective of the parties to the agreement.

The FSA memorandum did however leave the door open to another possible outcome: *"[h]owever,"* it concedes, *"if Taxpayer A did in fact perform an activity pursuant to the Agreement, and the primary purpose of such activity was entertainment, then, with respect to such activity, Taxpayer A could be an 'entertainer' for purposes of the Artistes and Athletes Article of the U.S.–Country X Treaty."* [65]) Notice, though, even in this acknowledgement, the assessment revolves around the *"primary purpose of such activity"*, which presumably refers again to the perspective of the parties.

Ultimately, although the divergent reasoning may, or may not, have resulted in a different outcome for the star's case, it seems that it would have been a much closer call. As the factors emphasized and weighed slightly differ, there is a risk that the authorities of the two states, Austria and the U.S., could reach different results in some cases.[66]) As such

[65]) *U.S. IRS*, Field Service Advice Memorandum, FSA 199947027 (30. 9. 1999).

[66]) See e.g. *Andersen*, Artistes and Athletes, in *Andersen*, Analysis of United States Income Tax Treaties (2022) section 13.04, explaining that in the *Boulez v. Commissioner* case, the U.S. Tax Court decided that a given contract gave rise to income for personal services, not royalties. *"It should be noted that the German competent authority did not agree with this conclusion, as a consequence of which the maestro was subjected to double taxation."*

hybrid promotion-performance cases share similarities with the business model of influencers (discussed in more detail in the next section, section III.1.), influencers who are active in various states are also at risk of double taxation.

III. Influencer and Art 17 OECD MC

1. Business Model of Influencers

Social media influencers[67]) are an enterprising, versatile group: for example, they have a diversity of content (e.g., fashion, tutorials, book reviews, travel, sports, comedy), range of functions (e.g., creating content, directing, producing, editing, distributing the content), levels of followers (e.g., nano, micro, macro, mega[68])), sources of income (e.g., subscriptions, advertisements, sponsorships), and mediums of communication across different platforms (e.g., text via blogs, pictures via *Instagram*, videos via *YouTube*, live streaming via *Twitch*[69])). As for content, a mere glance at, for example, *YouTube's "Creators on the Rise"* program showcases a wide array: in addition to lifestyle influencers and travel aficionados, all interests are covered, ranging from a French content creator's passion for manga comics (promoting the books and authors), to a Canadian family's passion for theme parks (visiting various theme parks to film the experience of the amenities, restaurants, and rides), to chefs (creating new recipes, teaching cooking techniques, and promoting kitchen supplies).[70]) What is notable is that often their content blends promotion, entertainment, and educational or informational components. This becomes relevant in the Art 17 analysis, as discussed in section III.2.2.

As for their functions, influencers tend to *"combine different roles, which, have traditionally been occupied by separate actors"*:[71]) normally, there is a hair and make-up artist, a lighting technician, a camera person, a producer, an actor, and so on, and, even after all of this, broadcasting or distributing the content to audiences is another process. One *"YouTuber"* might play all of these roles for each video they publish online (e.g. write their own scripts; apply their own make up; use their own camera and other equipment; edit their own videos; select the online platforms and medium of publication).[72]) This becomes crucial in the Art 17 analysis because, whereas the entertainers (e.g., actors or singers) themselves are generally covered by Art 17, the support staff

67) A terminological distinction is in order, namely that between *"influencers"* and *"content creators"*, as not everyone who creates content for social media would be considered (nor would consider themselves) an *"influencer"*. For a more detailed discussion, see e.g. *Goanta/de Gregorio*, Content Creator/Influencer, in *Belli/Zingales/Curzi*, Glossary of Platform Law and Policy Terms (2021) 69 (69 to 71).

68) *Brewster/Lyu*, Exploring the Parasocial Impact of Nano, Micro and Macro Influencers, International Textile and Apparel Association Annual Conference Proceedings 2020, available at https://doi.org/10.31274/itaa.12254 (last accessed 7. 12. 2022), explaining that *"[c]urrent literature has established four main levels of SMIs, based on follower count: 'mega' or 'super' influencers (> 1 million followers); 'macro' influencers (100k-1m); or micro-influencers (5k-100k); and 'nano' influencers (< 5k) (Alassani & Göretz, 2019; Mediakix, n.d.)"*.

69) *Borchers*, International Journal of Strategic Communication 2019, 255 (256).

70) See e.g. *Buxton*, Introducing November's Featured Creators on the Rise, YouTube Official Blog 3. 11. 2022, available at https://blog.youtube/creator-and-artist-stories/novembers-featured-creators-on-the-rise-2022/; *Buxton*, Introducing September's Featured Creators on the Rise, YouTube Official Blog 9. 9. 2022, available at https://blog.youtube/creator-and-artist-stories/creators-on-the-rise-september-2022/; *Buxton*, Introducing August's Featured Creators on the Rise, YouTube Official Blog 12. 8. 2022, https://blog.youtube/creator-and-artist-stories/august-2022-creators-on-the-rise/ (all last accessed 27. 11. 2022).

71) *Borchers*, International Journal of Strategic Communication 2019, 255 (255). This is also emphasized by *Höppner*, PIStB 2021, 22 (29), when assessing the applicability of Art 17.

72) See e.g. *Activate*, Double or Nothing: Betting Big on Influencer Marketing, 2019 State of Influencer Marketing Study (2019) 15 *("[…] an influencer is a model, photographer, creative director, editor, copywriter and distribution all in one.")*; *Borchers*, International Journal of Strategic Communication 2019, 255 (255); *David*, How Influencers Have Transformed Modern Marketing, minute 12:30, available at https://www.youtube.com/watch?v=gbbEXnRG9d8 (last accessed 24. 11. 2022).

(e.g., camera technician or director) are generally not; yet, influencers are often both (see further in section III.2.3.).

As for their sources of income, one law firm circular grouped the various sources into four overarching categories,[73]) namely

(1) *"Programmatic Ads"*, referring for example to the ads that play during videos, often placed by algorithms (such as *Google's AdSense*) that seek to select ads tailored to the viewers – any revenue from which is usually shared between the creator and the platform;

(2) *"Memberships and Tips"*, referring for example to monthly fees that some viewers are willing to pay to subscribe to a creator's content or to have special access to live-streamed events or online interactions with the creator;

(3) *"Direct Sponsorships"* and product placement, referring for example to *"specially-produced content to highlight an advertiser's products and services"*, which often involves the influencer and the business working directly together for a given video or other social media campaign; and

(4) *"Off-Platform Revenue"*, *"a catch-all category of other types of revenue"* capturing *"everything from merchandising (as many influencers maintain online shops selling branded clothing and other goods), offline experiences (such as, meet-ups, concerts, or other ticketed events), and offline collaborations with brands"*.[74])

The term *"influencers"* points to one of these sources of income as particularly paradigmatic of the influencer business model (at least in terms of the broader public perception of their role[75])), namely the income generated through sponsorships or product placements in their photos, videos and live streams. For this reason, the analysis below focuses particularly on income generated from such sponsored content via online media. Indeed, the signature of successful influencers is often their ability to seamlessly integrate products, services, and experiences into their content in natural ways that are authentic (or, even in cases where it is not a product they authentically would use, in ways that are nevertheless perceived to be authentic). Authenticity and relatability are driving factors for the trust of their followers and, therefore, for the interest of businesses in seeking influencer endorsements and partnering with them on marketing campaigns.[76])

As can be seen, influencers are entrepreneurs. Many start from scratch, so to speak. Broadly speaking, the typical business trajectory of influencers is to produce content of value and interest to people and, over time, to garner a following via social media. In some cases, they focus on self-branding (that is, developing one's own identity as its own brand).[77]) In nearly all cases, it seems, they focus on authenticity and intimacy,

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[73]) *Weigl/Vasilounis/West*, VitalLaw Wolters Kluwer 19. 4. 2021. For a tax administration's perspective on the types of income, see e.g. *Canada Revenue Agency*, Compliance in the Platform Economy (link in FN 12).

[74]) *Weigl/Vasilounis/West*, VitalLaw Wolters Kluwer 19. 4. 2021.

[75]) Of course, not all social media content creators strive to be *"influencers"* in the sense of swaying trends or recommending products or simply helping their followers in a given niche find the products/services to support the community in flourishing in their shared niche (e.g., the latest gadgets for the most effective cooking or crafting or other hobbies), but, for the portion of creators that do, their dedication to sharing their recommendations (be it in fashion, face products, or craft supplies) and generating a following seems to be what has given rise to the label *"influencer"*. For a definition of the term *"influencer",* see e.g. *Goanta/de Gregorio* in *Belli/Zingales/Curzi*, Glossary of Platform Law and Policy Terms, 69 (69 to 71).

[76]) See e.g. *Activate*, 2019 State of Influencer Marketing Study, 3 (7). The statistics in this 2019 study may help substantiate the trend that companies are increasingly appreciating the authenticity and relatability of influencers: while one might expect that companies prefer to work with influencers that have the largest following, industry research reveals the opposite. Under the heading *"Size Matters"*, the study reported that *"micro-influencers (those with 5K-100K followers) are the most engaged by brands, whereas Celebrities and Mega influencers (those with 500K+ followers) are generally tapped sporadically for high-investment partnerships"*.

[77]) See e.g. *Borchers*, International Journal of Strategic Communication 2019, 255 (256).

seeking to establish connections with their audience and with fellow social media content creators – often considered one of their hallmarks.[78]) Against this background, the next sections will elaborate on the question of whether influencers who generate income from (online) product placement could fall within Art 17 and, hence, be subject to source taxation in the performance state. This analysis will be divided into two parts: it will address, first, whether their activity may qualify as entertaining within the meaning of Art 17 (section III.2.) and second, whether the publication of online content (e.g. pictures, videos) may qualify as a performance within the meaning of Art 17 (section III.3.).

2. Influencer as Entertainer?

2.1. Definition and Delimitation of Entertaining Activity

Central to the scope of Art 17 is the interpretation of the term *"entertainer"*. As mentioned, *"entertainer"* is not expressly defined in the Models or the Commentary.[79]) Rather, some indications as to its meaning are provided by an illustrative, non-exhaustive list of examples in Art 17(1), namely *"theatre, motion picture, radio or television artiste, or a musician"*, as well as further elaboration in the Commentary.[80])

The examples may, at first glance, seem to indicate that the profession of the person is particularly pertinent: i.e., an *"entertainer"* is generally an actor, musician, or someone who is similarly dedicated to the performing arts. If so, an influencer who is none of these, yet who has gained a wide following for their skills or passions (e.g., cooking, travel, comics) outside of the performing arts, would not be covered. However, as mentioned above, according to the Commentary, an entertainer *"includes anyone who acts as such, even for a single event"*.[81]) In this way, emphasis is placed more on the activity in question than the profession of the person.[82]) This also accords with the phrase *"income derived […] as an entertainer […] from that resident's personal activities as such"* (emphasis added) in Art 17(1), indicating that the assessment revolves around how, or rather in what capacity, the person is acting when earning the income. According to *Roeleveld/Tetłak*, this question (namely, *"whether the income is derived in the capacity of an entertainer"*) leads to *"a broad and dynamic concept, dependent on the circumstances of the case and the evolving definition of entertainment"*.[83]) And indeed, speaking of evolution, social media content creators seem to be transforming the entertainment industry.[84])

In its attempt to delineate the scope of *"entertainer"*, three possible distinctions seem to emerge from the Commentary. These could be described, roughly, as

(1) entertainment versus educational/informational activities, by virtue of its exclusion of *"visiting conference speaker[s]"*;

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[78]) In this way, they may be contrasted with *"traditional mainstream celebrit[ies]"* with a focus on *"distancing strategies that elevate celebrity"*. *Borchers*, International Journal of Strategic Communication 2019, 255 (256) (discussing the findings from a study of *"Camgirls"*).

[79]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.

[80]) See e.g. paras 3, 4, 6 and 9.1 OECD Commentary 2017 on Art 17 OECD MC.

[81]) Para 9.1 OECD Commentary 2017 on Art 17 OECD MC.

[82]) See also *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.2.3.; *Kostikidis*, BIT 2020, 359 (364). But cf Tax Court of Canada, *Thomas F. Cheek v. Her Majesty the Queen*, 1999-1113(IT)G (2002), para 28 (seemingly emphasizing the person or professional in question). However, the *Cheek* decision occurred prior to the 2014 updates to the OECD Commentary, which added the statement that an entertainer *"includes anyone who acts as such, even for a single event"*. See also, e.g., *Sheppard*, News Analysis: Getting a Grip on Nonresident Performers' Income, Tax Analysts, Doc 2015-28586 (11. 1. 2016) (observing that, in the *Cheek* case, *"[t]he use of the word 'artist' in the treaty caused some confusion"*).

[83]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.2.3.

[84]) See e.g. *David*, How Influencers Have Transformed Modern Marketing, minute 12:08 (link in FN 72) (explaining how both the advertising and entertainment industries have changed as a result of influencers); see also https://medium.com/@thebloggerprogramme/how-influencers-are-changing-the-entertainment-industry-e7b20cacbdcc (last accessed 6. 12. 2022).

(2) entertainment versus presentational/promotional activities, by virtue of its exclusion of *"model[s] performing as such"* when presenting clothes at a photo shoot or even at a fashion show, and

(3) entertainment versus production and technical activities, by virtue of its exclusion of *"administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc.)"*.[85])

Influencers will often find themselves somewhere in the borderland of all three distinctions.[86]) In fact, the types of activities giving rise to points (2) and (3) are generally part and parcel of an influencer's business model. In order to (potentially) be subject to source taxation under Art 17, the influencer needs to receive some remuneration, which in particular may include consideration for product placement paid by different businesses (e.g. hotels, videogame producers, fashion labels). Hence, influencers will as a general rule conduct some promotional/advertisement activities (at least if they aim at earning some money from their activities) alongside entertainment (and potentially additional educational/informational ones). Moreover, a particularly salient feature of influencers' activities is their aforementioned combined roles (see section III.1.). The following discussion, therefore, focuses predominantly on distinctions (2) and (3).

2.2. Entertainment versus Promotional Activities

2.2.1. Analogy to Models and/or Actors?

As for the distinction between entertainment and promotional activities, this is precisely the borderline that the Austrian Supreme Administrative Court was grappling with in its 2015 decision (section II.2.1.) and that the U.S. IRS Office of Associate Chief Counsel was analyzing in its FSA memorandum (section II.2.2.). The fact patterns in both cases involved taxpayers who were models and actors. Also, both were paid by a corporation to help promote products. At least two points of comparison between these taxpayers and influencers are worth exploring: first, the extent to which influencers can be analogized to models and actors (and thus fit under the guidance in the Commentary that applies to either) and, second, the extent to which the more typical media used for the promotional activities of influencers (namely, online media) affects the outcome of the Art 17 analysis. The first is explored here and the second is explored in section III.3.

Should influencers be analogized to models for the purposes of Art 17? According to *Kostikidis*, what the two career paths have in common, among others, is that *"both earn their living primarily by using their image"*.[87]) The comparison with models is more apt for influencers that expressly brand themselves as social media models, evidently, and it

[85]) Para 3 OECD Commentary 2017 on Art 17 OECD MC. Another distinction has been developed by German scholars and jurisprudence distinguishing between (covered) performing activities and (not covered) work-creating activities (see section III.3.). See e.g. *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 35 (discussing "*painters, sculptors, writers, poets or composers"*). In a similar vein, see *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.1 (*"the term [entertainer] differs from the word 'artist', which covers those who create works of art, such as painters and sculptors"*). However, if painters or sculptors perform in front of an audience, the creation of their works in this context may be covered by Art 17. See e.g. *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 35 footnote 100.

[86]) For example, a channel dedicated to travel tips can seamlessly entertain, inform and promote products or places. A millennial, for example, tends to tune into the videos of their favorite globe trotter for all three purposes (among others), namely to enjoy the creator's unique personality, passion and presentation style, to learn (be it the history of a given city or practical travel insights), and to take note of which hotels, restaurants, etc, come recommended for providing the best experience. See e.g. *Croes/Bartels*, Young Adults' Motivations for Following Social Influencers and Their Relationship to Identification and Buying Behavior, Computers in Human Behavior (2021), available at https://doi.org/10.1016/j.chb.2021.106910 (last accessed 7. 12. 2022).

[87]) *Kostikidis*, BIT 2020, 359 (364).

may also be apt for others such as certain lifestyle, fashion-forward or beauty influencers. In general, to the extent influencers focus on self-branding – in particular if that brand revolves around their image – then it may be an apt analogy. However, even in these cases, there may be relevant differences: for example, those who are dedicated to make-up may go beyond the image element (e.g., modelling a new make-up look), by instead dedicating their core content to tutorials, thereby including a more instructional component. Moreover, even those who brand themselves as models tend to take on additional production-related tasks that traditional models may generally be less involved in (e.g., as mentioned in section III.1., influencers tend to wear many hats). Finally, numerous influencers earn their living from sharing other (arguably non-image related) aspects of their knowledge or personality, such as cooking skills or a passion for comics. That said, if one accepts the analogy with models (which may be suitable for some influencers), then based on the Commentary, these influencers would generally be excluded from Art 17. Remarkably, models are excluded not only when paid to take part in photoshoots but even when paid to walk the runway in a fashion show event. This stems from the very general statement in the OECD Commentary according to which Art 17 *"does not extend to […] a model performing as such (e.g. a model presenting clothes during a fashion show or photo session)"*.[88]) Perhaps unsurprisingly, this position, taken by the Commentary, is a disputed one, which not all countries adhere to. Turkey, for example, disagrees and *"considers that the activity of a model performing as such (e.g. a model presenting clothes during a fashion show or photo session) falls within the scope of [Art. 17]"*.[89]) In Belgium, according to *Topete*, a 2009 judgement by a Court of First Instance (Tribunal de Première Instance) held that models participating in photoshoots fall outside the scope of Art 17, but disagreed with the exclusion of fashion shows.[90]) Similarly, Argentina, Brazil, and Malaysia consider that a fashion show may be entertaining within the meaning of Art 17, while photo sessions are not.[91]) Overall, many tax authorities worldwide tend to agree with this distinction.[92]) In any case, arguably only a subset of influencers could be easily compared to models.

Could influencers instead be analogized to actors? For certain social media content creators, this comparison could be apt. Examples exist of those who have gained a following through comedic acts or skits, for instance. Outside of those producing such content, however, some influencers might object to being characterized as an actor, as that label may run counter to their aims for authenticity (if their aim is, for example, to eschew disingenuous reviews by endorsing only those products that they are personally using off camera or genuinely enjoying. Nevertheless, from an objective standpoint, some outside observers may view influencers as similar to actors in a television commercial or may view their activities as an infomercial of sorts. If so, following the OECD Commentary, this would seem to bring influencers squarely within Art 17, as actors in commercials are expressly covered.[93])

As can be seen, reasoning by analogy can be challenging with influencers: on the one hand, some could be compared with models, thus arguably excluded from Art 17; on the other hand, some could be compared with actors in a television commercial, thus clearly

[88]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.
[89]) Para 15 Observations on the OECD Commentary 2017 on Art 17 OECD MC.
[90]) See *Topete*, BIT 2017, section 1.3.6. (citing *"BE: TPIA, 16 Mar. 2009, 05/5497/A, Tax Treaty Case Law IBFD"*).
[91]) Paras 3 and 3.1 Positions OECD Commentary 2017 on Art 17 OECD MC.
[92]) See e.g. *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 37 (*"Current practice of national tax administrations and courts, however, usually approaches the issue on a case-by-case basis and tends to include fashion shows, while mere photo sessions usually remain excluded from the scope of Article 17(1) OECD MC."*).
[93]) Para 3 OECD Commentary 2017 on Art 17 OECD MC (*"the term 'entertainer' clearly includes the stage performer, film actor or actor (including for instance a former sportsperson) in a television commercial"*).

included in Art 17. In either case, neither parallel is a perfect fit. Against this background, as can also be seen, exploring the examples of influencers places a spotlight on the seemingly inconsistent treatment of promotional activities in the OECD Commentary.[94]) This combination of factors is likely a recipe for conflicts of qualification or double taxation (or non-taxation) in the case of influencers. This risk is not merely theoretical, as the selected examples of Austria and the USA (discussed in section II.2.) illustrate.

Finally, there are two additional questions when assessing whether an influencer's acts are entertaining within the meaning of Art 17. First, the activities (e.g., posting travel videos) of influencers will seldom lend themselves to a neat either-or outcome – i.e., either entertaining or promotional (or educational) – but rather will typically fuse entertaining and promotional (as well as educational) elements all together. The question, therefore, becomes whether it is sufficient that an entertaining character is merely present or whether it needs to be predominant for an activity to fall under Art 17. This first issue then leads to the second: from whose perspective?[95]) More precisely, when determining whether a given activity is entertaining or whether it serves other goals (such as advertising), or both, should the perspective of the audience control or should the perspective of the parties control (e.g., as evidenced in the agreement between the influencer and the company in question)?

2.2.2. Predominance Test?

According to the OECD Commentary an activity may be covered by Art 17, as long as *"an entertainment character is present"* (emphasis added).[96]) This indicates that predominance is not necessary. According to the Klaus Vogel Commentary (referring mainly to other German literature), however, *"the performance must predominantly serve to entertain the audience (i.e., its distraction, relaxation, amusement or pleasure)"* and other purposes should *"remain subordinate to such entertainment"* (emphasis added).[97]) However, this view does not seem to be shared globally. As mentioned above, for example the Austrian Supreme Administrative Court – apparently following the OECD Commentary – took the position that the advertising purpose of a performance does not preclude its entertaining character if the entertaining character from an objective point of view remains preserved.[98]) Also the U.S. IRS memorandum adopted a subtly different approach as well: when assessing the promotional-versus-entertainment distinction, it interpreted the Commentary (namely, the Commentary as it read in 1998[99])) as implying a *"primary purpose"* test. It derived this approach from a combined reading of the Commentary's statement that an entertainment character be present and the Commentary's statement that the activity be *"usually regarded"* as having an entertainment character (from para 6 of the Commentary, listing the examples of *"billiards and snooker, chess and bridge tournaments"*). The latter (i.e., the *"usually regarded"* statement) would seem to relate more to the question of whose perspective is relevant, rather than the question of the magnitude (or prevailing nature) of the en-

[94]) That is, the OECD Commentary, on the one hand, excludes presentational/promotional activities in the case of models, yet on the other hand, includes such activities in the case of actors in television commercials. See also *Kostikidis*, BIT 2020, 359 (365).

[95]) See e.g. Tax Court of Canada, *Thomas F. Cheek v. Her Majesty the Queen*, 1999-1113(IT)G (2002), paras 22 and 29.

[96]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.

[97]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 32.

[98]) VwGH 30. 6. 2015, 2013/15/0266 (original wording: *"Der Werbezweck der Veranstaltung selbst schadet nicht, weil deren Unterhaltungscharakter, wie der Verwaltungsgerichtshof bereits im angeführten Erkenntnis vom 24. Juni 2009 festgehalten hat, in objektiver Hinsicht jedenfalls gegeben war"*).

[99]) *U.S. IRS*, Field Service Advice Memorandum, FSA 199947027 (30. 9. 1999). The U.S. FSA quoted paras 3 and 6 of the OECD Commentary on Art 17 OECD MC in its reasoning. The version of para 6 it quoted reads the same as in the 2017 version. Para 3, however, did not yet include the specification regarding *"a model"*.

tertaining character. Most influencers produce content in which an entertainment character is present; if that is sufficient, the activity of an influencer could more easily be characterized as *"entertainment"* for the purposes of Art 17. If one needs to identify a higher degree of entertainment value (such as whether entertainment predominates), it could be particularly blurry and thus challenging; such a determination may even vary on a video-by-video or picture-by-picture basis.

2.2.3. Perspective of the Audience or the Parties?

As for the second question (regarding whose perspective is relevant), the comparison above of the U.S. memorandum with the Austrian court decision indicates that tax authorities may reach different conclusions depending on the perspective chosen. If the perspective of the parties is decisive, it may more often lead to the conclusion that the primary purpose of the activity is promotion or advertising. After all, the company is paying the influencer for exposure or reviews of its products; entertainment is possibly only a side benefit from its perspective.[100]) Of course, the company may very much hope or expect that the content remains entertaining as this may be an important factor in the influencer's ability to attract a wider audience to view the company's products. Nevertheless, the end goal is promotion, whereas entertainment is a means to that end (and perhaps not the sole means). The payment is for promotion. An exclusive focus on the parties' perspective could have drawbacks: it could grant the parties a degree of control over their own tax treatment since they have the contractual freedom to agree upon and specify their purposes (as promotional or otherwise); and, it could almost invariably lead to the conclusion that any payment by a company for a promotional activity would be out of scope of Art 17, irrespective of the specific (entertaining) content of the performance, which does not seem to be the desirable result (indeed, as the star's case above shows, there are instances where promotional activities are arguably quite entertaining).

It seems reasonable that determining the entertaining character of an activity should take into account what the perspective of the audience would likely be, and there is some support for this approach. The abovementioned language, *"usually regarded"*, in the Commentary seems to hint at the audience's perspective. Also, one of the conditions for Art 17 is that a performance occurs and *"must be available for people to watch or listen to"*, thus making an audience integral to its application.[101]) The Tax Court of Canada considered the perspective of the audience in the case of a U.S. resident who spent time in Canada as a radio broadcaster for the *Toronto Blue Jays*,[102]) reasoning that *"he was not the reason the fans turn on the radio"*;[103]) rather, the audience is listening for the skills of the professional players, and the broadcaster offers a play-by-play, more akin to a reporter rather than an entertainer.[104]) This is also the approach used by the Austrian Supreme Administrative Court, and it seems sound. Of course, adopting the perspective of the audience is not without its own limits or drawbacks: as *Roeleveld/Tetlak* rightly observe, *"[t]his criterion does not always give clear results"* [105]) – this is, however, common to the interpretation of subjective criteria and would not be an issue especially unique to Art 17.

[100]) In a similar direction (by arguing that the payment is not made for a performance as such, but for promotional activities) *Höppner*, PIStB 2021, 22 (29).
[101]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.1.
[102]) Tax Court of Canada, *Thomas F. Cheek v. Her Majesty the Queen*, 1999-1113(IT)G (2002).
[103]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.2.2.
[104]) Tax Court of Canada, *Thomas F. Cheek v. Her Majesty the Queen*, 1999-1113(IT)G (2002), paras 22 and 29. For more, see e.g. *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.2.2.; *Erwin*, Portfolio 6442-1st: Taxation of Foreign Entertainers and Sportsmen, Bloomberg Tax Management Portfolio; *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 39 footnote 121; *Sheppard*, Doc 2015-28586.
[105]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.2.2.

2.3. Entertainment versus Production and Technical Activities

As for the distinction between entertainment and technical activities, the OECD Commentary excludes those who play roles behind-the-scenes or screens.[106]) This merely confirms that a performance of sorts is required in order for Art 17 to apply. Indeed, the U.S. Technical Explanation refers to this distinction (e.g., between the actor and the camera technician) as one between *"performer and non-performer"* roles.[107]) Influencers tend to play all possible roles. The Commentary acknowledges that people can have dual roles (e.g., *"direct a show and act in it"*).[108]) In such cases, the OECD proposes a solution which can be summarized as: a predominance test; otherwise, apportionment. More precisely, its instructions are to identify the predominant nature of the activity. If the activities *"in that state [i.e., performance state]"* are *"predominantly of a performing nature"*, then all of the income may fall under Art 17; if it is negligible, then none of the income falls under Art 17 (an *"all-or-nothing"* [109]) approach).[110]) Only if there is no predominant character, *"an apportionment should be necessary"*.[111]) This predominance test is criticized in literature for being inconsistent with the approach taken by the OECD Commentary for purposes of Art 12 (which suggests a general preference for apportionment).[112])

One may wonder whether nearly every influencer would fulfill this predominance test, since many influencers spend a considerable amount of time on planning the performance in advance and editing it afterwards rather than the act of performing itself (e.g., posing for the photo or appearing in the video).[113]) So, if time would be seen as decisive, then based on the predominance test, their income arguably would not fall under Art 17. The OECD Commentary does not offer guidance on which factors (time, value, etc) are relevant for assessing predominance. As the example of actors and musicians shows, performance time alone does not seem decisive (i.e., referring specifically to the performance time that the audience sees). Albeit different from the behind-the-scenes technical activities mentioned here, many actors and musicians might also spend more time on studying and rehearsing than on actually performing on stage.[114]) In order to avoid uncertainty and double taxation the Vogel Commentary recommends that the parties to such "mixed" contracts clearly stipulate the different activities covered and allocate portions of the overall remuneration to them in the agreement.[115])

It is questionable how such predominance test and potential apportionment would be workable in cases of influencers, considering the fact that the activities they perform in any given state (where they are, for example, filming a video) are often inseparable: i.e., an influencer may be a one-woman show, for example, in business for herself and integrating all roles, inseparably, within one and the same performance in the form of a video

[106]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.
[107]) U.S. Technical Explanation (2006) 52. Currently, there is a preamble, to accompany the United States Model Income Tax Convention 2016, but not a Technical Explanation. See also para 4 OECD Commentary 2017 on Art 17 OECD MC (discussing the *"performing element"*).
[108]) Para 4 OECD Commentary 2017 on Art 17 OECD MC.
[109]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 41.
[110]) Para 4 OECD Commentary 2017 on Art 17 OECD MC.
[111]) Para 4 OECD Commentary 2017 on Art 17 OECD MC.
[112]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 43.
[113]) Cf *Höppner*, PIStB 2021, 22 (29: *"Bei Influencern ergibt sich die Problematik, dass ihr Tätigkeitsbereich breit gefächert ist. Einerseits werden Tätigkeiten ausgeübt, die unterhaltend sind, Darbietungen in den Videos. Andererseits sind sie auch in solchen Bereichen tätig, die die unterhaltende Tätigkeit unterstützen bzw. nur indirekt mit ihr im Zusammenhang stehen, wie das Schneiden, Aufnehmen und Planen der Videos"*).
[114]) *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 4.2.4.3.
[115]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 44.

production.[116]) Also, in negotiating their agreements, influencers and businesses might overlook the advice to clearly stipulate and allocate their remuneration, since the parties may – due to the relative paucity of administrative guidance and attention to this topic so far – not be aware of the potential problem.

3. Online Content as Covered Performance?

Although there might be occasions where an influencer acts in front of a real public in real time (e.g. visiting a promotional event), such occasions will likely prompt the same types of debates and considerations that arose before the Austrian Supreme Administrative Court and the U.S. IRS discussed above. The more typical activity of influencers, as received by the public, will be carried out purely online. This prompts another important open question for this increasingly digital age: is online content a covered performance?

Art 17 OECD MC grants a taxing right to the performance state of entertainers for income generated by the *"resident's personal activities as such exercised in the other Contracting State"*. The activity of the influencer will in many cases qualify as a *"personal activity"* within the meaning of this provision, since, as a general rule, the activity is carried out by the influencer (alone) by using his/her/their personal skills and personal appearance (e.g. face, voice, knowledge).

However, it might be questioned whether the activity of creating content which is made available to other persons only in digital format (via online media) is an *"activit[y] […] exercised"* within the meaning of this provision. Not all influencers will fulfill the requirement of a performance exercised in the capacity as an entertainer. In particular, if an influencer publishes mainly text (e.g. a blog), rather than videos or photos, there is no performance involved. The publication of texts only is not perceived as a public performance by an entertainer within the meaning of Art 17.[117])

This likely differs if the influencer publishes photos and videos. The examples of *"motion picture, radio or television artiste"* listed in Art 17(1) confirm that the performance does not need to be visually performed in real time in front of an on-site audience in order to be covered.[118]) This conclusion is further confirmed by the example of an actor appearing in a television commercial, which is covered by Art 17 according to the OECD Commentary.[119]) TV commercials, as well as TV shows and movies, are usually filmed in a given place and, while there are numerous actors and technicians on set, there are generally not broader public audiences on (or around) the film set for the purpose of watching the making of the commercial or film (rather the broader public watches the film at cinemas or at home after it is released). Against this background, many scholars state, in rather general terms, that Art 17 covers performances of entertaining character which directly (e.g. on a stage) or indirectly (through the TV or radio) address an audience.[120]) Following this view, *Kostikidis* concludes that influencers could be covered by Art 17, even if their performance is made available to the public only virtually (with a

[116]) What is also notable is that the OECD Commentary refers to the activity in the performance state which is to be assessed for purposes of the predominance test. This is interesting insofar as influencers might record the video or photo in one state, but might plan or edit the content in another. This might bring another challenge in applying the predominance test as developed by the OECD Commentary.

[117]) See, inter alia, *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 4.2.4.3 (listing authors, journalists and bloggers as examples for professions that are not covered by Art 17).

[118]) *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 33.

[119]) Para 3 OECD Commentary 2017 on Art 17 OECD MC.

[120]) See in particular *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 m.no. 32; *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 3.3.2; similar, inter alia, BFH 18. 7. 2001, I R 26/01; *Kalteis*, Die Besteuerung international tätiger Künstler und Künstlerbetriebe (1998) 210; *Schempf*, Entertainers and Sportspersons in Direct Taxation and VAT, in *Pfeiffer/Ursprung-Steindl*, Global Trends in VAT/GST and Direct Taxation (2015) 521 (525); *Schwenke/Wassermeyer* in *Wassermeyer*, DBA, Art 17 para 21.

time delay, as opposed to live on stage).[121]) Consequently, for example, one selfie promoting a certain label of sunglasses made by an Austrian influencer during her holidays in Spain and posted online on the same day, or with a time delay when arriving home in Austria, could – if all other requirements of Art 17 are met – lead to a taxation right for Spain on the remuneration paid for this product placement.

However, this first conclusion gets a bit blurred when looking at other examples in the OECD Commentary. For example, it is stated that payments for the *"simultaneous"* broadcasting of a performance by an entertainer may fall within Art 17.[122]) Moreover, according to the Commentary sponsorship payments may be covered by Art 17, but only if these payments have a close connection to personal (entertainment) activities in a given state (e.g. for wearing a certain fashion label during an event or concert).[123]) These statements indicate that payments for promotional pictures or videos made available in print or online could be covered by Art 17 only to the extent that they were made during a public event where a real audience was present.[124]) If this were true, it would seem to contradict the examples of TV artists and TV commercials (which are covered, according to Art 17[1] and the OECD Commentary respectively), which would be difficult to reconcile. The view (implied by the Commentary's position on sponsorship payments) would exclude many influencers from Art 17, since in most cases their content is viewed by many people online, but as a general rule there is no audience present when the content is created.[125])

In this respect, a look into German doctrine provides some guidance: German jurisprudence and scholars distinguish between performing activities (*"vortragende Tätigkeit"*) and work creating activities (*"werkschaffende Tätigkeit"*); only the first should be covered by Art 17 (but not the latter).[126]) In other words, the mere rendering of former art work is

[121]) *Kostikidis*, BIT 2020, 359 (364), also justifies this result on the grounds of the benefit principle: as the influencer makes use of the public resources offered by the performance state, giving taxing rights to this state would be reasonable. However, it could be argued that this policy rationale, relying on the benefit principle, is weakened in these cases, since influencers in many cases may not require extensive use of local resources; in some cases, access to the internet may be the only relevant resource needed and used (e.g. in the case of a selfie advertising sunglasses). Whether a more meager territorial link of this sort is sufficient to justify taxation could be questioned. If the benefit principle would be decisive here, it could imply that any use of internet resources could be sufficient to invoke it and thus presumably give taxing rights to the source state – which is not the case under other allocation rules (e.g. Art 7). Some may ask why the use of public benefits would matter more under Art 17 than under other allocation rules. For example, do entertainers use more public benefits in the source state than other mobile service providers (see *Wagner* in *Loukota*, Taxation of Artistes and Sportsmen, 63 [68])? This suggests that the benefit principle may not be particularly or consistently helpful when interpreting tax treaty rules. For a similar critical perspective on the relevance of the benefit principle in a virtual setting, see *Kreisl* in *Loukota*, Taxation of Artistes and Sportsmen, 137 (152). Rightly criticizing the relevance of the benefit principle for the purposes of the international allocation of income in general, as it is difficult *"to put into operation"*, see *Schön*, WTJ 2009, 68 (75 et seq).

[122]) Para 9.4 OECD Commentary 2017 on Art 17 OECD MC.

[123]) Paras 9 and 9.5 OECD Commentary 2017 on Art 17 OECD MC.

[124]) Along the same lines, the Austrian MoF held in a non-binding ruling that the remunerated participation of an e-sport gamer in a tournament may fall within Art 17 as entertainer, since his participation entertained the audience in the stadium and online (EAS ruling 3425 of 24. 7. 2020).

[125]) The OECD Commentary also includes an interesting statement for the use of image rights: payments for the use of image rights (i.e. right to use name, or personal image) may be covered by Art 17, if the payments are *"in substance remuneration for activities of the entertainer or sportsperson […] and take place in the other State"* (para 9.5 OECD Commentary 2017 on Art 17 OECD MC). As businesses usually do not pay remuneration to influencers in order to be able to use their name and picture in advertisements designed by them, but businesses pay influencers so that they promote the product via their individual channels by posting content. The statement and discussion on the use of image rights do hence not seem to be decisive for influencers.

[126]) See, inter alia, BFH 8. 4. 1997, I R 51/96; 18. 7. 2001, I R 26/01; *Schwenke/Wassermeyer* in *Wassermeyer*, DBA, Art 17 para 21; *Stockmann* in *Vogel/Lehner*, DBA[7] (2021) Art 17 para 23; in a similar vein *Roeleveld/Tetlak* in *IBFD*, Global Tax Treaty Commentaries, section 5.1.1.1 (*"the term [entertainer] differs from the word 'artist', which covers those who create works of art, such as painters and sculptors")*.

not within the scope of Art 17.[127]) This distinction explains why the work of painters, composers, writers and photographers is usually not covered by Art 17.[128]) The approach has been supported by historical and contextual arguments. The original English version of Art 17 OECD MC used the term *"public entertainer"* (OECD MC 1963) indicating the need for an audience watching the performance (may it be on-site or online). Moreover, from a contextual point of view, the condition of a *"personal activity"* and the legal consequence in terms of allocating taxing rights to the performance state indicate that Art 17 is meant to cover only entertaining activities which are personally performed at one place. Because the creation of works (e.g. books or sculptures) involves different (preparation) activities, typically lasts a period of time and might be carried out at different places in parallel or consecutively, it generally does not fall within Art 17.[129]) This doctrine is not specifically linked to the media used (e.g. online versus print), but it may nevertheless help to understand and assess this issue. In particular, this German doctrine helps to apply a more dogmatic approach, even though grey areas still remain – as for example demonstrated in the case of influencers. Influencers publish a piece of their own work online which they have created by using their own ideas prior to publication; they may, in addition to performing, also carry out various preparations (e.g. developing the concept, make-up) and supporting tasks (e.g. editing of photos). In this way, some similarities exist between influencers' work and that of painters or photographers who also publish their finalized product after having put efforts into it over a longer time. Nevertheless, as regards most influencers (but certainly not all) the performing element of their activities, i.e., entertaining an audience with a personal performance, still seems to prevail. From the perspective of the general public or the average person, the content influencers create and post online will in most cases not be seen as a work of art comparable to a book or a sculpture. Their activity in many (but not all cases) might be seen as more comparable to an actor, comedian, or model (on these analogies, see section III.2.2.) who are performing rather than carrying out work creating activities.[130]) Furthermore, any actor or musician carries out preparation tasks (e.g. learning scripts, rehearsals) which are obviously – as confirmed in Art 17(1) – not in and of themselves detrimental to the qualification as an entertainer within the meaning of Art 17. The German doctrine hence could arguably support that an influencer which is performing online only by posting pictures or streaming videos might be covered by Art 17; at least it does not clearly speak against such a conclusion.

Furthermore, the traditional business model of models – which has at least one similar feature to that of influencers, namely payments for photos that will be used as advertisements – may also provide some guidance: interestingly, many jurisdictions seem to exclude payments for the participation in photo sessions from Art 17, while payments for participating in fashion shows with an on-site audience is considered as being covered at least in some jurisdictions. Against this background, the presence of an audience who is watching the performance in real time seems to make a difference when assessing the application of Art 17 for some tax administrations and courts. From a traditional view point this result is understandable: in the "old" days, entertainment more often entailed visiting an event (e.g. on-site event with a cheering crowd) and/or the audience is distracted from their daily routine for some longer time (e.g., television shows).

[127]) *Schempf* in *Pfeiffer/Ursprung-Steindl*, Global Trends in VAT/GST and Direct Taxation, 521 (525).
[128]) *Schwenke/Wassermeyer* in *Wassermeyer*, DBA, Art 17 para 23, with reference to German case law. Exceptions may of course exist, e.g. a painter who paints at a *"happening"* in front of an audience, or a writer who holds a public reading in front of an audience may fall within Art 17, if he/she is remunerated for this activity.
[129]) *Schwenke/Wassermeyer* in *Wassermeyer*, DBA, Art 17 para 21.
[130]) Exceptions might be influencers who create very complex and time-consuming pictures or videos, where the preparation (design, concept etc) and editing tasks are a superior element of the overall activity.

Many people (including judges) may still have this traditional picture in mind when thinking about entertainment. In today's digital world, and in particular during and after the COVID pandemic, entertainment has evolved. Nowadays, many people look at the stories and profiles of their favourite influencers on *Instagram*, *YouTube* or *TikTok* online every day in order to distract themselves, relax, and feel amusement.[131]) They study one picture or a short video for some minutes, or perhaps seconds, and then move on to the next picture or video by the same or another person. Even though the enjoyment or relaxation derived from one picture or video may last for only a few seconds each, it could nevertheless qualify as entertainment within the meaning of Art 17.[132]) The requirements for falling under Art 17 do not seem to provide any convincing grounds for arguing to preclude activities merely for their duration; it should not make a difference whether the entertainment lasts five seconds, five minutes or five hours, as long as there is a performance[133]) and it involves entertainment.[134])

Overall, the discussion so far and the comparisons made demonstrate that the media used (online, print, radio) should not be relevant when assessing the applicability of Art 17. Moreover, such a distinction could risk being criticized in the light of the principle of equal treatment, since it could lead to different tax treatment of essentially identical situations (i.e., differing solely in their means of transmitting a performance to an audience, but otherwise identical). Rather the decisive question is whether the publication of work for an audience which has been created without an (on-site) audience can lead to an entertaining performance within the meaning of Art 17. On balance, the arguments seem to speak in favour of applying Art 17 to performance activities consisting of content made available to an audience solely via online means (e.g. social media platforms).[135]) However – as for many legal questions – this general conclusion might have (probably many) exceptions in practice; a case-by-case analysis will still be needed, taking into account the individual content created and published by the influencer. In particular, whereas live video streaming arguably is more likely to fall within Art 17 (due to a real-time audience and a performance which can be visually watched for a period of time), a blog mainly consisting of text will not (as it is more easily compared to the work of an author or journalist rather than a performer).

IV. Conclusion

Considering the growth of the industry and considering the corresponding growth in tax-related questions, it seems timely and worthwhile to contribute to the discussion on the tax treatment of social media influencers.

The business model of influencers not only raises domestic tax law issues, but also international taxation issues. As influencers – similar to other professions (considering, for example, digital nomads) – may increasingly cross borders to carry out activities in different countries, these questions are not purely theoretical in nature, but will likely become more widespread in the future.

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131) Compare the definition of *"entertainment"* by *Cordewender* in *Reimer/Rust*, Double Taxation Conventions[5], Art 17 para 32.

132) For a similar opinion see VwGH 30. 6. 2015, 2013/15/0266, which amongst others argued that the duration of the performance is not relevant when assessing Art 17 (*"Es ist nach dieser Bestimmung [Art. 17] nämlich nicht entscheidend, ob der fragliche Auftritt selbst eine bestimmte künstlerische Qualität, Mindestdauer oder dergleichen aufweist, […]").*

133) Arguably, the performance element might for example be missing, if an influencer publishes mainly text (via e.g. a blog) rather than videos or photos.

134) With a similar result by arguing that the photo sessions of models should be covered by Art 17 similar to fashion shows (as both are performing activities) *Kostikidis*, BIT 2020, 359 (365).

135) For a similar result, see *Kostikidis*, BIT 2020, 359 (364), who does not distinguish between the different forms of online content (picture, video, blog etc).

In light of these developments, this article analyzes one of the practically and academically interesting questions related to tax treaty law, namely, the applicability of Art 17 OECD MC.

The discussion has shown that, while many of the issues that influencers may face when assessing Art 17 are not totally new (as they prompt rather longstanding debates relevant also in the non-digital context), they appear to be exacerbated. For example, ascertaining the boundary line between promotional versus entertaining activities has long been challenging (including in the non-digital context, as the examples from Austria and the U.S. in section II.2. illustrate). Whereas traditional celebrities more often separate their activities (i.e., some activities will be clear-cut entertainment activities such as creating a movie or playing in a theatre), influencers more often fully blend the two (i.e., entertainment and promotion), seamlessly integrating products or services into their videos, live streams and photos.

Moreover, regarding the boundary line between performing and non-performing (technical) roles, this is a much more challenging one to draw in the case of influencers. Considering the increasing prevalence of digitally savvy performers who will blur this boundary, more guidance is merited on what considerations are relevant in drawing that line: when applying the "predominance" test suggested by the Commentary, for example, should it be the time spent on behind-the-"screens" roles versus performing roles? Should it be the roles which have the most added value, either from a remuneration standpoint or from the online audience standpoint?

Considering the various factors, derived from the discussion above, that may play a role assessing whether promotional activities may qualify as entertaining within the meaning of Art 17 (e.g., the content of the performance and the event; the profession of the person; the presence or predominance of entertainment; the relevant perspective) – all of which might be assessed differently by taxpayers, tax administrations and judges around the world – double taxation or non-taxation may arise. This was another issue well captured by the examples from Austria and the U.S. where subtle divergences in the reasoning in both jurisdictions could lead to different outcomes in cases with similar fact patterns.

Finally, a key open question addressed above in the context of influencers is whether content created and distributed exclusively online would also be considered a performance covered by Art 17. As the analysis suggests, in general, Art 17 appears to be media-neutral, i.e., there is neutrality vis-à-vis the media (television, radio, internet) through which the performance is conveyed to the audience under Art 17.

Just as there is not a definitive or exhaustive definition for *"entertainers"*, there likewise (and, in part, as a result of this) cannot be an all-encompassing definitive answer as to whether all social media influencers as a group are covered by Art 17. This is true, of course, for many legal issues, especially those with particularly heavy reliance on more subjective requirements (such as assessing whether an activity is entertaining). Instead, a case-by-case assessment of, inter alia, the individual content they create and the way it is published seems inevitable, hence the relevance of exploring the various factors throughout this contribution that will have to be weighed in the context of social media influencers. Nevertheless, from the discussion, broadly speaking, one generalization seems possible. While there is bound to be skepticism as to whether posts of photos alone would fall under Art 17 (considering the above-cited debates regarding photoshoots for models), there are arguments in favour of covering, in particular, influencers who livestream or publish videos online with promotional content for which they receive remuneration (in-kind or cash), as long as the video is not of purely informational or promotional character, but includes some entertaining elements.

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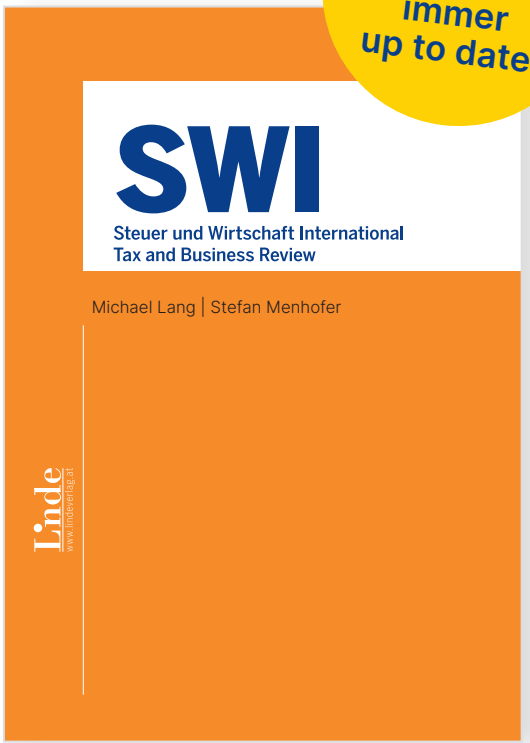

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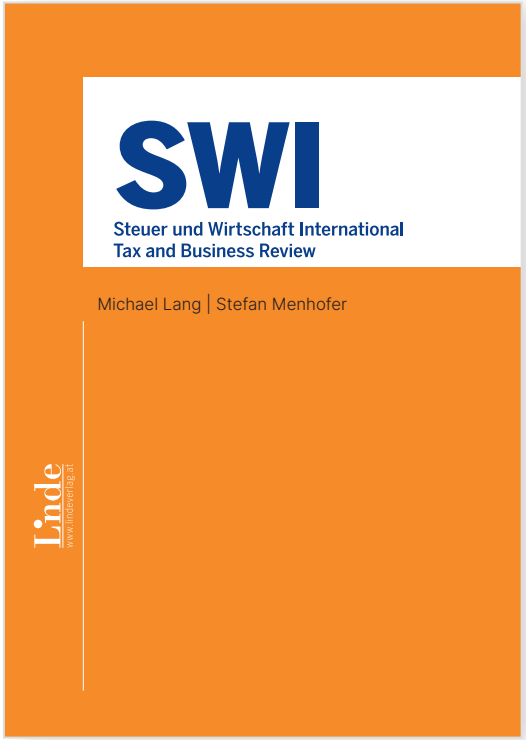

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