



## OPPORTUNITIES AND PITFALLS OF B2B & B2C PROMOTIONAL GIFTS (NOT ONLY) AT CHRISTMAS

The Christmas season – an opportunity used by many companies to distribute **promotional gifts** – gives rise to the question of legally compliant conduct in connection with giving and receiving gifts.

Promotional gifts are a proven tool for **acquiring and retaining customers**, both in the **B2B** and **B2C areas**. Especially for start-ups and SMEs, promotional gifts can make a significant contribution to making a name for the company and enabling it to grow faster; but established large companies and international corporations also use promotional gifts to maintain their image as well as to remind business partners and customers of their company and products.

Carelessness when giving or choosing promotional gifts is not advisable, however, since one could run the risk of making oneself liable to prosecution under **anti-corruption law**.

There are different provisions regarding the **admissibility of promotional gifts**, depending on whether the gift is given to a public official or to an employee of a private company, as well as depending on whether

the gift is in connection with the performance of an illegal or dutiful act, or serves to maintain good relations.

### I. WHAT DOES ANTI-CORRUPTION CRIMINAL LAW REGULATE AND WHAT IS COMPLIANCE?

The **anti-corruption criminal law** is largely regulated in the respective criminal code. The conduct of both the party giving the gift (active corruption) and the party accepting the gift (passive corruption) can be punishable. Even the mere offering and promising – i.e. not only the actual granting and acceptance – of gifts or other improper advantages can be punishable by law.

Within the framework of **Compliance**, various risks – including corruption – are to be combated in companies. Compliance with applicable laws and ethical standards is to be ensured by both management and employees by means of corporate **Compliance guidelines**. At the same time, the company can largely protect itself against any consequences under corporate criminal law and the financial damages associated with this through appropriate compliance measures.



## II. ARE PROMOTIONAL GIFTS PERMITTED ACCORDING TO THE LAW OR COMPLIANCE GUIDELINES?

Promotional gifts are generally permitted by law, whereby a distinction must be made between the public and the private sector.

**(Public) officials** – this includes all employees of regional authorities, public companies and all companies and organisations that are audited by the Court of Auditors – are subject to **strict limits** in terms of the permissibility of accepting benefits (including promotional gifts, if applicable). In the **private sector**, the limits are not so narrow. Thus, for example, maintaining relations (“sweetening”) is not punishable in the private sector or, if applicable, only in the context of competition law.

**In any case**, with regard to the admissibility of promotional gifts some **general aspects** have to be taken into account, such as the following:

- 1) The **promotional gift** must be **recognisable** as such (company logo, advertising/greeting message of the company, etc.) and fulfil promotional purposes.
- 2) In the case of public officials, in any case – but usually also in private business – **de minimis limits or upper value limits** for gifts must be observed.
- 3) There must be **no** clear connection between the (promotional) gift and an act by the recipient for the **benefit** of the giver.

In the event of non-compliance with the (legal) limits, even promotional gifts may be prohibited. In general, the following applies: **Corruption is punishable** – both in **the public and private sectors**; however, it is sanctioned less strictly in the private sector than in the public sector.

## III. WHERE IS THE SPECIFIC (VALUE) LIMIT OF THE ADMISSIBILITY OF PROMOTIONAL GIFTS?

Specific (value) limits for the permissibility of gifts are not legally defined.

The de minimis limit is generally assumed to be a total value of **less than EUR 100.00**, although this is not a legally defined limit, but a **guideline**.

A further distinction must be made between the **obligatory compliance or breach of duty** of an official or legal act in connection with the (promotional) gift:

Benefits granted in connection with the **proper** performance of an official transaction are, therefore, permissible if they also meet the criteria of **local or national custom and the de minimis requirement**.

Granting of benefits for the **breach of duty** or omission of a specific official transaction is prohibited in **any case**, irrespective of the value and type of gift.

In the **private sector**, however, the granting of benefits to employees and agents is always **prohibited exclusively** in connection



with **the breach of duty or** omission of a legal act.

Within the framework of **compliance guidelines**, numerous companies and authorities have also established their own regulations – which sometimes deviate from the law and are more restrictive – often with lower value limits.

#### IV. CORRUPTION: WHAT PENALTY IS TO BE EXPECTED?

**All corruption offences** in the narrower sense, both in the private and in the public sector, make provision for **imprisonment**.

In addition to the individual criminal liability of the respective acting person, the company itself can also be criminally liable. However, the establishment of appropriate **compliance measures** can **prevent** (administrative) criminal **liability of** the company or at least have a **mitigating effect**.

#### V. HOW DOES CRIMINAL PROSECUTION WORK?

All cited corruption offences must be prosecuted **ex officio**. The – possible – withdrawal of an already submitted notification is not possible; the law enforcement authority must, therefore, initiate proceedings.

#### VI. WHAT TAX ASPECTS MUST BE TAKEN INTO ACCOUNT FOR PROMOTIONAL GIFTS?

In the case of promotional gifts, taxes play an important role since personal contribu-

tions can be considered a form of “enrichment” for the recipient and thus fall under the tax liability.

We have summarised for you in detail below which tax regulations apply in the respective countries:

#### CHINA

For promotional gifts to a private person, they must pay individual income tax (“IIT”) as ancillary income according to Chinese tax law. If the ancillary income is less than RMB 10,000, the individual income tax is zero. If the ancillary income is above RMB 10,000, the tax rate is 20%. This means that a person receiving a gift worth RMB 12,000 must pay individual income tax of RMB 2,400.

In general, the company may deduct these costs as promotional or entertainment costs, regardless of who the promotional gift is given to. However, there are some restrictions on promotional costs. The appropriate gifts should be branded with the company logo and the unit price should be less than RMB 2,000. This is more appropriate for both accounting and tax purposes. In addition, the company should pay attention to total income-related expenses. The annual income-related expenses should be less than 15% of annual turnover. The additional income-related expenses cannot be taken into account in the Annual Enterprise Income Tax Declaration.

If the company identifies the promotional gift as hospitality expenses, the annual limit



for the Annual Enterprise Income Tax Declaration is a maximum of 60%. The remaining 40% is not included in the Annual Enterprise Income Tax Declaration.

## **GERMANY**

### **Business expense deduction at the company making the gift:**

Gifts of up to €35 per person per year to customers and business partners can be considered as business expenses if the gifts are made without consideration, for operational reasons and with appropriate documentation.

If the €35 value is exceeded, the total amount is subject to a ban on deduction. Strictly speaking, according to a judgment of the Federal Finance Court (BFH) dated 30 March 2017 (ref. IV R 13/14), the assumption of the flat-rate taxation of 30% must also be added when determining the promotional cost amount because this represents a “tax gift”.

The exemption limit of €35 does not apply if the recipient has to treat the promotional gift as a necessary business asset and can only use it for business purposes (e.g. prescription blocks for doctors); then the business expense deduction is retained even for higher goods values.

There is an unrestricted business expense deduction for gifts to employees.

### **Employee gifts**

Gifts to employees are exempt from income

tax and social security tax if the general “non-cash exemption limit” of EUR 44.00 per month (from 2022 onwards: EUR 50.00) is not exceeded. However, non-cash benefits such as vouchers, assumption of membership contributions, etc. are also to be expected for benefits in kind. For a personal occasion (e.g. birthday or wedding), additional gifts of up to EUR 60.00 are tax-free and duty-free.

## **AUSTRIA**

### **Tax consequences for the recipient**

In principle, the recipient must pay tax on promotional gifts worth more than €10. They represent operating income for an entrepreneur or freelancer. If an employee is given a gift, this is a form of wage.

However, the company giving the gift can take over the taxation for the recipient by paying a flat-rate tax in the amount of 30% according to Section 37b EStG (Einkommensteuergesetz [Income Tax Act]). This is possible up to a value of EUR 10,000.00 per recipient per year.

Promotional items under a value of EUR 10.00 are tax-exempt as so-called “giveaways”.

### **Business expense deduction at the company making the gift**

Gifts of up to EUR 35.00 per capita and year to customers and business partners can be considered as business expenses if the gifts



are made without consideration, for business reasons and with appropriate documentation.

If the amount exceeds EUR 35.00, the total amount is subject to a ban on deduction. Strictly speaking, according to a judgment of the Federal Finance Court (BFH) dated 30 March 2017 (ref. IV R 13/14), the assumption of the flat-rate taxation of 30% must also be added when determining the promotional cost amount, because this represents a “tax gift”.

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### **POLAND**

The giving of promotional gifts generally entitles you to recognise the expenses associated with your purchase as business expenses. The promotional expenditure has an impact on the positive effect of the sale, and thus on the acquisition of customers and the generation of income. As they are related to sales revenues, they are part of the operating expenses. The recording of promotional costs as operating expenses requires that records are made about them.

Receipt of a promotional gift can generate tax revenue for the consumer. However, the Income Tax Act provides for tax exemptions for free-of-charge contributions in promotional campaigns. Thus, the value of the free-of-charge gifts received from a seller in connection with its sales promotion or advertising is exempted from the tax if the one-time value of these gifts does not exceed the amount of PLN 200.

It is important that the aforementioned tax exemption does not apply to the awarding of promotional gifts to B2B contract partners. In this situation, income from gratuitous gifts arises for an entrepreneur who has received the gifts, the value of which is to be added to the income from business activity and taxed together with other income from the sale of goods and services.

The granting of promotional gifts for B2C and B2B represents a delivery of goods, which generally entails the duty to calculate VAT. The VAT Act provides for exceptions



to the obligation to collect VAT on the free granting of goods, namely for gifts of up to PLN 100.00 if the taxpayer keeps records that enable the identification of the recipients, or of up to PLN 20.00 if no records are available.

## ROMANIA

From a tax law or accounting perspective, the costs for gifts that are intended for customers, partners, etc., for example, are posted in Romania as protocol expenses.

Protocol expenses are costs incurred through the giving of gifts or business activities such as: meals with business partners or customers, gifts to them, expenses due to meetings with potential customers, etc.

Protocol expenses are only tax deductible in the amount of 2% of the accounting profit and must be taken into account accordingly when calculating the amount of the profit tax (Rum.: impozit pe profit).

The calculation of the tax-deductible protocol expenses as shown above is carried out at the end of the year for the respective financial year. The additionally incurred protocol expenses are considered non-deductible.

## SLOVAKIA

The tax law-related topic of promotional gifts is regulated in Slovakian law in Act No. 595/2003 Collection on income tax and in Act No. 222/2004 Collection on VAT. The type of the promotional gift itself is just

as important as the purchase price. Gifts whose purchase price exceeds EUR 17.00 per item represent a tax expense for the entrepreneur.

Different regulations apply to wine, high-percentage alcohol and cigarettes: Assuming that the company giving the gift is not the producer, wine is a tax-deductible expense, up to a value of EUR 17.00 per bottle and, at the same time, up to 5% of the tax calculation base. Gifts in the form of high-percentage alcohol and cigarettes do not constitute deductible tax expenses. An entrepreneur who purchases promotional gifts in order to give them to business partners or employees can also claim VAT, subject to the condition that the unit price does not exceed EUR 17.00 excl. VAT.

## SPAIN

Article 15.e of the Law on Corporate Tax 27/2014 governs the non-deductible expenses and clarifies, in principle, that expenses for donations and gifts are not deductible.

An exception, however, applies to the following cases:

- Expenses for services to customers and suppliers, such as invitations to sporting events, but only up to 1% of company turnover.
- Expenses incurred by company personnel in accordance with the usual practice. For example, if a Christmas basket is given out every year, this would be a permissible case.



- Expenses that are intended to directly or indirectly promote the sale of goods and the provision of services. For example, wine boxes (and bottles) that a wine-grower company gives to potential customers.
- Expenses that correlate with revenue. An example of this would be the costs paid by a company for meals and travel for employees of a subcontractor hired to provide certain services.

It must also be considered that business gifts to employees have tax consequences for them, whereby the value must be included as a benefit in kind with corresponding deduction in the respective salary statement.

In this context, the provisions on income tax refer to the provisions on corporate tax.

With regard to VAT, Article 96 of the VAT Act 37/1992 in item 1 and Sections 5 and 6 states that objects or services intended for services to customers, employees or third parties are not deductible.

The following are no such objects or services and are therefore deductible:

- Free samples and product samples without recognisable commercial value: Items that are representative of a product group and can only be used for promotional purposes due to their presentation or quantity. For example, perfume samples that some magazines distribute free of charge.
- Free deliveries of printed materials or objects of a promotional nature: They may not have their own commercial value and must be indelibly marked with the advertising lettering (company logo). Their value must be less than EUR 200.00 per recipient and year.

## CZECH REPUBLIC

The basic regulation of promotional gifts from a tax perspective can be found in law no. 586/1992, collection on income tax, and in law no. 235/2004, collection on VAT.

The definition of promotional gifts is different in both laws. In order to achieve the best possible tax effect for the company, the conditions in both laws must be complied with. The promotional gift must meet clear criteria in order for the company to be able to claim this as a tax-deductible expense. From the point of view of the Income Tax Act, the gift must be marked with the trade name or trademark of the provider, the value of this gift may not exceed CZK 500.00 without VAT and the object may not be subject to excise tax (i.e. it must not be alcoholic beverages, with the exception of still wines). On the basis of law no. 235/2004 collection on value added tax, a gift of up to CZK 500.00 excl. VAT, which takes place within the framework of a business activity, is not subject to value added tax. If at least one of the conditions is not met, the gift becomes subject to value added tax and the buyer



must show the tax on the day of the taxable delivery (on the day of the gift).

If the tax administrator should have doubts about the correctness of the gift, the taxpayer is obliged to prove that it is actually a promotional item that meets the requirements for tax deductibility (e.g. by means of purchase receipts, invoices or photos). The group of potential recipients of these gifts is not restricted by any legislation.

## TURKEY

Companies can claim general expenses for tax purposes if they are made in order to generate profits and maintain the profitability of the company. These expenses must be the cause of the income, and the income generated by the company in this form must be taxable. Promotional and marketing expenses of companies are also taken into account within the framework of the general expenses within the meaning of the Income and Corporate Tax Act, since the purpose of advertising and thus also the distribution of promotional gifts is the promotion of the company's products and the increase in sales. However, only such promotional gifts can be claimed for tax purposes, which are appropriate in terms of their scope and their costs, i.e. correspond to the activities and the turnover of the company, are customary according to general commercial practice and actually serve to promote the company, for example, by including the company logo on them or where it involves the company's own sample products (these sample products must

be expressly marked as samples). In addition, no VAT is charged for promotional gifts that meet the aforementioned conditions and are expressly not passed on for sale to customers. The value added tax paid by the company within the framework of the purchase of the promotional gifts is deductible.

## HUNGARY

Promotional gifts that are generally given by a company free of charge for marketing purposes to customers and business partners are treated as follows in Hungary under tax law:

Items that have not been delivered against payment in accordance with Section 11 (3) item (b) of the General Value Added Tax Act ("VAT Law") are regarded as if the taxpayer assigns samples of goods and low-value items to another person free of charge for ownership. In this case, the transfer is not subject to VAT. Pursuant to Section 259 items 3 and 9 of the VAT Law, this concerns:

- Samples of goods which are handed over exclusively for the purpose of presenting the represented products and which, due to their physical condition or asset value, are not suitable for other purposes;
- The goods are of low value. A low value is considered to be when the value of the asset advantage granted is not above a sum equivalent to HUF 5000.00.

If the product used for promotional purposes does not meet the above-mentioned conditions, it is classified as a delivery of objects for a fee in accordance with Section 11 (1) of the VAT Law and thus falls under the VAT obligation.





According to Annex 1 item 8.14. b) of the Income Tax Act, the following applies: Non-cash benefits in the form of product samples for the purpose of increasing business turnover, which serve exclusively to present the products presented, are exempt from income tax.

According to Annex 3 item B/2 of the Corporation Tax and the Dividend Tax Act, the following applies: The cost of products provided for promotional purposes and recorded as costs or expenses, as well as any taxes paid by the buyer, are not added to the pre-tax profit.

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