Austria

Adrian Kubat and Arno Scharf

Adrian Kubat
University of Vienna, Austria
Email: adrian.kubat@univie.ac.at

Arno Scharf
University of Vienna, Austria
Email: arno.scharf@univie.ac.at

1. Introduction

The digital economy has not only led to the emergence of new data-driven business models but also changed advertising and pricing strategies. Although the increasing digitisation undoubtedly creates efficiencies both for consumers and suppliers, it raises new legal challenges. In this paper, some of the most topical issues will be discussed from a competition law perspective. The first part deals with new advertising strategies under Austrian unfair competition law, in particular with native advertising, influencer marketing and related labelling obligations (see Section 2). The second part assesses innovative pricing strategies under Austrian antitrust law, namely the use of artificial intelligence and algorithms as a means of anticompetitive collusion as well as personalised pricing (see Section 3).[1]

2. Legal Framework in Influencer Marketing and Native Advertising

2.1. Terminology

In the course of digitization, the media landscape has changed over the past years and decades. This has also been followed by a change in the way products are advertised. In particular, the partly negative perception of traditional advertising, which is increasingly making viewers feel uncomfortable, has made it necessary to rethink marketing. A prominent example of modern marketing strategies includes the so-called *Native Advertising*. In simple terms, native advertising describes a situation where the advertisement is embedded in an environment familiar to the viewer.[2] The advertised party shall be addressed individually and should not get the feeling of being affected by the advertisement in his reading flow or his other activities. This form of advertising not only offers the advertiser the advantage of being able to reach the desired target group, but is also usually much cheaper than offline advertising.[3]

In a typical Native Advertising scenario, video advertisements are embedded in a text, leading to the impression that the video belongs to the editorial section of a report. Also, the graphic overlay of such an editorial article with associated advertising messages is becoming increasingly common.[4] If, for example, an online daily newspaper reports on the advantages of electric mobility and this editorial article is embraced by partly animated advertising messages from a manufacturer of renowned electric cars, then this advertising message does not disturb the viewer's reading flow, but rather shows the reader possible sources of supply. In a separate view, this form of advertising may seem just as intrusive as "classical" advertising. Yet, it is the interaction of advertisement with information and the embedding in the familiar environment that relieves native advertising of its disruptive effect and makes it more attractive for the viewer.

Naturally, however, native advertising is dynamic and constantly adapts to new circumstances. Meanwhile, one can therefore subsume a multitude of other advertising strategies and problem areas under it, especially *Influencer-Marketing*. The latter refers to a form of social media marketing used by so-called influencers. Influencers

[1] Adrian Kubat has written Section 2, whereas Section 3 has been written by Arno Scharf.
[2] In detail A. Wiebe and O. Kreutz, Native Advertising – Alter Wein in neuen Schläuchen? (Teil 1), WRP 2015(9), pp. 1053-1060.
[3] M. Specht and E. Theobald, Broadcast Your Ad, Nomos 2010, pp. 27f.
[4] See for example the very fitting example of Mini's advertising strategy on the news portal Buzzfeed at A. Wiebe and O. Kreutz, Native Advertising – Alter Wein in neuen Schläuchen? (Teil 1), WRP 2015(9), pp. 1053-1060 (1056).

characterise the use of a social media channel that primarily focuses on oneself, but also advertises products and campaigns.[5] Due to their sometimes enormous impact, but especially by building up an almost friendship-like relationship with their viewers, influencers also gain considerable value for the advertising industry as testimonials. As elaborate and convincing a company's commercial may be, it still has the nimbus of a beautified advertisement hovering over it. Influencer marketing can fade this stigma into the background as the focus instead lies on the recommendation of the influencer as an alleged friend. According to a recent study, about one in five people aged between 16-64 has already made a purchase decision based on the recommendation of an influencer. In the age group of 16-24, every second person did so.[6]

The legal framework for this young phenomenon is certainly not new, but sometimes leads to differentiations based on the target group and the digital environment. In Austria, the respective legal provisions can, in particular, be found in the E-Commerce Act (ECG)[7], the Audiovisual Media Services Act (AMD-G)[8], the Media Act (MedienG)[9] as well as in the Act Against Unfair Competition (UWG).[10] They regulate the behaviour of influencers by means of specific advertisement restrictions but also genuine competition law standards. Three problem areas that currently dominate the discussion in Austria will be presented in the following, namely (i) the *obligation to label advertising* contributions, (ii) the *applicability of product liability standards to influencers* who provide false information about products and (iii) the problem that occurs with *fake product ratings*.

2.2. Labelling Obligations in Influencer Marketing

The current body of law contains numerous special labelling obligations, the violation of which is primarily sanctioned by administrative penalties. In general, with the exception of the MedienG (up to EUR 20,000), these are not particularly high, but play an important role in the context of unfair competition law.[11] Common to these provisions is that they are linked to the payment of remuneration for the determination of the contributions to be labelled. Even if the definitions in the respective legal provisions overlap to some extent, there are some (significant) differences which will be elaborated in more detail below.

2.2.1. Labelling Obligations According to Sec 26 MedienG

The first of these obligations is set out in Sec 26 of the Media Act (MedienG), which requires that paid publications must be labelled, unless the advertising character of the contribution itself is evident. The Austrian Media Act, which was originally designed for print media, now also applies to "*periodic electronic media*", provided that these have a corresponding distribution, namely broadcasting at least four times a year. Thus, the vast majority of channels used by influencers fall within the scope of application of the MedienG. This includes those channels which are not publicly accessible, but remain hidden behind a paywall or whose access depend on the consent of the channel owner.[12]

In addition, a labelling obligation under Sec 26 requires a remuneration to be paid to the influencer. The definition of the consideration is still subject to vivid discussions, as meanwhile mere monetary fees have been replaced by a variety of different methods of payment. Especially products or invitations to events are often made available in return for the insertion of advertising. This kind of consideration is certainly covered by Sec 26, as has become now an old-fashioned monetary payment. In general, an asset of any kind is to be subsumed under the concept of remuneration in the Media Act. The provision of goods also leads to an increase in the recipient's financial resources, which is why a contribution inserted for this purpose must be labelled accordingly.

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[5] On their job profile S. Lettmann, Schleichwerbung durch Influencer Marketing - Das Erscheinungsbild der Influencer, GRUR 2018(12), pp. 1206-1211.

[6] BVDW, Umfrage zum Umgang mit Influencern 2020, available at https://www.bvdw.org/der-bvdw/news/detail/artikel/mehr-als-jeder-fuenfte-verkaeufe-durch-influencer-marketing-nehmen-laut-bvdw-studie-2020-nochmal-zu/. Accessed 08. June 2021.

[7] Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz – ECG) BGBl I 152/2001.

[8] Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz – AMD-G) BGBl I 85/2011.

[9] Bundesgesetz vom 12. Juni 1981 über die Presse und andere publizistische Medien (Mediengesetz – MedienG) BGBl 314/1981.

[10] Bundesgesetz über den unlauteren Wettbewerb 1984 – UWG BGBl 448/1984.

[11] See Section 2.2.1.

[12] A. Koukal, In: Berka, Heindl, Höhne and Koukal (eds), MedienG, 4th ed, LexisNexis 2019, Sec 1 MedienG para 7.

Nevertheless, cases of so-called "*favouritism reporting*" (*Gefälligkeitsberichterstattung*) have always been controversial and problematic. Favouritism reporting is characterised by a labelled advertisement and a (corresponding) editorial contribution that almost merge into each other. Typically for favouritism reporting is media coverage, where half of a page consists of an advertisement provided and paid for by the advertising company, while the other half provides an article that emphasises the advantages of the same company to a great extent. Since the accompanying advertisement was actually paid for, one could now be tempted to assume that also the corresponding editorial contribution must be labelled. However, the OGH[13] assumes, in accordance with the explanatory text of the law,[14] that Sec 26 requires a synallagmatic relationship between the payment and the article. This means that the payment of remuneration must have been the very cause of the publication of the contribution. Yet this is not the case if the advertising company and the publisher only agree to pay for an advertisement, but the additionally disclosed contribution is not covered by this agreement, but is published merely out of courtesy or gratitude.

According to the jurisdiction of the OGH, in such cases, a label must therefore be applied only to the advertisement, but not to the editorial contribution, no matter how enthusiastic it may be about the company or product. In doing so, the OGH uses the term "*editorial contributions with advertising surplus"*[15] and focuses exclusively on the underlying agreement, thus leaving other aspects out of consideration. As a result, which has even been criticised by media associations themselves,[16] the OGH leaves it up to the parties to decide on the labelling obligation. Although such a result may well be congruent with the history of the origins of Sec 26 MedienG, it remains to be seen whether it is also desirable from a legal policy point of view. To prevent the protective concept of the labelling obligation from being undermined, it would in any case be more consistent to strive for a de lege ferenda regulation that also includes the problem of favouritism reporting in the scope of Sec 26 Media Act. The concept of remuneration could, for example, be amended by abandoning the synallagmatic relationship between the report and the payment and instead subject the report to a separate review. If this review reveals that payment would typically have had to be made for such a report, then this should also be sufficient to require a labelling obligation. The fact that this is not only possible from a legal point of view, but can also be implemented in practice, is shown in particular by the standards of the AMD-G and ECG, which will be discussed in a moment.

2.2.2. Labelling Obligations According to Sec 31 AMD-G

The Audiovisual Media Services Act (AMD-G) can be traced back to the EU Audiovisual Media Services Directive (AVMS-Directive)[17] and, similar to Sec 26 MedienG outlined above, aims at increasing market transparency by providing information to the consumer. While the MedienG is indisputably applicable to most channels of influencer marketing, this was anything but clear for the AMD-G in the past. In order to fall within the scope of application, and hence possible labelling obligations, of the AMD-G, the existence of an audiovisual media service is necessary in the first place. Audiovisual media services are characterised by six elements as defined in the AVMS-Directive. Accordingly, it must be a service within the meaning of Articles 56 and 57 TFEU which is under the editorial responsibility of a media service provider. Furthermore, the service must be operated for the principal purpose of providing programmes intended to inform, entertain, or educate the general public by electronic communications networks.[18] Recently, the element of the main purpose has been subject to controversial discussions. In an eagerly awaited recent judgement, the CJEU[19] ruled that the YouTube channel of a company on which new cars are advertised does not constitute an audiovisual media service, as the advertising purpose of the channel would clearly be in the foreground. However, as the ruling deals with a channel that exclusively provides advertisement content, while typical influencer marketing is characterised by a mixture of editorial content and advertising contributions, it would not apply to influencer-marketing. Apart from this, the amended AVMS-Directive,[20] which has not yet been implemented into national law, now explicitly includes "*video sharing*

[13] OGH 4 Ob 60/16a, *Gefälligkeitsberichterstattung*, ÖBl 2017/25 (L. Wiltschek).
[14] AB 743 BlgNR 15.GP, p. 11.
[15] Authentic version "*redaktionelle Beiträge mit werblichem Überschuss*".
[16] See for example the press release of the PR Ethics Council, available at www.prethikrat.at/wp-content/uploads/2016/11/Presseinfo_PR-Ethikrat_OGH-Urteil_2016-11-15.pdf. Accessed 8 September 2021.
[17] Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95, p. 1.
[18] In detail C. Handig, Wenn "Influencer" zum Beruf wird, stellt sich ua die berufsrechtliche Frage, ecolex 2019(6), pp. 547-550.
[19] CJEU 21 February 2018, case C-132/17, *Peugeot Deutschland*, ECLI:EU:C:2018:85.
[20] Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member

platforms". By doing so, the European legislator takes account of changes in consumer behaviour and subjects video blogs to regulation.[21]

Although the labelling obligation under Sec 31 AMD-G is, in general, similar to the one laid down in Sec 26 MedienG, it differs in important aspects. What they have in common is that commercial communication as such must be easily recognisable.[22] However, the notion of remuneration in the AMD-G differs significantly from the one used in the MedienG described above. What is relevant to the concept of remuneration is not merely the donation of an asset, but an objective standard, that focuses on the question, wether or not a remuneration would typically have to be made for such a contribution. The assessment of a contribution is based on the perception of the targeted consumers. The decisive question is whether a fee would typically have to be paid for that very special contribution.[23] If this is the case, the labelling obligation of Sec 31 AMD-G applies. However, this means that the labelling obligation also applies to those contributions which the OGH describes as "*editorial contributions with advertising surplus*".[24] If the author of the editorial contribution exceeds the limit of objectivity and slides into almost euphoric calls to buy, this will, in the perception of the consumers, generally represent a paid advertisement, which must be labelled.

2.2.3. Labelling Obligations According to Sec 6 ECG

Thirdly and lastly, a labelling provision can also be found in the E-Commerce Act (ECG), which in part, however, goes beyond the requirements of its related provisions. Sec 6 ECG requires not only a clear and unambiguous identification of commercial communication, but also the disclosure of the client.[25] This obligation applies to the provider of a so-called "*information society service*", defined as a "*service, usually against payment, provided electronically at a distance on individual demand*".[26] Hence, this definition also covers platforms typically used by influencers in the vast majority of cases. Indeed, the concept of remuneration is understood broadly and does not require payment for the service by the end customer, but rather includes self-promotion and third-party financing.[27] In addition to the elements of electronic retrieval and distance selling, which are inherent to influencer marketing, individual retrieval is also generally given. This requires users to be able to choose when and what they would like to consume from a programme catalogue, something that is undoubtedly possible on usual video platforms such as YouTube or Instagram, and which leads to the overall applicability of the ECG.[28]

A broad understanding of the concept of remuneration is also appropriate with regard to the definition of commercial communications. If the influencer's communication "*directly or indirectly*" promotes the sale of goods, services or the image of a company, then the commercial character of a contribution is affirmed.[29] This means that all common forms of advertising by influencers fall within the scope of application of Sec 6 ECG, particularly since it is not a question of the transfer of an asset, but an objective standard, such as discussed in regard of the AMD-G,[30] must be applied.[31] Independent statements about companies, in particular those made without any consideration, are explicitly excluded from the scope of application.[32] However, the relevance of this exception is doubtful for influencer marketing. After all, the narrowly defined requirements can only be met by factual tests or descriptive statements about the company, since otherwise there is always at least an indirect promotion of sales

States concerning the provision of audiovisual media services (Audio Media Services Directive) in view of changing market realities, OJ 2018 L 303, p 69.

[21] In detail P. Zurth and V. Pless, #transparenz: Die Kennzeichnung nutzergenerierter Werbung in sozialen Netzwerken unter der neuen AVMD-Richtlinie Teil 1, ZUM 2019(5), pp. 414-424 (416f).

[22] See e.g. P. Zurth and V. Pless, #transparenz: Die Kennzeichnung nutzergenerierter Werbung in sozialen Netzwerken unter der neuen AVMD-Richtlinie Teil 2, ZUM 2019(6), pp. 457-466 (464f).

[23] Inter alia VwGH 26.2.2016, Ra 2016/03/0021; 1.9.2017, Ra 2017/03/0007; see also M. Kogler, M. Traimer and M. Truppe, Österreichische Rundfunkgesetze, 4th ed, LexisNexis 2018 Sec 2 AMD-G p 434.

[24] OGH 4 Ob 60/16a, *Gefälligkeitsberichterstattung*, ÖBl 2017/25 (L. Wiltschek).

[25] In detail M. Ciresa, In: Schwimann and Kodek (eds), ABGB, 4th ed, Manz 2015, Sec 6 ECG.

[26] Sec 3 ECG; e.g. M. Ciresa, In: Schwimann and Kodek (eds), ABGB, 4th, Manz 2015, Sec 3 ECG.

[27] In detail M. Ciresa, In: Schwimann and Kodek (eds), ABGB (ed), 4th ed, Manz 2015, Sec 3 ECG paras 6f; W. Zankl, E-Commerce-Gesetz, 2nd ed, Verlag Österreich 2016, Sec 3 paras 48f.

[28] M. Ciresa, In: Schwimann and Kodek (eds), ABGB, 4th ed, Manz 2015, Sec 3 ECG para 15; A. Kubat, Kennzeichnungspflicht im Influencer-Marketing, ÖBl 2020(1), pp. 8-16 (12f).

[29] M. Ciresa, In: Schwimann and Kodek (eds), ABGB, 4th ed, Manz 2015, Sec 3 ECG paras 6f; W. Zankl, E-Commerce-Gesetz, 2nd ed, Verlag Österreich 2016, Sec 3 paras 48f.

[30] See Section 2.2.2.

[31] See P. Raffling and H. Wittmann, Rechtsfragen am Beispiel des „Influencer Marketings", MR 2017(4), pp. 163-168 (166f).

[32] Sec 3 Nr 6 lit b ECG.

or appearance.[33] Hence, in business relations between advertising companies and influencers, it is strongly recommended to keep in mind all relevant regulations. Special attention should be given to the disclosure obligation, whereby a link to the company's web content is normally sufficient.[34]

2.2.4. Relevance for Unfair Competition Law and Transparency Provisions Within the UWG

While the special legal provisions described above are primarily sanctioned by administrative penalties, the Act Against Unfair Competition (UWG) undoubtedly plays the most important role in unfair competition law. This is for two reasons, which will be discussed in the following. First, the UWG functions as a gateway for special legal norms through the category of breach of law in its Sec 1, which can also be enforced by law-abiding competitors through actions for injunction. Second, the UWG itself also contains substantive transparency provisions in Sec 2 para 4 and in Nr 11 of its Annex. The telos of these provisions, in general, coincides with the rules discussed above, but in part also opens up room for interpretation.

2.2.4.1. Acting in the Course of Trade

Before potential labelling obligations can be discussed, it must be clarified whether and under what conditions the UWG applies to influencer-marketing. The UWG requires to "*act in the course of trade*".[35] According to the jurisdiction of the OGH, this applies to any independent, acquisition-oriented activity that goes beyond purely private or official activities.[36] It is obvious that entrepreneurs that use influencer marketing generally fall within the scope of the UWG. However, it must be noted that also those who intervene in somebody else's commercial activity and try to promote or hinder the competitive process are addressees of the UWG.[37] Thus, also influencers themselves might fall within the scope of application and must therefore comply with the respective provisions of the UWG.

However, it is anything but clear, when influencers are bound by the UWG and under which circumstances their behaviour is covered by the *constitutionally guaranteed freedom of expression*.[38] In this regard, also the German courts do not follow a uniform approach but rather diverge considerably in certain aspects. The German jurisdiction identifies at least three categories of contributions. *First,* the influencer receives a monetary advantage from the applicant for the contribution. In this case, it is undoubtedly assumed that the commercial activity of the applicant is encouraged. This is not a new phenomenon, but merely a further manifestation. The commercial activity is equally given for the advertising influencer and for the advertised company, as it would be the case with "traditional" advertising methods. However, *secondly,* the matter is more difficult if the influencer purchases the advertised product himself and receives no consideration for the advertisement. In this case, the allocation depends to a great extent on the content of the contribution. If the content is limited to pure commercial purposes, which typically lead to euphoric calls to buy, it can be assumed that the influencer is acting in the course of trade in the form of promoting the commercial activity of somebody else. However, *thirdly,* the situation is different if the content contains information related to the advertised product. Particular problems have arisen in this respect with the use of hyperlinks. By setting a link, the viewer can be forwarded to the social media profile of the advertised company with a single click.

This can be illustrated with the following example: *Influencer A* runs a fashion blog on Instagram where she regularly reports on her daily routine and the latest trends. She is invited by company B to an event in New York to report on their new collection. In return for reporting, *Company B* finances her journey and stay in New York. On her flight home, *Influencer A* publishes several photos on her blog. First, a posting from the event she visited appears, with *Company B's* application. This posting must be clearly marked as *Influencer A* received an asset for this contribution from *Company B*. Furthermore, she publishes a photo of a headphone she bought herself, which cannot be attributed to *Company B.* However, in the text accompanying the photo, she links to *Company B* and reports once again on the pleasant journey. According to a convincing view, this must be seen as promoting the commercial activity of *Company B*, since the link is not related to the photo and does not cover any informational needs of the viewer.

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[33] W. Zankl, E-Commerce-Gesetz, 2nd ed, Verlag Österreich 2016, Sec 3 para 74.
[34] Again M. Ciresa, In: Schwimann and Kodek, ABGB (eds), 4th ed, Manz 2015, Sec 6 ECG para 11.
[35] Handeln im geschäftlichen Verkehr.
[36] Inter alia OGH 4 Ob 2007/96t, *Clinclowns*, ÖBL 1996, 191.
[37] H.G. Koppensteiner, Wettbewerbsrecht, 3rd ed, Orac 1997, Sec 23 para 7.
[38] In detail A. Kubat, Kennzeichnungspflicht im Influencer-Marketing ÖBl 2020(1), pp. 8-16 (12f).

However, the fact that the influencer has previously received payment for another entry only plays a secondary role. If one follows the view of the German *KG*[39] in this respect, a promotion of commercial activity can be assumed if the link does not represent a connection to the contribution or the need for information. Consequently, the third photo published by *Influencer A* on her journey, namely a self-portrait with a link to the brands belonging to the company of the clothing worn, does not constitute an act in the course of trade. The fact that viewers of a fashion blog as well as readers of a fashion magazine expect not only photographs of new items of clothing but also information about them is almost inherent to the idea of a fashion blog and cannot in itself constitute a promotion of commercial activity. On the contrary, this is covered by freedom of expression, since the link to the companies here undoubtedly covers the informational needs of the viewers.

This is convincing, especially since the Austrian VfGH also differentiates in its jurisdiction between commercial and editorial contributions. Although the first of these are also protected under the principle of freedom of expression, the scope for legislative action goes further, particularly with regard to the proportionality test.[40] The draft regulation of the German Ministry of Justice,[41] which - in consultation with the European Commission - is intended to clarify the UWG accordingly, also moves in this direction. In particular, the draft regulation subjects only those contributions to the UWG in which the company-related aspects of the contribution clearly outweighs the need for information. If there is therefore a surplus of advertising in individual cases, then such a contribution should also be marked for transparency reasons. In the meantime, the Austrian Federal Government does not intend to make any modification, but rather considers the existing legal framework to be sufficient. [42]

2.2.4.2. Transparency Provisions Within the UWG

If the above-mentioned conditions are fulfilled, the UWG is applicable, including several obligations on transparency. First of all, *Nr 11* Annex UWG renders business practices unfair if advertising is disguised as information by using editorial content to promote a product, whereby the company has paid for the promotion and this fact is not clearly evident for the consumer (e.g. from the content, images or sounds used). In view of their per se nature of the prohibition, these conditions must be interpreted narrowly. In general, Nr 11 Annex UWG requires both an editorial content and a payment. Editorial content can, in particular, be found on YouTube channels, as these are typically characterised by recurring and thematically related contributions. As regards payment, the term "fee" again covers every asset-related benefit, including product mailings and invitations to events. Hence, the favouritism reporting discussed above cannot be subsumed under Nr 11 Annex UWG.

The situation is different for *misleading conduct* in the meaning of Sec 2 para 4 UWG. This provision is a lex generalis and also includes business practices which are not unfair under Nr 11 Annex UWG, e.g. because they lack editorial content or proof of payment. Under Sec 2 para 4 UWG, such business practices are unfair if they hide their commercial purpose. However, it is not defined by Sec 2 para 4 UWG in more detail, when this is the case or how the commercial purpose is to be understood. It seems appropriate to apply an objective standard for this purpose, as the legislator could not have intended to leave the determination of what is a commercial character to the hands of those against which the consumer should actually be protected under the UWG. Therefore, also favouritism reporting may be subject to a labelling obligation under Sec 2 para 4 UWG. Although mainly dealing with the Media Act, the OGH[43] ruled against such an interpretation. Following the approach of the BGH,[44] a review seems desirable in order to ensure the transparency necessary to protect the average informed consumer.

Finally, the category of infringement of law in the general clause of Sec 1 also provides a gateway for the special labelling provisions of the law.[45] A market participant should not be able to achieve competitive advantages by infringing the law. Consequently, such breaches of law are equally unfair business practices to the extent that they could potentially cause a shift in demand. In this context, violations of labelling regulations serve as prime examples, since the targeted consumer group is more likely to deal with content that has not been embellished

[39] KG 5 U 83/18 MMR 2019, 175.
[40] E.g. VfGH B 658/85 MR 1986, 32 (B. Binder); see also W. Berka, Die Kommunikationsfreiheit in Österreich, EuGRZ 1982(19), pp. 413-427.
[41] Regelungsvorschlag des Bundesministeriums der Justiz und für Verbraucherschutz zur Abgrenzung nichtkommerzieller Kommunikation zur Information und Meinungsbildung von geschäftlichen Handlungen 2020availableat https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Regelungsvorschlag_Influenzer.pdf?__blob=publicationFile&v=1. Accessed 19 November 2020.
[42] See response 1358/AB (XXVII. GP) of the Federal Ministry of Digitisation and Economic Affairs to enquiry 1390/J (XXVII. GP).
[43] OGH 4 Ob 60/16a, *Gefälligkeitsberichterstattung*, ÖBl 2017/25 (L. Wiltschek).
[44] BGH I ZR 205/11, *Preisrätselgewinnauslobung* V, GRUR 2013, 644.
[45] For the special labelling provisions see Sections 2.2.1., 2.2.2. and 2.2.3.

through the eyes of the advertising industry. The advantages of the UWG for law-abiding competitors compared to the special legal standards should not be underestimated. While in the case of the latter, it is up to the competent administrative authorities to initiate proceedings and to impose administrative penalties, the UWG grants a subjective right to affected competitors to claim injunctive relief and, if necessary, to damages.

2.2.5. Exemptions from the Labelling Requirement on the Basis of Perceptibility

Irrespective of the relevant standard, the provisions dispense with the need for labelling if the *advertising character* is *apparent at first glance* to the average attentive and knowledgeable observer.[46] This may be the case if the contribution stands out by its presentation, for example by using colours different to those used in the editorial part, or by its placement in a separate, exclusively commercial channel.[47]

Recently, the OGH has given the average viewer a particularly critical appraisal and considers an exuberant application within an editorial contribution to be recognisable, as the average viewer would not assume that editorial contributions are always objective.[48] Of course, there is still no supreme court decision in Austria regarding influencer marketing, but as far as the recognisability of commercial contributions is concerned, first conclusions can be drawn from recent decisions in Germany. The *LG München I,*[49] has recently assessed a free (!) contribution by a well-known fashion blogger as an advertisement subject to mandatory labelling, only to row back to the extent that this contribution is clearly recognisable as an advertisement for the average viewer anyway due to the enormous reach of the influencer.

Nevertheless, it must be stated that a connection between the reach of an influencer and labelling obligations is not very helpful. In the case mentioned, the defendant influencer had 485,000 followers. Based on this wide reach, the LG München I concluded that the commercial purpose of the entire channel would be clear to *"any viewer, however uniformed"*. A person with such an impact, whose channel is public and not private, would undoubtedly always pursue commercial interests. However, this vehemently fails to recognise the supporting pillars of social interaction and ultimately leads the idea of transparency ad absurdum. Rather, it is inherent to influencer marketing that private and public life merge more and more in order to generate the appropriate attention. As a result, the protection against surreptitious advertising cannot be less for such influencers with a large reach than for those with a small reach.[50] It remains to be seen whether this view - for the influencer generous - will prevail.[51]

2.2.6. Form of Labelling

If one ultimately comes to the conclusion that a contribution is subject to compulsory labelling, the latter must be done in a certain form. According to the standards laid down in legislation, the labelling must be more or less identical to "*clear and unambiguous*". What is meant by this has always been the subject of discussion and is now also the object of dispute in various court decisions in the field of influencer-marketing.

If one initially sticks to the wording of the law, the terms "*Anzeige*", "*entgeltliche Einschaltung*" and "*Werbung*" can be found in Sec 26 MedienG as suitable forms of identification. The expressions chosen by the legislator itself must therefore undoubtedly be suitable to ensure adequate transparency in influencer-marketing. However, also German-speaking influencers are increasingly using English expressions or abbreviations, and in some cases, there is a general attempt to push the name into the background. The problem that the latter can quickly lead to conflicts can be seen from the very fact that the law requires clear and unambiguous disclosure. If, to give just a few examples, the marking is therefore written in a minimum font size, marked in colours that coincide with the background in such a way that the font becomes almost illegible, or the text is even hidden behind other

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[46] Inter alia OGH 4 Ob 62/09k, *Promotion II*, MR 2009, 258 (G. Korn); OGH 4 Ob 113/08h, *Medium T*, MR 2008, 261 (P. Burgstaller).

[47] See e.g. A. Koukal, In: Berka, Heindl, Höhne and Koukal (eds), Mediengesetz, 4th ed, LexisNexis 2019, Sec 26 para 3; A. Kubat, Kennzeichnungspflicht im Influencer-Marketing, ÖBl 2020(1), pp. 8-16 (11).

[48] OGH 4 Ob 60/16a, *Gefälligkeitsberichterstattung*, ÖBl 2017/25 (L. Wiltschek).

[49] LG München I 4 HK O 14312/18 GRUR-RR 2019, 332 (P. Zurth and V. Pless).

[50] See A. Kubat, Kennzeichnungspflicht im Influencer-Marketing, ÖBl 2020(1), pp. 8-16 (16); P. Zurth and V. Pless, Schleichwerbung in Posts von Influencern durch Verlinkung – Cathy Hummels, GRUR-RR 2019(7), pp. 332-336.

[51] The OLG München appealed to in the second instance confirmed the decision of the LG München I at least in this respect (although without necessity, since it had previously already denied the applicability of the UWG for lack of commercial activity). The case is now pending at the BGH. At the time of submitting this report, no ruling of the BGH has yet been proclaimed.

characters,[52] this is generally not sufficient marking. In one case concerning print media, the OGH[53] considered a marking to be inadequate because it was placed next to the advertisement in such a small font size that it was not easily recognisable even on closer inspection. Therefore, as a general rule, the basic considerations that apply to the recognisability of advertising, which from the outset excludes an obligation to label, also apply to the type of labelling and must therefore be based on the specific presentation and design of the individual case.

There are various opinions on *english-language labelling*, although a tendency seems to be emerging in jurisdiction. This applies in particular to Germany, where the legal situation with regard to labelling requirements is essentially comparable to Austria, it is already possible to rely on relevant judgments on influencer-marketing. For example, the terms "*#ad*" and "*#sponsoredby*" have now been judged inadmissible. While the OLG Celle[54] with regard to "#ad" referred to the placement of the hashtag in the middle of a "hashtag cloud"[55] and thus denied a clear and unambiguous recognisability, it left open whether the term in itself would suffice as identification. With regard to the abbreviation and the associated mental intermediate step for the viewer, namely the correct assignment of the abbreviation, this will tend to be negated at present. However, it must be admitted, that the consistently young circle of consumers seems to become more and more accustomed to this abbreviation and that this therefore becomes increasingly valid. A change from the previous judicature thus seems to be at least within the realm of possibility, provided that the trend towards influencer-marketing remains constant.

The same applies to the terms "*#sponsoredby*" and "*#promotion*". The OLG Celle,[56] but also the OGH,[57] explained that an English language term would, in general, not reveal the commercial purpose of the contribution to a German-speaking audience. This seems to be doubtful, especially since the average addressee of influencer marketing is familiar to the digital environment, where users have to deal with English language expressions on a daily basis. If this circle of addressees is thus acknowledged to have at least a rudimentary knowledge of English, it will have to be permissible to label them by the terms mentioned, especially since the OGH was dealing with a much older circle of addressees in its decision cited above.[58] It should also be pointed out that the recurrent marking of contributions by "*unpaid advertising*" de lege lata has no legal basis. Insofar as the reference to "unpaid" is intended to indicate that no payment was made for the insertion of the contribution, but merely that a product was provided, this is in any case contrary to the legal situation. The aim of the legal situation is not the payment of a fee, but rather the inclusion of all valuable assets in the obligation to label. If, however, no consideration of any kind has actually been received and the contribution contains at least a minimum of information that goes beyond commercial content, there is no need to label it as "*unpaid advertising*" because there is no contribution to be labelled at all.

2.3. Influencer Marketing and Product Liability

In times of allegations of "*fake news*", the question of liability for false information and advice is becoming increasingly important. Especially when products are advertised, it is important not to overstretch the boundaries of what is permissible. However, if false product characteristics are promised, this is not only a problem of unfair competition law (so called misleading business practices), but may also give rise to liability for damages incurred. In order to deal with this problem, the legislator has enacted specific liability rules, which can be found above all in the Austrian *Product Liability Act (PHG).*

The PHG standardises a *strict liability of the manufacturer* for the products manufactured by him *without setting any requirements regarding fault*. The purpose of this liability is not to have to refer injured parties exclusively to delictual claims, as in this case the fault of the manufacturer would generally be ruled out and an attribution would

[52] Popular in this context is the "*hiding*" behind another text or the profile picture of the influencer. The Instagram platform allows, for example, the posting of so-called "*stories*", which, when called up by the viewer, show the name and profile picture of the influencer in the upper left corner. If the influencer places the label on the photo or video published in the story in this corner, it is almost impossible for the viewer to see it at first glance. Only then, when the viewer actively pauses the story, the name and the picture of the influencer disappears in the upper left corner and reveals what is hidden behind it.
[53] OGH 4 Ob 172/90 MR 1991, 75.
[54] OLG Celle 13 U 53/17 WRP 2017, 1236.
[55] What is meant by this is the sequence of a large number of so-called hashtags, which are represented by the #-symbol and are intended to facilitate the search within the network.
[56] OLG Celle 13 U 53/17 WRP 2017, 1236.
[57] OGH 4 Ob 62/09k, *Promotion II*, MR 2009, 258 (G. Korn).
[58] See A. Anderl and A. Seling, Social Media – Rechtssicherheit im Unternehmen, ecolex 2018(6), pp. 535-538.

only be possible under the strict conditions of the liability of assistants.[59] The claimants are not only the direct purchaser of the product, but also third parties ("*innocent bystanders*") who suffer personal injury or damage to property as a result of the product. However, a particularly relevant question arises for the area of influencer-marketing, namely how the product term of the PHG is to be understood.

In this respect, the text of the law itself refers in Sec 4 to the *product as a movable physical object*, including energy and such objects that are connected with other movable or immovable objects.[60] Strictly according to the wording and to remain with the textbook example that is often used, it is therefore at first glance obvious (and probably inconsistent) that the architect's construction plan is not subject to strict liability under PHG, but the executed construction project based on this very plan is.[61] In terms of influencer-marketing, at first sight this would mean that influencers are not liable for *wrong advice or indications*, but for the dangerousness of self-made products such as cosmetics. Nevertheless, the discussion in Austria was recently spurred on by a reader's lawsuit against a daily newspaper she subscribed. The defendant newspaper printed a health tip to use freshly torn horseradish as a medical salve against rheumatic pain. This circulation - and this is the decisive point of the lawsuit - could, according to the author's opinion, be left on the skin for "*quite two to five hours*". However, this does not correspond to the facts, rather the medically recommended duration of such a circulation is well below two to five hours, namely two to five minutes (!).

Once the reader noticed a painful, toxic reaction on the ankle after about three hours, she removed the circulation and eventually filed a lawsuit against the daily newspaper under the PHG. She explained that the author's advice took shape in the form of the printed copy of the newspaper and thus represented a movable, physical object. While the first and second courts rejected the action, the OGH now referred the question to the CJEU for a *preliminary ruling*. In doing so, the OGH[62] pointed out that a newspaper is not bought by the reader as a stack of paper, but obviously because of the printed content.[63] Of course, the textbook example of the faulty plan mentioned above could not be omitted in the reasoning in a modified form. The OGH stated that it is inconsistent if the author of a cookbook who gives a harmful dose of an ingredient is not subject to product liability, whereas the manufacturer of a finished product who mistakenly adds the same dose to his product is. However, the protective purpose of the PHG, which explicitly refers to the danger of the object itself, and not to the advice or information, contradicts the view of the OGH.[64]

Undoubtedly, it is also questionable how far this desired consequence should go and where it can find a limitAfter all, would it not also be inconsistent if product liability depended on the *format*? A factual differentiation between the faulty recipe printed in book form and the one published online on a blog seems to be hardly possible. For influencer-marketing, which by definition takes place in a digital context, this very question is decisive. If the CJEU extends the scope of the product concept to include intellectual performances, then the influencer who gives faulty advice in his blog is ultimately also subject to strict liability. However, if one sticks to the wording of the law as the starting point for interpretation, Sec 4 PHG explicitly refers to physicality and mobility. A subsumption of incorporeal, intellectual achievements, which never take shape in physical form, seems constructed under the current law, although the result is admittedly inconsistent.[65] Taking these arguments into account, the CJEU[66] ultimately also answered the question referred by the OGH by stating that a service that is incorporated into a physical, movable object does not belong to the inherent characteristics of this object. Accordingly, the incorrect health tip is not a product within the meaning of the PHG even if it was printed in a daily newspaper. This must therefore apply even more to the subject of influencer marketing, according to which a service is not subject to the strict product liability standards even if it is offered in a digital context.

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[59] E.g. C. Rabl, PHG, LexisNexis 2017, Vorbem paras 11f; the standard of Sec 1315 ABGB, which is relevant to the area of delictual claims, attributes fault to assistants if the manufacturer uses "*an unfit or knowingly dangerous person*". This is, of course, verifiable in the very least cases.

[60] In detail W. Posch and U. Terlitza, In: Schwimann and Kodek (eds), ABGB, 4th ed, Manz 2015, Sec 4; C. Rabl, PHG, LexisNexis 2017, Sec 4.

[61] R. Welser and B. Zöchling-Jud, Grundriss des bürgerlichen Rechts II, 14th ed, Manz 2015, para 1628.

[62] OGH 1 Ob 163/19f AnwBl 2020, 278 = ecolex 2020/210.

[63] The OGH had already had the opportunity to address this issue in 2007, but did not do so, citing the lack of compensatory damages. The matter in question was a legal calendar which contained erroneous time sheets and on the basis of which a lawyer suffered a damage; OGH 6 Ob 256/06z MR 2007, 144 (G. Streit) = ecolex 2007/176 = Zak 2007/275 (D. Beig).

[64] See e.g. W. Posch and U. Terlitza, In: Schwimann and Kodek (eds), ABGB, 4th ed, Manz 2015, Sec 1 PHG para 1.

[65] C. Rabl, PHG, LexisNexis 2017, Sec 4 para 52.

[66] CJEU, case C-65/20, *VI v KRONE-Verlag Gesellschaft mbH & Co KG*, ECLI:EU:C:2021:471.

2.4. The Issue with 'Astroturfing'

The global networking and the corresponding impact of contributions on the internet give consumers the opportunity to review products or companies, and to exchange experiences with like-minded users. Various technical solutions are available for this purpose, but the possibility of awarding stars on a scale of 1 to 5 for a product and reviewing it is particularly popular in this context. These reviews are usually publicly available and sometimes offer customers an important reason for their purchase decision. After all, the evaluation of a private person seems to be much more reliable than the promotion of the product by the manufacturer. Especially when there are multiple reviews from different people and most of them highlight the product positively, this can be the decisive factor for the purchase after comparing several similar products. The same applies in the other direction, of course. A product that has been given a negative evaluation by many people will also at least cause scepticism among the viewer and ultimately discourage the purchase.

However, there is no legal provision for any kind of verification of the reviewer or a requirement to use his or her real name. For example, one of the largest trading platforms also offers the possibility of publishing reviews under a pseudonym. Obviously, it is therefore also an opportunity for the manufacturer himself to give his products or his company a positive evaluation on this platform or to invite employees to do so. Yet this leads the idea of objective reviews ad absurdum, as the viewer is deceived about the commercial purpose of the review and the author's business character. This increasingly prevalent problem,[67] which is referred to as *astroturfing*, has also attracted the attention of legal scholars and has raised the question of how such practices should be assessed under unfair competition law.[68]

Obviously, this issue is once again a manifestation of the problem discussed above with regard to the labelling requirements in influencer marketing. If the commercial nature of a contribution is not adequately clarified for the reader, the consumer risks buying on a false basis and is therefore misled. Hence, the legal framework of astroturfing is broadly identical to that governing labelling obligations, and reference may therefore be made to our comments on the latter.[69] In particular, the UWG is generally applicable to fake ratings, since the author of such ratings typically either promotes his own product (and thus also promotes his own commercial activity) or rates competing products correspondingly poorly (and therefore engages in conduct that is objectively capable of hindering somebody else's commercial activity). Advertising the products of a third party company, with which, for example, a cooperation or even a group of companies is established, also constitutes part of trade, since it promotes competition from other companies.

However, the picture is more differentiated in terms of *applicable standards*. If one initially examines the per se bans of the black list, one will find what appears to be the case with *Nr 11* (disguising commercial content as editorial contributions), although this will generally not be applied. Neither does the occasional evaluation of products constitute editorial content within the meaning of Nr 11, nor does the author necessarily receive any consideration for this contribution, especially since own products are often advertised.[70] There is also disagreement about the application of *Nr 22*,[71] according to which the false claim or the creation of the incorrect impression that the trader is not acting for purposes related to his trade, business, craft or profession, or the false appearance as a consumer, is in any case unfair. At least in Germany (where the relevant provision can be found in Nr 23 of the Annex) this is sometimes denied, since fake evaluations do not constitute a direct offer to buy and therefore do not

[67] Der Standard, Amazon: Riesiger Betrug mit Fake-Bewertungen aufgeflogen (2020), available at https://www.derstandard.at/story/2000119826429/amazon-riesiger-betrug-mit-fake-bewertungen-aufgeflogen. Accessed 18 November 2020.

[68] In detail S. Holzweber, Kundenbewertungen im Internet, ÖBl 2021(3), pp. 100-105; H. Krieg and J.D. Roggenkamp, Astroturfing – rechtliche Probleme bei gefälschten Kundenbewertungen im Internet, K&R 2010(11), pp. 689-694; also A. Wilkat, Bewertungsportale im Internet, Nomos 2013; A. Anderl and A. Seling, Social Media – Rechtssicherheit im Unternehmen, ecolex 2018(6), pp. 535-538; A. Kulka, Das Fingieren von (größerer) Beliebtheit eines Unternehmens im Wettbewerbsrecht, ecolex 2012(2), pp. 148-151.

[69] See Section 2.2.

[70] The situation is different, however, in the case of those contributions which are similar to editorial contributions in specialist journals due to their content conception and for which the author is paid by the applicant. See H. Krieg and J.D. Roggenkamp, Astroturfing – rechtliche Probleme bei gefälschten Kundenbewertungen im Internet, K&R 2010(11), pp. 689-694 (690); also A. Anderl and A. Seling, Social Media – Rechtssicherheit im Unternehmen, ecolex 2018(6), pp. 535-538 (537).

[71] In detail A. Anderl and A. Appl, In: Wiebe and Kodek (eds), UWG, 2nd ed, Manz 2016, Annex to Sec 2 paras 217f.

serve the purpose of protection.[72] The situation is different in Austria, where the presumably prevailing doctrine assumes that at least the false appearance as a consumer is realised in the submission of fake evaluations.[73] In our view, this has to be endorsed, since the manipulation of the basis of information prior to the conclusion of the contract affects the consumer's business decision in the same way as it does directly when the contract is concluded.

Nonetheless, there is agreement that such assessments are to be subsumed under the provision of *Sec 2 para 4 of the UWG* covering misleading conduct.[74] Admittedly, this requires that the rating is suitable to affect the protective interests of market participants to a noticeable extent.[75] While suitability will generally not pose a problem, as customers will at least make decisions in reliance on a secure information basis, which does not exist due to the falsified rating, this must be considered in a differentiated manner with regard to *noticeability*. If the individual falsified rating falls significantly behind the bulk of the real ratings, it is difficult to argue that precisely this one falsified rating was the decisive factor for the purchase decision and was therefore noticeable in the sense of the UWG.[76]

Ultimately, however, these can only be exceptional examples and not those cases which proceed systematically and order a large number of fake ratings via agencies, for example.[77] This also applies to a variation of astroturfing, which does not directly deal with fake ratings, but falsifies the information provided in such a way that negative ratings are hidden in order to prevent the viewer from seeing them.[78] For example, if a company advertises its products with a broad rating system and publishes only those - genuine - positive ratings immediately, while negative ratings are first subjected to an internal review, then the viewer is misled by the unfiltered rating basis.[79] Ultimately it is not only the legal problems that have far-reaching consequences, but also the public perception, which typically causes lasting damage to the company's reputation.

2.5. Conclusion

Native advertising is becoming more and more important in the marketing world, especially when using influencers. It is thus hardly surprising that the associated legal issues are increasingly coming into focus, In Austria they are currently focussing primarily on the area of labelling obligations. While the declaration of the commercial purpose of paid advertising is a well-known problem, other issues remain, especially where products are purchased and recommended free of charge. Time will tell whether the first judgments in Austria, which are probably unavoidable, will follow those in Germany and consider this to be a commercial practice. However, the fundamental question of the limits to freedom of expression arises in this context, so particular caution is called for. A distinction should therefore be made in the approach adopted here.[80] Editorial contributions in which the focus lies on the informational aspect fall within the private sphere of influencers, whereas purely company-related contributions, which in particular show a clear advertising overlap, must be labelled according to Sec 2 para 4 UWG. One issue that the jurisdiction has clarified, at least temporarily, concerns product liability. According to the CJEU, the strict product liability regulations do not apply to services such as advice, even if they are printed in newspapers.[81] For influencer marketing, this initially brings relief, especially since it already takes place in the

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[72] Inter alia O. Sosnitza in Ohly and Sosnitza (eds), Gesetz gegen den unlauteren Wettbewerb, 7th ed, C. H. Beck 2016, Annex to Sec 3 para 3 at para 64; also H. Krieg and J.D. Roggenkamp, Astroturfing – rechtliche Probleme bei gefälschten Kundenbewertungen im Internet, K&R 2010(11), pp. 689-694 (691); for an applicability however H. Köhler, In: Köhler, Bornkamm and Feddersen (eds), UWG, 38th ed, C. H. Beck 2020, Annex to Sec 3 para 3 at para 23.1.

[73] A. Anderl and A. Appl, In: Wiebe and Kodek (eds), UWG, 2nd ed, Manz 2016, Annex to Sec 2 para 217; also A. Anderl and A. Seling, Social Media – Rechtssicherheit im Unternehmen, ecolex 2018(6), pp. 535-538 (537); contrary A. Kulka, Das Fingieren von (größerer) Beliebtheit eines Unternehmens im Wettbewerbsrecht, ecolex 2012(2), pp. 148-151 (150).

[74] A. Anderl and A. Appl, In: Wiebe and Kodek (eds), UWG, 2nd ed, Manz 2016, Sec 2 para 517; H. Köhler, In: Köhler, Bornkamm and Feddersen (eds), UWG, 38th ed, C. H. Beck 2020, Sec 5a para 7.80; in detail H. Krieg and J.D. Roggenkamp, Astroturfing – rechtliche Probleme bei gefälschten Kundenbewertungen im Internet, K&R 2010(11), pp. 689-694 (691).

[75] A. Anderl and A. Appl, In: Wiebe and Kodek (eds), UWG, 2nd ed, Manz 2016, Sec 2 paras 45f.

[76] H. Krieg and J.D. Roggenkamp, Astroturfing – rechtliche Probleme bei gefälschten Kundenbewertungen im Internet, K&R 2010(11), pp. 689 – 694 (691).

[77] Such an approach must, of course, also take into account the criminal law component, since a major fraudulent activity must, at least in all probability, be considered to be likely to cause damage to the consumer.

[78] A. Anderl and A. Seling, Social Media – Rechtssicherheit im Unternehmen, ecolex 2018(6), pp. 535-538 (536f).

[79] BGH I ZR 252/14, *Kundenbewertungen im Internet*, GRUR 2016, 828.

[80] See Section 2.2.4.1.

[81] CJEU, case C-65/20, *VI v KRONE-Verlag Gesellschaft mbH & Co KG*, ECLI:EU:C:2021:471.

digital sphere and would therefore have been difficult to align with the product concept of the PHG, which is based on physicality and mobility. Of course, the last word has not been spoken yet, as there is still recourse to general tort law. Therefore, it remains to be seen how the Jurisdiction will resolve these two controversial issues in the interests of legal certainty.

3. Algorithmic Collusion and Personalised Pricing Under Competition law

3.1. Introduction

The advent of the digital economy made transactions to be carried out to an increasing extent on the Internet, where pricing is more and more based on algorithms. In case undertakings delegate their pricing decisions to algorithms, the question arises whether such practices pose a risk to the competitive process and whether the current legal framework can effectively deal with this phenomenon. There is no doubt that the use of algorithms generates efficiencies, both on the supply and the demand side.[82] Algorithms allow suppliers to better respond to consumer demand, better allocate their resources and save on human capital.[83] Algorithms reduce transaction costs by providing consumers with a wealth of information[84] that in turn e.g. allows them to efficiently compare offers and enables them to find products that fit them better.[85] Increased market transparency achieved through reduced information asymmetries may intensify competition to the benefit of consumers. However, the adoption of algorithms can have far-reaching impacts on the forms of and conditions for competitive business conduct and might lead to undesirable, anti-competitive results.[86] The consequences of such behaviour may be ultimately borne by the consumers in the form of excessive prices or a loss in total consumer welfare. Data driven-markets – notably those in the digital economy – with few competitors, homogenous products and high entry barriers are particularly vulnerable. First, algorithms may facilitate and accelerate the coordination of prices between undertakings, thereby potentially violating the ban on cartels (Art 101 TFEU; Sec 1 Cartel Act) (see Section 3.2). Second, algorithms may enable undertakings to offer different prices to different consumers according to the information they hold about them. Such personalised pricing may qualify as price discrimination contravening the ban on abusive practices (Art 102 TFEU; Sec 5 Cartel Act) (see Section 3.3).

3.2. Algorithmic Collusion

Big Data[87] and Big Data Analytics[88] enable undertakings to implement software-based automated price adjustments. While algorithms can be an efficient means to achieve price optimisation, commentators also consider anti-competitive effects in connection with collusion made possible or facilitated by the implementation of algorithms: price agreements can be enforced more easily, their compliance can be monitored better and deviations can be detected and punished more quickly. In general, due to the characteristics of the digital world, there is less need for *ex ante* communication.[89] Rather, algorithms can coordinate actions and may enable new forms of coordination that were not observed or even possible before. This is referred to as "algorithmic collusion".[90]

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[82] See e.g. CMA, Pricing Algorithms 2018, paras 4.1.ff.

[83] M. Gal, Algorithms as Illegal Agreement, Berkeley Technology Law Journal 2019(67:34), pp. 67-118 (70); OECD, Algorithms and Collusion – Competition Policy in the Digital Age 2017, pp. 14f.

[84] However, it should not be overlooked that users may be confronted with „too much" information and that the costs related to the sorting and selection of this new variety of information may constitute a form transaction costs itself, see in particular B. Schwartz, The Paradox of Choice - Why More Is Less, 1st ed, Harper Perennial 2004.

[85] M. Gal and N. Elkin-Koren, Algorithmic Consumers, Harvard Journal of Law & Technology 2017(30:2), pp. 309-353 (318).

[86] P. Picht and G. Loderer, Framing Algorithms – Competition law and (Other) Regulatory Tools, MPI Research Paper 2018(24), pp. 1-35 (2).

[87] Big Data is characterised by the famous four V's made possible by technological progress: the *volume* of data processed, the *variety* of data aggregated, the *velocity* at which data is collected and used and the *value* of the information found in the data, see A. De Mauro/M. Greco/M. Grimaldi, A formal definition of Big data based on its essential features, Library Review 2016(65:3), pp. 122-135; the former "3 V"-definition was originally introduced by D. Laney, 3D Data Management: Controlling Data Volume, Velocity, and Variety, available at https://blogs.gartner.com/doug-laney/files/2012/01/ad949-3D-Data-Management-Controlling-Data-Volume-Velocity-and-Variety.pdf. Accessed 7 September 2021.

[88] Big Data Analytics is the process of collecting, organising and analysing Big Data to discover patterns and other useful information.

[89] M. Gal, Algorithms & Competition Law: Interview of Michal Gal by Thibault Schrepel, e- Competitions Algorithms, Concurrences 2020, Art. N° 93929, pp. 1-12.

[90] OECD, Algorithms and Collusion - Competition Policy in the Digital Age 2017, p 19.

In general, two different scenarios in which algorithms may promote collusion can be distinguished. First, competitors use algorithms as a simple tool to implement an existing price agreement, which relates to the alignment of prices as well as to the use of algorithms as a means of coordination.[91] Such collusion constitutes a conventional "agreement" within the meaning of Art 101 TFEU (Sec 1 Cartel Act). Second, competitors autonomously decide to use (the same or different) pricing algorithms, leading to price alignments. In this scenario, the cartel price is merely based on the software independently used by the competitors, i.e. without explicit communication between the undertakings. In such cases, it may be hard to differentiate between legitimate mere parallel behaviour and anticompetitive conduct contravening the ban on cartels. The existence of collusive behaviour is particularly difficult to prove where (self-learning) algorithms interact with each other.

3.2.1. Ban on Cartels

Art 101 para 1 TFEU (Sec 1 para 1 Cartel Act) prohibits agreements and concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition. The ban on cartels thus requires some element of "collusion" between independent undertakings. The different types of collusion are distinguishable from each other only by their intensity.[92] An agreement requires "the existence of a concurrence of wills"[93] of the participating undertakings "to conduct themselves on the market in a specific way".[94] The concept of concerted practices is designed to provide a safety net, catching looser forms of collusion. The latter is defined as "a mental consensus whereby practical cooperation is knowingly substituted for competition".[95] This applies in particular to "any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."[96] As opposed to an agreement, the concept of a concerted practice requires both concertation between undertakings and subsequent conduct on the market, and a relationship of cause and effect between the two.[97] However, there is a presumption that concertation has been followed by conduct if the undertakings involved in the concerted action remained active on the market.[98]

Whether an agreement or concerted practice is the result of human communication or algorithmic interaction does not change the legal assessment of the conduct. Most importantly, Art 101 TFEU (Sec 1 Cartel Act) requires each undertaking to determine independently the policy, which it intends to adopt.[99] However, this does not deprive the undertakings of their right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.[100] Such mere parallel behaviour or tacit collusion does constitute neither an agreement nor a concerted practice and is permitted under Art 101 TFEU (Sec 1 Cartel Act).[101] It follows that the implementation of pricing algorithms is legitimate as long as they unilaterally observe, analyse and react to publicly observable behaviour of competitors (e.g. to pricing decisions). This is considered as an intelligent adaption to the market rather than an illicit coordination.[102]

Despite the existence of a restriction of competition, an agreement or a concerted practice can be justified if the conduct is associated with specific efficiencies mentioned in Art 101 para 3 TFEU (Sec 2 para 1 Cartel Act). This individual exemption also applies to algorithmic collusion. In this context, it might be useful to analyse the algorithm and its role in the collusive scheme. Potential (counteracting) efficiencies associated with the algorithm

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[91] Zimmer, In: Immenga and Mestmäcker (eds), Wettbewerbsrecht, 6th ed, C. H. Beck 2019, Art. 101 para 1 TFEU para 77.
[92] A. Jones and B. Sufrin, EU Competition Law, 5th ed, Oxford University Press 2014, p 149.
[93] EGC, case T-41/96, *Bayer*, ECLI:EU:T:2000:242, pt 96.
[94] CJEU, case C-49/92, *Anic Partecipazioni*, ECLI:EU:C:1999:356, pt 130.
[95] R. Wish and D. Bailey, Competition Law, 9th ed, Oxford University Press 2018, p 116; see also CJEU, case C-8/08, *T-Mobile Netherlands*, ECLI:EU:C:2009:343, pt 26.
[96] CJEU, case C-40/73 ao, *Suiker Unie*, ECLI:EU:C:1975:174, pt 174.
[97] CJEU, case C-199/92, *Hüls*, ECLI:EU:C:1999:358, pt 161.
[98] CJEU, case C-199/92, *Hüls*, ECLI:EU:C:1999:358, pt 162; see also CJEU, case C-8/08, *T-Mobile Netherlands*, ECLI:EU:C:2009:343, pt 52, stating "that the presumption of a causal connection stems from Article 81(1) EC, […] and […] consequently forms an integral part of applicable Community law."
[99] CJEU, case C-40/73 ao, *Suiker Unie*, ECLI:EU:C:1975:174, pt 173.
[100] CJEU, case C-40/73 ao, *Suiker Unie*, ECLI:EU:C:1975:174, pt 174; CJEU, case C-8/08, *T-Mobile Netherlands*, ECLI:EU:C:2009:343, pt 33.
[101] CJEU, case 89/85, *Woodpulp*, ECLI:EU:C:1993:120.
[102] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 56.

need to be balanced with its allegedly negative effects, which might reinforce the ascertained anticompetitive practice.[103]

3.2.2. Application to Different Scenarios

3.2.2.1 Algorithms as Tools to Implement Pre-existing Agreements

Messenger Scenario
The first category considers the so-called Messenger Scenario. In this case, humans agree to collude and decide to use computers as simple tools to implement, monitor and police existing collusion.[104] As a result, this kind of collusion constitutes an anti-competitive agreement caught by Art 101 TFEU (Sec 1 Cartel Act).

These considerations were illustrated in the CMA's poster decision.[105] The undertakings concerned agreed not to undercut each other on prices for certain posters and frames sold only by the two of them on the Amazon UK marketplace. This agreement was implemented by using (different third-party) pricing software. In a similar case undertaken by the US DoJ,[106] a seller in the Amazon marketplace was charged for coordinating prices of posters sold online. The parties concerned designed and shared dynamic pricing algorithms, which were programmed to act in conformity with their pre-existing explicit agreement. Both cases constitute traditional horizontal price-fixing cartels, where the agreement was implemented by the use of algorithms.

Hub-and-Spoke Scenario
In this category, competitors delegate certain strategic (pricing) decisions to a third-party that then takes the decisions using an algorithm.[107] This concept is often related to the established "hub and spoke" doctrine. Platforms or computer algorithms of one supplier execute the function of the "hub" to facilitate collusion between competitors referred to as "spokes". Although the competitors do not interact directly with each other, their strategic (pricing) principles are coordinated or aligned via the hub. In the extreme, the effects of a horizontal hard-core cartel can be achieved.

In its *Eturas*[108] case, the CJEU was considering a possible hub-and-spoke conspiracy facilitated by an online system.[109] Several Lithuanian travel agencies (spokes) used a common travel booking system (hub). The system administrator sent a message to the participating travel agencies proposing a cap on discount rates (max 3%). According to the CJEU, this would constitute a concerted practice if it were proven that the travel agencies were aware of that message.[110] However, the focus of this case laid on the awareness of the message and not on the subsequent implementation of a software rule that limits the possibility of granting higher discounts.[111] Another example of an algorithm-fuelled hub-and-spoke conspiracy concerns the car services platform *UBER*[112]. The latter connects drivers and passengers via a smartphone application; the prices are determined by Uber's automated price-setting algorithm. The industry-wide use of a single pricing algorithm (hub) used by competing drivers

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[103] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 29.
[104] A. Ezrachi and M. Stucke, Virtual Competition, Harvard University Press 2016, p 36.
[105] CMA, 12 August 2016, Case 50223, *Trod Ltd;* a similar case was undertaken in the US: US District Court of Northern California, 11 August 2016, CR 15-0419 WHO, *US/Trod Ltd*.
[106] US District Court of Northern California, 6 April 2015, CR 15-00201 WHO, *US/Topkins*.
[107] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 32ff further distinguish between situations, in which the respective companies (i) do or (ii) do not know that they use the same or somehow coordinated algorithmic solutions.
[108] CJEU, case C-74/14, *Eturas*, ECLI:EU:C:2016:42.
[109] See however AG Spunar, case C-74/14, *Eturas*, pt 65, who refuses to qualify the *Eturas* case as a hub-and-spoke conspiracy since he latter only applies to constellations in which the exchange of information may also be considered as a legitimate commercial practice, whereas the limitation of discount rates in the *Eturas* case would be *a priori* inadmissible; such a narrow interpretation of the hub-and-spoke notion is not necessary – rather, it is decisive that the coordination does not take place directly between competitors but via a third party, see A. Heinemann, Algorithmenbasierte Kartelle, p 19, footnote 73, available at https://www.ius.uzh.ch/dam/jcr:6baf23a8-6b0d-4b11-95a9128bc5c686bd/Heinemann_Algorithmenbasierte_Kartelle.pdf. Accessed 7 September 2021; and J. Safron, The Application of EU Competition Law to the Sharing Economy, Stanford-Vienna European Union Law Working Paper 2018(27), p 32, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/02/safron_eulawwp27.pdf. Accessed 7 September 2021.
[110] CJEU, case C-74/14, *Eturas*, ECLI:EU:C:2016:42, pt 44.
[111] European Union, Note to the OECD on Algorithmic Collusion, DAF/COMP/WD(2017)12, para 25.
[112] US District Court of Southern NY, 31 March 2016, 15 Civ. 9796 (JSR), *Meyer/Kalanick*.

(spokes) may lead to a horizontal coordination that eliminates price competition between allegedly independent undertakings.[113]

3.2.2.2. Parallel use of Individual Algorithms with no Pre-existing Agreement

Predictable Agent Scenario
In the third collusion scenario, undertakings unilaterally design and implement an algorithm, which reacts to external factors in a predictable way.[114] Algorithms may be designed to detect market behaviour of competitors and rationally follow price leadership, thereby reducing strategic uncertainty and facilitating a tacitly coordinated outcome. As opposed to the Messenger and Hub-and-Spoke, this category does not involve any prior contact between the undertakings concerned or via a hub as a third party. Rather, the alignment might result from a mere interaction of computers based on the parallel use of individual algorithms. Such mere parallel "algorithmic" behaviour, i.e. in the absence of an agreement, qualifies as tacit coordination, which is not caught by the ban on cartels. Rather, such unilateral conduct is covered by the right of any undertaking to adapt its market behaviour intelligently to the existing or anticipated conduct of their competitors.[115]

Digital Eye
The most complex and subtle way in which algorithms may facilitate collusive outcomes is the use of machine learning and deep learning technologies (this scenario is also referred to as "Digital Eye"). These kinds of algorithms are not explicitly designed to tacitly collude, but do so itself through self-learning.[116] However, to date, it is "not clear how machine learning algorithms may actually reach a collusive outcome".[117] In particular, it remains unclear whether algorithms would actually manage to align strategic decisions tacitly, or whether the coordination would still require some kind of communication between the algorithms.[118] As already explained above, any direct or indirect prior exchange of information would constitute an agreement or concerted practice within the meaning of Art 101 TFEU (Sec 1 Cartel Act). In this context, a specific form of such a communication may be signalling practices.

Signalling Scenario
Signalling describes situations in which undertakings publicly announce their intent to change a relevant parameter of competition, such as the price.[119] In contrast to the Predictable Agent and Digital Eye Scenario, the alignment of prices does not occur "automatically" but rather by means of sending price signals to other undertakings with the prior intent to collude. According to the EC's Horizontal Co-operation Guidelines, "genuinely public" announcements do not amount to a concerted practice within the meaning of Art 101 TFEU.[120] However, in a situation where such an announcement was followed by public announcements by other competitors, the possibility of finding a concerted practice cannot be excluded.[121] Signalling is inevitably associated with certain costs and risks for the signalling firm. If the competitors do not receive or intentionally not react to the signal, the signalling firm might lose sales and profit. To reduce or eliminate these costs and risks, the undertakings concerned might set up algorithms that establish and negotiate the terms of collusion.[122] Algorithms might e.g. enable the

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[113] A. Ezrachi and M. Stucke, Note to the OECD on Algorithmic Collusion, DAF/COMP/WD(2017)25, para 32; A. Ezrachi and M. Stucke, Virtual Competition, Harvard University Press 2016, p 52; critical on this issue with regard to potential pro-competitive effects of Uber's business model U. Salaschek and M. Serafimova, Preissetzungsalgorithmen im Lichte von Art. 101 AEUV, WuW 2018(1), pp. 8-17 (12f).
[114] CMA, Pricing Algorithms 2018, para 5.22.
[115] CJEU, case C-40/73 ao, *Suiker Unie*, ECLI:EU:C:1975:174, pt 174; CJEU, case C-8/08, *T-Mobile Netherlands*, ECLI:EU:C:2009:343, pt 33; see also German FCA, Fuel Sector Inquiry 2011, p 21: "Mutual price monitoring without communication does not raise competition concerns", available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Kraftstoffe%20-%20Zusammenfassung.pdf?__blob=publicationFile&v=5. Accessed 7 September 2021.
[116] CMA, Pricing Algorithms 2018, para 5.24.
[117] OECD, Algorithms and Collusion - Competition Policy in the Digital Age 2017, p 30,
[118] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 43.
[119] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 53; for an overview of the (scarce) EU case law on signaling practices see B. Meyring, Signalling – When Should We Worry? JECLAP 2020(7), pp. 335-345.
[120] EC, Guidelines on the applicability of Art 101 TFEU to horizontal co-operation agreements, OJ 2011 C 11, p. 1, para 63.
[121] EC, Guidelines on the applicability of Art 101 TFEU to horizontal co-operation agreements, OJ 2011 C 11, p. 1, para 63.
[122] German Monopolies Commission, XXII. Biennial Report – Competition 2018, para 188.

companies to automatically set very fast actions that cannot be exploited by the consumers but are still visible to competitors.[123]

Alternatively, the respective signals might be conveyed in a masked way, i.e. the publicly disclosed data is used as a code to propose and negotiate price increases.[124] This was observed in the US *Airline Tariff Publishing* case,[125] where airline companies used first ticket dates to signal intended future prices using a third party centre. Algorithms enabled them to negotiate higher fares and to monitor and punish deviations.

3.2.3. Attribution and Responsibility

Undertakings are liable for algorithmic price behaviour if the conduct in question constitutes an agreement or a concerted practice within the meaning of Art 101 TFEU (Sec 1 Cartel Act), which has as their object or effect a restriction of competition. This is the case if algorithms are merely used as tools to implement pre-existing explicit agreements, namely in the Messenger and the Hub-and-Spoke Scenario. The same might apply for signalling practices where price signals are sent to competitors with the intent to collude.[126] On the contrary, the independent use of algorithms by a number of undertakings to monitor and react intelligently to market behaviour of competitors qualifies as unilateral conduct not caught by the ban on cartels. Therefore, given the absence of other means of communication, the Predictable Agent Scenario does, in general, not raise competition concerns.

In the Digital Eye Scenario, the undertaking's accountability for the behaviour of its (self- or deep-learning) algorithms is much less clear.[127] In general, undertakings are obliged to know the competition rules and act accordingly.[128] Such an obligation to ensure antitrust compliance also require undertakings to design algorithms in a compliant way[129] to "prevent collusion in the first place".[130] As the algorithm remains under the firm's control, the firm cannot avoid liability on the grounds that they outsourced their pricing decision to algorithms.[131] This must also be true for self-learning algorithms.[132]

Although the detection of algorithmic facilitated collusion still remains difficult in practice, undertakings that create and build algorithms which directly affect market process are well advised to keep competition law compliance in mind.[133] As the distinction between collusion and mere parallel behaviour permitted under Art 101 TFEU concerns the very essence of the ban on cartels, Member states should exercise a degree of caution. According to Art 3 para 2 Reg 1/2003, national rules on the ban on cartels may not be stricter than those laid down at the European Union level. As a prerequisite, EU competition law must be applicable; cases of the digital economy will regularly fulfil this condition. Therefore, we recommend awaiting for more clarity or guidelines at the EU level related to algorithmic facilitated collusion before implementing regulatory or legislative measures in Austria.[134]

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[123] OECD, Algorithms and Collusion – Competition Policy in the Digital Age 2017, p 30, e.g. "snapshot price changes during the middle of the night".
[124] BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 55.
[125] US District Court of Columbia, 21 December 1992, 92-2854, *US/Airline Tariff Publishing Company*.
[126] R. Hoffer, In: Binder Grösswang (ed), Digital Law, LexisNexis 2018, p 199.
[127] In academia, different standards have been outlined, for an overview see BKartA and Autorité de la Concurrence, Working Paper - Algorithms and Competition 2019, p 57ff with further references.
[128] CJEU, case 19/77, *Miller/Commission*, ECLI:EU:C:1978:19, pt 17ff; CJEU, case 27/76, *United Brands*, ECLI:EU:C:1978:22, pt 299, 301.
[129] M. Vestager, Algorithms and competition, Speech at the Bundeskartellamt's 18th Conference on Competition, Berlin, 16 March 2017; see also H. Schweitzer, In: Kühling and Zimmer (eds), Neue Gemeinwohlherausforderungen – Konsequenzen für Wettbewerbsrecht und Regulierung, Nomos 2020, p 61.
[130] J. Laitenberger, Competition at the digital frontier, Speech at the Consumer and Competition Day, Malta, 24 April 2017, p 8, available at https://ec.europa.eu/competition/speeches/text/sp2017_06_en.pdf. Accessed 7 September 2021.
[131] European Union, Note to the OECD on Algorithmic Collusion, DAF/COMP/WD(2017)12, para 25; BKartA 20 May 2018, Case Summary B9-175/17, *Lufthansa/Air Berlin*, p 4, although ultimately no proceedings were initiated against Lufthansa based on excessive pricing.
[132] R. Hoffer, In: Binder Grösswang (ed), Digital Law, LexisNexis 2018, p 199ff; M. Becka, Preisabsprachen zwischen selbstlernenden Preisalgorithmen, ÖZK 2019(1), pp. 9-16 (16).
[133] S. Vezzoso, In: Lundqvist and Gal (eds), Competition Law for the Digital Economy, Edward Elgar 2019, p 100.
[134] See also Opinion of the Studienvereinigung Kartellrecht on the Austrian FCA's Position Paper on digitisation and competition law, para 14, available at

3.3. Personalised Pricing

The practice of personalised pricing describes a situation where an undertaking charges different prices to different consumers for a given product or service based on the consumers' willingness to pay. The latter is determined by the consumers' personal characteristics and subjective criteria (e.g. age, sex, occupation, income, geo-location, etc.) and conduct (e.g. off-/online behaviour). Such person-specific pricing can, in particular, be observed in online commerce, where companies e.g. charge different prices dependent on the customers' search queries or past online purchases. Personalised pricing is facilitated by the use of algorithms which allows undertakings to collect vast amounts of personal data. The creation of "digital user profiles" enables companies to better predict consumers' behaviour and preferences and to better identify the reserve prices of their customers, i.e. their expected willingness to pay.[135] Personalised pricing is to be distinguished from mere dynamic pricing where prices are flexibly set based on objective criteria (like stock, popularity and demand of the product, time of the day, day of the week, etc.) and are uniformly applied to all customers.[136] Although personalised pricing does not allow a margin of savings, it is, in general, not designed to rip off those customers in a state of need; it rather matches the highest value a customer is willing and able to pay for a particular product or service.[137]

3.3.1. Abuse of a Dominant Position

Such person-specific pricing may qualify as abusive price discrimination in the meaning of Art 102 TFEU (Sec 5 Cartel Act). This may apply to constellations where two transactions of the same good or service occur at different prices despite having the same cost.[138] Unlike algorithmic collusion, where computer programs are used to increase market transparency in order to coordinate prices (see Section 3.2), this part focuses on unilateral strategies to limit price transparency and to use algorithms as a vehicle for price discrimination. Constellations, where two or more undertakings agree to apply the same personalised prices to their customers, do not fall within the remit of Art 102 TFEU (Sec 5 Cartel Act) but rather constitute a collusive cartel behaviour prohibited by Art 101 para 1 lit d TFEU (Sec 1 para 2 Nr 4 Cartel Act); the ban on abusive practices only covers personalised prices that have been unilaterally imposed.[139] In this context, commentators suggest that algorithmic collusion is more difficult where personalised pricing was implemented; [140] this is due to the increased number of factors that must be taken into account.[141]

Art 102 TFEU (Sec 5 Cartel Act) prohibits dominant companies from abusing their position on a particular market. According to case law, market dominance is defined as a position of economic strength that confers to an undertaking „the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[142]. Such independence is mainly reflected by the undertaking's power to profitably maintain prices above the competitive level for a significant period of time.[143] The assessment of dominance will take various factors into account, including the competitive structure of the market (in particular market shares),[144]

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https://www.bwb.gv.at/fileadmin/user_upload/Digitalisierung_und_Wettbewerbsrecht_Thesenpapier.pdf. Accessed 7 September 2021.

[135] M. Gal, Algorithms as Illegal Agreements, Berkeley Technology Law Journal 2019(67:34), pp. 67-118 (91); for an overview of different forms of price discrimination in digital markets, see A. Ezrachi and M. Stucke, Virtual Competition, Harvard University Press 2016, p 106ff.

[136] Prominent examples include gas and travel prices (e.g. flight tickets); however, dynamic pricing may be combined with elements of personalised pricing.

[137] M. Maggiolino, Personalized Prices in European Competition Law, Bocconi Legal Studies Research Paper No. 2984840, pp. 1-24 (2).

[138] I. Lianos, V. Korah and P. Siciliani, Competition Law, Oxford University Press 2019, p 1231.

[139] M. Maggiolino, Personalized Prices in European Competition Law, Bocconi Legal Studies Research Paper No. 2984840, pp. 1-24 (17ff).

[140] H. Schweitzer, In: Kühling and Zimmer (eds), Neue Gemeinwohlherausforderungen – Konsequenzen für Wettbewerbsrecht und Regulierung, Nomos 2020, p 60; see also CMA, Pricing Algorithms 2018, paras 7.27ff.

[141] M. Gal, Algorithms & Competition Law: Interview of Michal Gal by Thibault Schrepel, e- Competitions Algorithms, Concurrences 2020, Art. N° 93929, pp. 1-12.

[142] CJEU, case 27/76, *United Brands*, ECLI:EU:C:1978:22, pt 65.

[143] EC, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45, p. 7, para 11; EGC, case T-321/05, *Astra Zeneca*, ECLI:EU:T:2010:266, pt 267; O. Blanco, Market Power in EU Antitrust Law, Hart 2012, p 47.

[144] Different presumptions of dominance might apply under national and EU Law: While the Austrian Cartel Act provides a rebuttable presumption of dominance for undertakings with a market share of at least 30% (Sec 4 para

the structure of the company and market behaviour of the undertaking concerned. Unlike in the US,[145] to be market dominant is not in itself considered illegal.[146] However, a market dominant company has the special responsibility not to distort competition[147] to the detriment of both final consumers (exploitative abuse) or competitors (exclusionary abuse). Examples of behaviour that may amount to an abuse include personalised pricing, which may be facilitated by the use of algorithms.

3.3.2. Application to Different Scenarios

Algorithmic assisted personalised pricing may either take the form of an exploitative or an exclusionary abuse, depending on whether final consumers or business partners are affected.

Exploitative Abuse
In the first (exploitative) scenario, the supplier gives preferential treatment to some customers and not to others. If the undertaking concerned has market power, the firm would be able to set different prices for different customer groups it has identified based on the data collected.[148] So far, the courts have never fully clarified the question whether and to what extent Art 102 TFEU (Sec 5 Cartel Act) could sanction cases of price discrimination harming final customers.[149] In *MEO*, *AG Wahl* pointed out that exploitative cases of price discrimination are "extremely rare".[150] However, it is conceivable that this scenario may be treated under the general abuse of dominance clause of Art 102 TFEU (Sec 5 para 1 Cartel Act) or as a form of excessive pricing or unfair trading conditions within the meaning of Art 102 lit a) TFEU (Sec 5 para 1 Nr 1 Cartel Act). This may be the case when personalised pricing has led to higher prices which would have prevailed in the absence of the algorithmic manipulation.[151] Some commentators argue that personalised pricing may as well fall within the remit of Art 102 lit c) TFEU (Sec 5 para 1 Nr 3 Cartel Act),[152] which prohibits the application of dissimilar conditions to equivalent transactions. Although the latter provision explicitly targets only trading partners (for details see below), it is argued that the ban on abusive practices may – based on its functional interpretation – be applied beyond the strict letter of the law.[153] Following this approach, Art 102 lit c) TFEU (Sec 5 para 1 Nr 3 Cartel Act) could sanction cases of price discrimination harming final customers too.[154]

Exclusionary Abuse
Under certain circumstances, algorithmic-based price discrimination may also amount to an exclusionary abuse. Art 102 lit c TFEU (Sec 5 para 1 Nr 3 Cartel Act) explicitly forbids the discrimination of business trading partners who compete with one another.[155] This may be the case where the market dominant supplier offers more favourable conditions to its own customers, in an attempt to prevent them from switching to rivals, i.e. to foreclose rivals on the upstream-market.[156] The most important element of Art 102 lit c TFEU (Sec 5 para 1 Nr 3 Cartel Act) is that the application of dissimilar conditions must place trading partners at a "competitive disadvantage". According to case law, this term does not require the proof of actual quantifiable deterioration in the competitive situation, but

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2 Nr 1 Cartel Act), under EU law such a presumption applies at a 50% market share, see CJEU, case C-62/86, *AKZO*, ECLI:EU:C:1991:286, pt 60.
[145] Sec 2 Sherman Act: „Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]".
[146] CJEU, case C-209/10, *Post Danmark/Konkurrencerådet*, ECLI:EU:C:2012:172, pt 21 with further references from case law.
[147] CJEU, case C-322/81, *Michelin*, ECLI:EU:C:1983:313, pt 57.
[148] BKartA and Autorité de la concurrence, Competition Law and Data 2016, p 22.
[149] Affirmative C. Townley, E. Morrison and K. Yeung, Big Data and Personalized Price Discrimination in EU Competition Law, Yearbook of European Law 2017(36), pp. 683-748.
[150] AG Wahl, case C-295/17, *MEO*, ECLI:EU:C:2018:413, pt 80
[151] I. Lianos, V. Korah and P. Siciliani, Competition Law, Oxford University Press 2019, p 1235.
[152] I. Graef, Algorithms and fairness – What role for competition law in targeting price discrimination towards end consumers, Columbia Journal of European Law 2018(24:3), pp. 541-559 (549); P. Akman, To Abuse or not to Abuse: Discrimination between Consumers, ELR 2007(32), pp. 492-512 (498f).
[153] See also EC, COMP/C-1/36.915, *Deutsche Post AG*, pt 133 noting that "consumers are affected negatively by having to pay prices for these services which are higher than those charged to other senders and by having their mailings delayed significantly".
[154] P. Akman, To Abuse or not to Abuse: Discrimination between Consumers, ELR 2007(32), pp. 492-512 (498) argues that consumers could also be considered as trading partners in the meaning of Art 102 lit c) TFEU.
[155] CJEU, case C-525/16, *MEO*, ECLI:EU:C:2018:270, pt 27.
[156] I. Graef, Algorithms and fairness – What role for competition law in targeting price discrimination towards end consumers, Columbia Journal of European Law 2018(24:3), pp. 541-559 (542f).

must lead to the conclusion that – based on all relevant circumstances of the case[157] – the behaviour affects *"*the costs, profits or any other relevant interest*"*[158] of one or more trading partners. However, the EC and NCAs face a high burden of proof as the competition enforcers are required to prove the existence of a competitive disadvantage suffered by one of the discriminated customers.[159]

3.3.3. Digression: Austrian Local Supply Act (Nahversorgungsgesetz)

Apart from the provisions on price discrimination stipulated in the TFEU and the Cartel Act, Sec 2 para 1 of the Austrian Local Supply Act (*Nahversorgungsgesetz*)[160] contains a general prohibition on discrimination in relationships between suppliers and authorised resellers. A supplier who – without objective justification – grants or offers different conditions to authorised resellers may be sued for a cease-and-desist order.[161] Of course, this may also apply to algorithmic-based price discrimination. Preferential treatment of individual resellers is only feasible where an economically equivalent consideration exists in return. Finally, the preferential treatment must be appropriate and necessary to achieve the objective pursued (proportionality test).[162] The Local Supply Act is to be viewed as a supplementary law to the Cartel Act, which is also executed by the Cartel Court.[163] However, it must be noted that the Local Supply Act, including the provision cited, applies to all undertakings, irrespective of their (dominant) market position.[164] However, the Supreme Court left open the question whether the undertaking concerned must at least have a certain amount of market power.[165]

Similar, the EU Regulation on platform-to-business relations[166] applies to all operators of the specified online services, i.e. not only to dominant undertakings. The P2B regulation sets out guidance on the equitable delivery of online services and prohibits, *inter alia*, the arbitrary and discriminatory treatment of business users. Any acts against these rules are deemed to be an unfair commercial practice that may trigger responsibility of the undertaking concerned. Besides the Austrian Economic Chamber (*Wirtschaftskammer Österreich*) and the Association against Unfair Competition (*Schutzverband gegen unlauteren Wettbewerb*), since 10 September 2020, also the Austrian FCA has a standing to bring proceedings before the competent court.[167]

3.4. Conclusion

The relevance of collusive behaviour and person-specific pricing is reinforced by the increasing use of algorithms and the greater availability of market data. The first part analysed the effects of algorithms on the ability of competitors to coordinate their conduct. Algorithmic collusion may take place either explicitly, i.e. simple collusion where computers limit competition through an agreement or concerted practice within the meaning of Art 101 TFEU (Sec 1 Cartel Act), or tacitly, where collusion is achieved through subtler means not amounting to a hard core-cartel. Whether algorithmic coordination constitutes an agreement or concerted practice largely depends on the specific circumstances of the respective case (market structure, supply and demand-related factors, etc).[168] While unilaterally observing, analysing and reacting to publicly observable behaviour of competitors through algorithms does not contravene the ban on cartels, constellations involving (algorithmic) exchange of information can be deemed unlawful. In this context, one of the main risks of algorithms is that they may enable

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[157] For an overview of elements to be considered see CJEU, case C-525/16, *MEO*, ECLI:EU:C:2018:270, pt 31; see also CJEU, case C-413/14 P, *Intel*, EU:C:2017:632, pt 139.
[158] CJEU, case C-525/16, *MEO*, ECLI:EU:C:2018:270, pt 37.
[159] M. Botta and K. Wiedemann, To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance, EJLE 2020(50:3), pp. 381-404 (392); C. Ritter, Price discrimination as an abuse of dominant position under Article 102 TFEU, CMLR 2019(56:1), pp. 259-274 (267).
[160] Bundesgesetz vom 29. Juni 1977 zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen (Nahversorgungsgesetz), BGBl 392/1977.
[161] For details see N. Gugerbauer, In: Gugerbauer (ed), KartG und WettbG[3], Verlag Österreich 2017, Sec 2 Local Supply Act paras 1ff; on the Local Supply Act in general, see e.g. W. Barfuß, Das Bundesgesetz zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen „NVG", ÖZW 1978(1), pp. 10-14.
[162] N. Gugerbauer, In: Gugerbauer (ed), KartG und WettbG[3], Verlag Österreich 2017, Sec 2 Local Supply Act para 7.
[163] Sec 6 Local Supply Act.
[164] See also OGH 9 October 2000, 16 Ok 8/00.
[165] OGH 16 July 2008, 16 Ok 3/08, *Sägerundholz*.
[166] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service (P2B Regulation), OJ 2019 L 186, p 57.
[167] List of designated organisations, associations and public entities drawn up and published pursuant to Article 14 para 6 P2B Regulation, OJ 2020 C 300, p 2.
[168] German Monopolies Commission, XXII. Biennial Report – Competition 2018, para 197.

firms to replace explicit collusion with new forms of tacit-coordination.[169] Therefore, competition enforcers are well-advised to expand their range of detection tools for cartel activity, possibly complemented by setting up new (regulatory) agencies specialised in IT and AI.[170]

The second part argued that price discrimination facilitated by algorithms may constitute an abuse of dominance within the meaning of Art 102 TFEU (Sec 5 Cartel Act). One the one hand, this may apply to the unequal treatment between commercial customers (exclusionary abuse). On the other hand, the question whether and if so to what extent Art 102 TFEU (Sec 5 Cartel Act) can also sanction personalised pricing that harms final consumers is less clear. However, as suggested by some commentators, broadening the scope of Art 102 TFEU (Sec 5 Cartel Act) is certainly worth to be discussed. In this regard, it should be considered that the digital economy introduces new forms of exploitative business strategies that directly harm final consumers.[171] From an economic viewpoint, personalised pricing is not harmful *per se*.[172] While some consumers end up paying a higher price, i.e. those with a high willingness to pay, personalised pricing can also favour others, i.e. those with a lower willingness to pay. These consumers that value less the products would receive better prices than in the absence of the discrimination.[173] Although personalised pricing reallocates wealth in favour of undertakings, it makes goods or services accessible which would otherwise be inaccessible by the poorest.[174] It follows that the overall effect of price discrimination on welfare is ambiguous and requires a case-by-case analysis under competition law.[175] Besides this, the detrimental effects of personalised pricing on competition would have to be demonstrated, including the absence of a proportionate justification.[176] Undertakings may e.g. argue that price discrimination enables them to increase output to the benefit of (many) consumers, which in turn may enhance the aggregate consumer welfare.[177]

[169] OECD, Algorithms and Collusion – Competition Policy in the Digital Age 2017, p 25.
[170] As suggested by the Brics Competition Law and Policy Center, Digital Era Competition 2019 (Brics Report), pp. 671ff.
[171] See e.g. the proceedings against Facebook in Germany where the theory of harm is based on a lack of users' choice, for an overview see R. Podszun, Der Verbraucher als Marktakteur – Kartellrecht und Datenschutz in der „Facebook"-Entscheidung des BGH, GRUR 2020(12), pp. 1268-1276; *Scharf*, Exploitative business terms in the era of big data – the Bundeskartellamt's Facebook decision, ECLR 2019(7), pp. 331-339.
[172] CERRE, Big Data and Competition Policy: Market Power, personalised pricing and advertising 2017, p 8, available at https://www.cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf. Accessed 7 September 2021.
[173] BKartA and Autorité de la concurrence, Competition Law and Data 2016, p 21.
[174] M. Maggiolino, Personalized Prices in European Competition Law, Bocconi Legal Studies Research Paper No. 2984840, pp. 1-24 (3, 13ff).
[175] M. Botta and K. Wiedemann, To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance, EJLE 2020(50:3), pp. 381-404 (388, 399).
[176] BKartA and Autorité de la concurrence, Competition Law and Data 2016, p 21; U. Salaschek and M. Serafimova, Preissetzungsalgorithmen im Lichte von Art. 101 AEUV, WuW 2018(1), pp. 8-17 (12); for an overview of challenges for competition enforcers in assessing personalised pricing strategies in digital markets see M. Botta and K. Wiedemann, To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance, EJLE 2020(50:3), pp. 381-404 (392).
[177] C. Townley, E. Morrison and K. Yeung, Big Data and Personalized Price Discrimination in EU Competition Law, Yearbook of European Law 2017(36), pp. 683-748 (730).