Admissibility of a teacher evaluation app in the light of Art 6 (1) f GDPR and the Austrian protection of personality rights (§§ 16, 1330 ABGB) – OGH 6 Ob 129/21w of 2 February 2022[1]

Caterina M. Grasl*

Contents

[1] This contribution is a revised and significantly extended version of Caterina M. *Grasl*, 'Case comment: Datenschutzkonformität einer *Lehrerbewertungs-App*' (2022), JBl 453–462; for further (brief) comments on this ruling, cf. Andreas Rohner, 'Case comment: "Lernsieg": Zulässigkeit einer Bewertungsplattform für Lehrpersonal' (2022), Dako 63; Clemens Thiele, 'Case comment: OGH: Lehrerbewertungsplattform ist rechtskonform' (2022), *Zeitschrift für Informationsrecht* 154–163; David Bierbauer, 'Case comment: OGH: Rechtmäßigkeit der Lehrer:innen-Bewertungsplattform "Lernsieg" erneut bestätigt' (2022), *jusIT* 75, and Nina-Maria Hafner-Thomic, 'Case comment: "School's (not) out: Zur Datenschutzkonformität der Lehrerbewertungs-App "Lernsieg"' (2022) *ecolex* 280–282. All decisions of the Austrian Supreme Court (OGH) can be accessed via http://ris.bk.gv.at/ under their case number.

* Caterina Maria Grasl studied English and Law at the University of Vienna, where she is currently employed as a postdoctoral researcher. Contact: caterina.grasl@univie.ac.at.

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I. Introduction and facts of the case

The problem under discussion in this contribution presents itself against the backdrop of the ever-increasing opportunities for an exchange of opinions and information afforded by the internet. Crucially, this pertains not only to the publication and exchange of factual knowledge but also of purely subjective experiences and evaluations. The human urge to share one's experiences with others is certainly nothing new, and word-of-mouth as the best – or, on the other hand, the most damaging – form of advertisement is certainly as old as the provision of goods and services itself. However, with the rise of online evaluation forums, the sheer number of people to whom anyone of us can communicate our experiences, and hence the potential consequences that our accounts may have for those affected, have expanded in a manner that would have been unthinkable even a few decades ago. Given the huge economic impact that negative online reviews can have on businesses and other service providers, it is unsurprising that court cases centring on (especially negative or unfairly biased) reviews have repeatedly arisen both in Germany and Austria. However, with the trend of online evaluations – and specialised apps and forums dedicated to their publication – spreading to all areas of life, the focus has shifted from the purely economic to matters of data protection, and to the delicate balance between the personality rights of the reviewed and the rights of free speech of the reviewers.

After the question of the admissibility of teacher evaluation forums has already occupied the German court[2] several times in recent years, the Austrian Supreme Court (OGH) has now also had to comment on this problem for the first time in its decision 6 Ob 129/21w. This decision deals with the admissibility of teacher evaluations in a forum that is (in principle) accessible to the public under aspects of data protection and personality rights. The focus is, on the one hand, on the admissibility of an evaluation per se, but also on the concrete design of the evaluation forum as well as the possibilities of inspection by the public and the rights of appeal available to the persons concerned.

[2] BGH 23/6/2009, VI ZR 196/08 *spickmich.de*, AG (*Arbeitsgericht*, Court for employment-related matters) Berlin 22/1/2007, 7 C 208/06; LG (*Landesgericht*, Regional Court) Berlin 31/5/2007 MMR 2007, 68; LG Regensburg 2/2/2009, 1 O 1642/08 – *meinprof.de*.

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The plaintiff is a teacher at a technical college[3]; the first defendant is the developer of the app "*Lernsieg*", the second defendant is the company founded in December 2019, into which the plaintiff had brought his unrecorded sole proprietorship "*Lernsieg-App*". The first defendant is the managing director and one of several shareholders of the second defendant.

The app allows students to rate their teachers on predefined criteria, i.e. teaching, fairness, respect, motivation, patience, preparation, assertiveness, and punctuality. Each of these is divided into further subcategories, which are to be evaluated according to a rating system that ranges from a maximum of five stars for the best score and one star for the worst. An average rating is then calculated from the sum of the ratings given. It is not possible to enter free text comments.

In order to be able to submit ratings, users must first download the app from the app store onto their smartphone. Afterwards, registration is required, in the course of which users must enter a telephone number to validate their account. Only one account can be created per phone number. In order to rate teachers, users must first select a specific school; subsequently, only the teaching staff of this school can be rated. It is possible to switch schools, but in this case all ratings of the "old" school will be deleted. However, there is no check to see whether users are actually students at the selected school.

The app's terms of use explicitly point out the inadmissibility of non-objective evaluations. In particular, users are made aware that only persons who are actually taught by the teachers in question are authorised to submit ratings. In the event of abuse, user accounts can be blocked or deleted. Examples of abuse include the blanket submission of one-star ratings for all teachers or the submission of ratings by non-pupils.

To view ratings, you also need to download the app, but you do not need to register. Users can only view ratings after selecting the school in question; a search by teacher name is not possible. The data cannot be accessed via the internet or conventional search engines such as Google. Only the average rating calculated from all the ratings per teacher given is displayed. This becomes publicly visible as soon as a minimum number of five ratings has been submitted; if the number of ratings subsequently falls to less than five again (e.g. through the deletion of ratings), the overall rating can no

[3] *Höhere Technische Lehranstalt* (HTL); in Austria, these are vocational schools with different professional, industrial or technical focuses.

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longer be accessed in the app. The data entered is checked every six months to ensure that it is up to date; content that is no longer up to date is regularly deleted.

Teachers cannot enter comments on their evaluations in the app; they can only request a review of their performance ratings via a "Request change" button. It is unclear, however, what concrete steps the app operators will take in response to this request from the rated persons or what criteria will (or can) be used to check the ratings submitted.

The plaintiff sought to prohibit the defendants from processing his personal data, i.e. his name, ranks and academic titles, as well as the school at which he works, in particular in connection with the possibility of evaluating his teaching activities, as well as similar acts. In addition, he requested that the second defendant be ordered to delete the data concerning him.

Both the facts of the case and the reasoning of the courts of the individual instances with regard to the (in)permissibility of the encroachment on the plaintiff's personality rights by public evaluation are similar to those of the German case law. Like the previous instances, the argumentation and assessment of the OGH also shows that the argumentation approaches and evaluations underlying the relevant decision of 23 June 2009 - VI ZR 196/08 *spickmich.de* of the German Federal Supreme Court (BGH) have hardly changed. This is all the more remarkable because in recent times there has been a heightened sensitivity in public discourse to the problem of online encroachments on personality rights (keyword "hate speech"), but it also shows that in the more than ten years that have passed since the German *spickmich* ruling, the ubiquity of online ratings has found widespread social acceptance. The comparison of the German and Austrian rulings also shows that the GDPR has hardly brought any significant innovations in this area.

In its ruling (made before the GDPR came into force), the BGH had to decide on the admissibility of an online rating platform for teachers (*spickmich.de*). The design of this platform largely corresponded to that of the *Lernsieg* app - apart from minor differences in the selection of assessment criteria and the possibility to enter quotations from teachers. One major difference - which however was not significant for the decision - was that *spickmich.de* was an assessment forum available to registered users on the internet, not a smartphone app. What was significant, however, was that - as in the case of the *Lernsieg* app - it was not possible to search for evaluations by name (or to find them via an internet search engine). Further arguments were apparently also taken from the rulings of German courts that had

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already been issued on the online rating platform *meinprof.de.*[4] Nevertheless, in the present instance both the legal starting point and the focus are different from those of comparable German cases.

II. Legal problems

A. Are the ordinary courts bound by decisions of the Austrian data protection authority (DPO)?

At the outset, the OGH deals with the question whether courts are bound by decisions of the Austrian data protection authority, which discontinued its official examination of the app in February 2020 without issuing a decision.

In accordance with its case law, the OGH points out that courts are bound by final decisions of administrative authorities, but that this binding effect is limited to the decision itself and does not extend to the assessment of a legal question based on the specific facts of the case or to the reasoning. According to the case law of the OGH, third parties who are not involved in the administrative proceedings can only be bound by the formative and factual effect of a decision. Courts would therefore be bound by decisions of administrative authorities where the latter have decided on a question that constitutes a preliminary question in civil proceedings.[5] Since none of these alternatives applies to the discontinuation of the review proceedings, the OGH does not have to enter into the question whether the decision to discontinue the review proceedings has the quality of a decision at all. Since the plaintiff himself had not filed a complaint against the app with the data protection authority, the question of whether the data protection authority had primary jurisdiction to determine a violation of the GDPR could be left open. This question is of particular importance in view of the fact that Articles 77 to 79 GDPR basically provide for a two-track legal protection mechanism in the sense of a possibility to appeal both to the data protection authority and to the national courts, but do not contain any regulation on how to deal with divergent decisions. The OGH has already affirmed the jurisdiction of the ordinary courts on several occasions, also in matters that go beyond the claim for damages due to violations of the GDPR; conversely, the data protection authority has rejected the parallel handling of a complaint that is already pending before the

[4] AG Berlin 22/1/2007, 7 C 208/06; LG Berlin 31/5/2007 MMR 2007, 68; LG Regensburg 2/2/2009 - 1 O 1642/08.

[5] For details see Sebastian Schwamberger, 'Parallelität und Bindungswirkung von Zivil- und Verwaltungsverfahren nach der DSGVO' in Dietmar Jahnel (ed.), *Jahrbuch Datenschutzrecht* (Vienna: Neuer Wissenschaftlicher Verlag, 2019) 259–301, pp. 284 seq.

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court or in which a legally binding title to enforce the data protection law claim already exists.[6]

B. Regarding Art 85 GDPR and § 9 (1) DSG (Data Protection Act)

Article 85 of the GDPR, often shortened to simply "media privilege",[7] contains the instruction to the Member States to harmonise the right to protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and for scientific, artistic or literary purposes. For processing carried out for the above-mentioned purposes, Member States are encouraged to provide for derogations or exemptions from Chapters II to VII and IX of the Regulation to the extent necessary to ensure the compatibility of the right to the protection of personal data with the freedom of expression and information.

The question of the applicability of the media privilege of Art 85 GDPR to rating forums was already raised in connection with the *meinprof.de* decision of the BGH and partially affirmed in the literature, since in view of the changing media landscape, programmes for the presentation of information on the internet were already to be regarded as "prior processing".[8] Based on these considerations, the defendants argued for the first time in the appeal proceedings that the processing of the submitted ratings in the app was covered by Art 85 of the GDPR.

In this regard, it should first be noted, as the OGH also points out, that Article 85 does not constitute an exception to the general provisions of the Regulation but merely contains the authorisation to the national legislator to create exceptions, inter alia, for journalistic activities. The Austrian legislator made use of this authorisation in Section 9 of the Data Protection Act, Paragraph 1 of which refers to the processing of personal data by media owners, publishers, media employees and employees of a media company or media service within the meaning of the Media Act - MedienG, Federal Law Gazette No. 314/1981. Where data is used for journalistic purposes of the media enterprise or media service, the provisions of this Federal Act as well as

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[6] Cf. Thomas Schweiger, 'Art 77 DSGVO' in Rainer Knyrim (ed.), *Der DatKomm* (1/12/2021, rdb.at), para 22/3.

[7] Cf. e.g. Johannes Öhlböck, 'Art 85 DSGVO' in Rainer Knyrim (ed.), *Der DatKomm* (1/10/2018, rdb.at), para 1.

[8] Cf. Holger Greve/Florian Schärdel, 'Der digitale Pranger – Bewertungsportale im Internet' (2008) MMR 644–648 (pp. 647 seq); critical of this Sibylle Neumann, 'meinprof.de – Portal zur Ausübung des "vornehmsten Menschenrechts"?' (2009) zfhr 139–148, p.146; of a different opinion are the German case law and parts of the doctrine, cf. e.g. Stephan Pötters, 'Art 85 DS-GVO' in Peter Gola (ed.), *DS-GVO*, 2nd edn. (Munich: C.H. Beck, 2018) para 8 with further references.

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Chapters II (Principles), III (Rights of the data subject), IV (Controller and Processor), V (Transfer of personal data to third countries or international organisations), VI (Independent supervisory authorities), VII (Cooperation and consistency) and IX (Provisions for special processing situations) of the GDPR do not apply. However, this would only be relevant for the defendants if the app were to be subsumed under the term "classical" media as defined by the Media Act, because the Data Protection Act 2018 created a so-called "absolute media privilege" for them. The term "absolute" in this context means that the necessity test for data processing is waived in favour of the right to freedom of expression.[9] However, a balancing of the conflicting interests of freedom of expression on the one hand and the fundamental rights of the data subjects on the other hand remains necessary in any case.[10]

However, the data protection authority extends the media privilege of Section 9 (1) DSG to operators of internet forums in which opinions and information on journalistic articles can be exchanged,[11] and the European Court of Justice (ECJ) also emphasises that the term journalism is to be interpreted broadly to protect freedom of expression in this context and that the exemptions and exceptions provided for in Article 9 of the Data Protection Directive (the predecessor regulation of Article 85 GDPR) apply not only to media companies but to anyone who is active in journalism.[12] The OGH also follows this view in a detailed discussion of the case law of the ECJ by subsuming under the term "journalism" all activities that have the purpose of disseminating information, opinions or ideas to the public, by whatever means of transmission.[13]

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[9] Cf. Hans J. Pollirer/Ernst M. Weiss/Rainer Knyrim/Viktoria Haidinger, '§ 9' in *DSG*, 4th edn. (1/4/2019, rdb.at) para 2; Clemens Thiele/Jessica Wagner, '§ 9' in *Praxiskommentar zum Datenschutzgesetz (DSG)* (1/1/2020, rdb.at) para 7.

[10] See Thiele/Wagner, '§ 9' para 55.

[11] DSB 13/8/2018, DSB-D123.077/0003-DSB/2018.

[12] ECJ 16/12/2008, C-73/07 para 56 and 59; critical of this decision Marco Blocher/Lukas Wieser, 'Von privilegierten Journalisten und Daten im (fast) rechtsfreien Raum – Zur einseitigen Lösung der Grundrechtskollision zwischen Datenschutz und Meinungsfreiheit durch § 9 DSG' in Dietmar Jahnel (ed.), *Jahrbuch Datenschutzrecht* (Vienna: Neuer Wissenschaftlicher Verlag, 2019) 303–324, pp. 314 seq.

[13] Some authors argue for the direct applicability of Art 85 (1) and (2) of the GDPR with regard to the wording of Art 9 (1) of the DSG, which restricts the media privilege to "classic" media companies within the meaning of the Media Act (*Mediengesetz*). According to these voices, the provision is thus not amenable to a Union law-compliant - i.e. "broad" – interpretation and hence to be regarded as invalid (cf. Öhlböck, 'Art 85 GDPR' para 48 seqq; Sebastian Krempelmeier, 'Case comment: Unzuständigkeit der DSB bei Anwendbarkeit des Medienprivilegs – Besprechung von DSB 13. 8. 2018, DSB-D123.077/0003-DSB/2018' (2018) jusIT 239–241, p. 240; see also Thiele/Wagner,

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This does not mean, however, that every public expression of opinion is to be considered a journalistic activity. In particular, the BGH, which has had to deal with the data protection assessment of online rating forums several times in the past, assumes that a journalistic activity is only given if a minimum of journalistic processing of the published content takes place.[14] Thus, with regard to a rating forum for doctors, the BGH explicitly stated that the calculation of average ratings is not sufficient for the qualification as "journalism".[15] Also, in the view of the BGH, it could not be assumed that the forum users themselves were engaged in journalistic activity by posting reviews.[16] The OGH rightly agrees with this view - also with reference to the case law of the European Court of Justice.[17]

C. On the permissibility of data processing pursuant to Art 6 (1) f GDPR

1. Parallels to German case law

The decision centres on the question whether it is permissible under data protection law to process personal data in the context of a forum that permits students to anonymously evaluate their teachers' performance. The relevant legal provision is therefore Article 6 (1) f of the GDPR. According to this provision, the processing of personal data is lawful if it is necessary for the purposes of the legitimate interests of the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child.

Praxiskommentar zum Datenschutzgesetz (DSG) § 9 para 5; for a comprehensive presentation of the state of opinion cf. *Blocher/Wieser*, 'Von privilegierten Journalisten' pp. 307, on the lack of equality of the restriction to media companies in the "classical" sense see ibid, p. 310 seq). The argumentation of the defendants, who suggest a direct application of Art 85 GDPR, is apparently also based on these considerations. However, as the OGH points out, the defendants have nothing to gain from such an application, as Art 85 merely provides a programmatic mandate to the Member States to create appropriate exceptions for media reporting, but would not lead to a general non-application of the GDPR.

[14] Cf. BGH 20/2/2018, VI ZR 30/17 – *Ärztebewertung IV* para 19 with further references from German literature.

[15] Cf. BGH 20/2/2018, VI ZR 30/17, BGHZ 217, 340 para 10 – *Ärztebewertung III*; see also BGH 20/2/2018, VI ZR 30/17 – *Ärztebewertung IV* para 20.

[16] Cf. BGH 20/2/2018, VI ZR 30/17 – *Ärztebewertung IV* para 21.

[17] On this point cf. also Bierbauer, 'Rechtmäßigkeit', p. 75, who rightly criticises that the OGH did not enter into the question of the personal scope of Art 6 (1) seq GDPR.

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In the present case, the court of first instance[18] already saw this legitimate interest in the exercise of freedom of expression and freedom of information, to which the personal interests of the rated person had to take a back seat. Both the processing of the data and its disclosure to the public were limited to what was necessary: the ratings are only visible to users who install the app on their smartphones; furthermore, ratings cannot be searched by name but can only be viewed after selecting a specific school. Further restrictions or the use of pseudonyms would not do justice to the app's objective. Furthermore, the court also considered that data relating to the professional sphere was generally subject to less protection than data relating to private life and that users had a legitimate interest receiving information on the quality of the plaintiff's teaching.

This view – subsequently approved by the OGH – corresponds to the so-called sphere theory developed by German doctrine and case law in the context of the general personality right. According to this theory, the worthiness of protection of the human personality is determined by the gradation of certain spheres in which it develops. While the private and intimate spheres are granted particularly comprehensive protection, this only applies to a limited extent to the social sphere - in which the exercise of one's profession generally takes place.[19]

The risk of abuse inherent in every rating platform did not make it inadmissible per se; in particular, there was also a right to the anonymous expression of opinion. The lack of the possibility to leave text comments reduced the informative value of the ratings but also served to improve comparability and to prevent abuse. Accordingly, the claim was dismissed in its entirety.

The Court of Appeal[20] upheld the plaintiff's appeal insofar as it ordered the defendants to refrain from processing this personal data as long as they did not take steps to ensure that the plaintiff was only assessed by persons who were actually taught by him. In all other respects, it dismissed the claim.

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[18] Vienna Regional Court for Civil-Law Cases (LG für Zivilrechtssachen Wien) 29/1/2021, GZ 26 Cg 16/20v-23.

[19] Cf. in detail *BGH* 23/6/2009, VI ZR 196/08 *spickmich.de* with further references from German case law; see also Franz-Stefan Meissel, § 16' in Attila Fenyves/Ferdinand Kerschner/Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang-Kommentar*, 3rd edn. (July 2014, lexisnexis at) para 65; Josef Aicher, '§ 16 ABGB' in Peter Rummel/Meinard Lukas (eds), *ABGB*, 4th edn. (1/7/2015, rdb.at) para 39; Franz Matscher, 'Medienfreiheit und Persönlichkeitsschutz isd EMRK' (2001), RZ 238–247, p. 245.

[20] OLG (*Oberlandesgericht*, Higher Regional Court) Wien, 26/4/2021, GZ 11 R 51/21g-31.

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In its legal assessment, the Court of Second Instance stated that students must be free to critically engage with their teachers, to give feedback on their teaching, and to publicly express their opinions. Although evaluations of this kind did not meet academic standards, they were nevertheless suitable for providing constructive feedback to teachers and exposing grievances. The resulting contribution to opinion-forming and quality assurance outweighed the teachers' interest in secrecy and privacy.

This view is in line with the decision made by the Cologne Higher Regional Court as the court of second instance and confirmed by the BGH on *spickmich.de.* At that time, it was already generally accepted that in the professional sphere, individuals had to tolerate public assessment of their behaviour due to the effects their activity had on others; it was also held that the assessments given could contribute to desirable goals such as communication, interaction and transparency. Moreover, since everyday school life was characterised by grading on the part of teachers, it was not considered inappropriate to give them back a similar form of evaluation. The court also emphasised the permissibility of anonymous internet use and argued that given the relationship of superiority and subordination between teachers and students, the latter would often refrain from submitting a (negative) evaluation under their own names for fear of consequences.

While the Higher Regional Court of Cologne and, in agreement with it, the BGH considered the access criteria - in this case registration by providing an email address and activation by means of a link sent to this address – to be sufficient to ensure that the platform was predominantly used by pupils of the relevant school (and in this case also by interested parents and teachers), the similarly structured registration procedure in the Austrian case *Lernsieg* gave rise to different assessments by the courts of the individual instances. In the case of the *Lernsieg* app*,* users register by entering a telephone number, to which an SMS is then sent for verification; the account can then be used after entering this code. Only one user account per telephone number can be created. Since it is probably much easier for the average student to create a large number of email addresses than to gain access to several telephone numbers, it is much less likely than in the case of the German decision that a user misuses the rating app by creating fake profiles and submitting several (negative) ratings. The Vienna Higher Regional Court as the court of second instance in the present case nevertheless found the safeguards in place to be insufficient and argued that the legitimate interest of students in constructive critical feedback could not be achieved as long as the possibility of evaluation by persons who had no personal experience of the professional activities of the teacher in question could not

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be excluded. Since the current design of the app could not prevent misuse by third parties outside the school, there was no legitimate interest in its operation in its current form in the light of section 16 of the General Civil Code (ABGB) and in the sense of Article 6 (1) f of the GDPR.

2. The application of Art 6 (1) GDPR in light of § 16 ABGB and the case law of the EJC

Section 16 of the ABGB is the "positive law general clause for the protection of personality rights"[21] in Austrian private law. While the concept of the "general personality right" (*allgemeines Persönlichkeitsrecht*) recognised by German doctrine and case law is disputed in Austrian doctrine and case law, it is widely recognised that § 16 ABGB provides the legal basis for the comprehensive protection of all aspects of the human personality.[22] The provision thus allows for judicial development of the law by analogy to the explicitly standardised special personality rights (including the right to life, the right to physical integrity and health, the right to personal freedom, the right to a name, the moral right and the "right to one's own image") and with regard to the freedoms and rights of the individual guaranteed by fundamental rights, which always requires a comprehensive weighing of conflicting interests.[23] It is also on this basis that the permissibility of data processing within the meaning of Article 6 (1) f of the GDPR must be examined.

In order to assess the permissibility of the processing of personal data under data protection law, the OGH used the three-stage test that is predominantly recognised in the relevant literature. This test stems from the ECJ's judgment on Art 7 f Data Protection Directive, the predecessor provision of today's Art 6 (1) f GDPR.

Stage 1: Legitimate interest

Firstly, the processing must be carried out in the exercise of a legitimate interest of the controller (in this case the second defendant) or of a third party (in this case the app users), secondly, the processing of the personal data must be necessary for the achievement of this legitimate interest, and thirdly, the interests or fundamental rights

[21] Meissel, '§16' para 63 (my translation).

[22] For a detailed discussion, cf. Meissel, '§16' para 59 seqq with further references.

[23] Cf. Meissel, '§16' para 59 seqq with further references.

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and freedoms of the person to whom the processed data relate must not be overridden.[24]

The concept of legitimate interest of the processor is to be interpreted broadly, whereby legal, economic and non-materialistic interests come into consideration.[25] In a further step, it must be assessed whether this interest violates applicable legal provisions or data protection principles, in particular the principle of necessity and the principle of good faith. If this is not the case either and the intended purpose cannot be achieved by less intrusive means (such as processing anonymised data), the existence of a legitimate interest must generally be assumed. The wide interpretation of the term does not impact the interests of the person affected by the processing, because the permissibility of the data processing actually only takes place in the context of a balancing of interests.[26] The legitimate interests of the person undertaking the data processing must not stand in opposition to overriding interests of the data subject. This means that not every interference in the rights of the data subject makes data processing unlawful; if there are interests of equivalent weight, it must be assumed in case of doubt that the processing is lawful.[27]

In light of these statements, it becomes clear that the economic interest of the second defendant in the app, as alleged by the plaintiff, would not per se have made the data processing inadmissible. The question of the economic use of the app through the placement of advertisements (currently only envisaged for the future), which the plaintiff had raised as a reason for the inadmissibility of the processing of his personal data, had already been discussed in the *spickmich.de* decision. While the Higher Regional Court of Cologne had (albeit under the older German data protection law) considered these as a reason for the permissibility of data processing, the BGH specified that the dissemination of advertisements to finance the website was not the purpose of the data collection. Rather, it was to be seen in the users' interest in information and in the exchange of opinions among them. The defendants were not pursuing their own business purpose within the meaning of § 28 Federal Data Protection Act (BDSG; old version) with the collection of the data, although it was a commercial collection within the meaning of § 29 BDSG (old version), so that the

[24] Cf. inter alia Markus Kastelitz/Walter Hötzendorfer/Christof Tschohl, 'Art 6 DSGVO' in Rainer Knyrim (ed.), *Der DatKomm* (7/5/2020, rdb.at) para 51.

[25] Cf. Sebastian Schulz, 'Art 6 DS-GVO' in Peter Gola (ed.), DS-GVO 2nd edn. (Munich: C.H. Beck, 2018) para 57; Kastelitz/Hötzendorfer/Tschohl, 'Art 6 DSGVO', para 54.

[26] Cf. Schulz, 'Art 6 DS-GVO', para 57.

[27] Cf. Schulz, 'Art 6 DS-GVO', para 58.

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collection and storage of the data in question was permissible as long as there was no reason to assume that the data subject had an interest worthy of protection in prohibiting the collection and storage of the data. In this context, the type, content and significance of the disputed data had to be measured against the tasks and purposes served by the data collection and storage. If the person collecting and processing the data could demonstrate and, if necessary, prove that the data was necessary to achieve the intended, legally permissible purpose, the data processing was therefore lawful, provided that no conflicting interests of the data subject could be identified. This, in turn, had to be determined by weighing the interests of the plaintiff in the protection of their right to informational self-determination and the right to freedom of opinion and information of the forum users. In the present case, the result of this comparison was judged to be in favour of the defendant.

The Austrian courts followed the same line of argumentation in the case of the *Lernsieg* app. The Court of First Instance did not focus on the (theoretically possible) economic benefits that the defendants could derive from the app, but on the interest of the users in exercising their rights to freedom of expression and information under Art 10 (1) ECHR. Agreeing with these statements, the OGH concluded that the app served a legitimate interest of both the students evaluating their teachers and the users who could view these evaluations. Furthermore, it correctly emphasised that the fact that pupils cannot choose their teachers and therefore the usual function of evaluation forums, namely to offer the interested public a decision-making aid, was not decisive.[28] Rather, the right to freedom of expression and freedom of information is fully available to participants even where they have no or only an indirect possibility to make dispositions on the basis of the information received.

Stage 2: Necessity of the data processing

In a second step, the OGH examined the necessity of the data processing. This criterion is not to be equated with compelling necessity but is only to be understood as meaning that the processing of the collected data is objectively suitable for the intended purpose and a less invasive alternative does not exist or cannot be reasonably expected of the person undertaking the processing.[29] In this context, it becomes clear that the decision of the court of second instance, which had denied the necessity of the data processing on the grounds that the app could not exclude

[28] For a different opinion (with reference to *spicknich.de*) cf. Jürgen Kühling, 'Im Dauerlicht der Öffentlichkeit – Freifahrt für personenbezogene Bewertungsportale?!' (2015) NJW 447–450, p. 448.

[29] Cf. Schulz, 'Art 6 DS-GVO', para 20.

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abuse by third parties outside the school, is misguided. Firstly, the theoretical possibility of misuse does not make a procedure per se objectively unsuitable; this would at best be the case if the procedure actually favoured misuse and if, in addition, alternatives were available that were less susceptible to misuse.

Secondly, the OGH emphasises that a less intrusive mode of data processing could not exclude abuse either. The OGH correctly recognises that the pseudonymisation of the personal data of the evaluated teachers, as demanded by the plaintiff, would run counter to the objective of the app, as there is a legitimate interest in knowing how the teaching quality of individual teachers is evaluated by their students even beyond the decision-making process in choosing a school. However, this goal could only be achieved if the evaluations given were linked to the names of the teachers, so that the necessity for data processing had to be affirmed. On the other hand, as the OGH rightly points out, the second defendant cannot be expected to check whether the evaluators are actually students of the evaluated person. Moreover, as already emphasised by the BGH in *spickmich.de,* disclosing the identity of the app users, even if only to the operators of the forum, could lead to self-censorship of the ratings given.[30] In contrast to the German BGH in *spickmich.de*[31] , the OGH also dealt in detail with the case law of the European Court of Human Rights (ECtHR) on this point and referred to the ECtHR's recent rulings on the permissibility of anonymous internet use,[32] which can even be given - in contrast to the case at hand – in the case of clearly defamatory evaluations.

Stage 3: Weighting of conflicting interests

In a third step, the OGH carried out the required weighting of the conflicting interests. Here, the plaintiff asserted his right to respect for private and family life, privacy, anonymity of name and protection of his (professional) reputation; the defendants, on the other hand, asserted the right to freedom of expression and information, also citing the precautions taken against abuse within the app.

With regard to the protection of data originating from the social sphere of the person concerned, the OGH agrees with the reasoning of the court of first instance and explains that the more intensively an individual is active in public or social life, the more they must be prepared to have their behaviour observed and evaluated. Only

[30] So also Kühling, 'Im Dauerlicht der Öffentlichkeit', p. 448 in relation to *spickmich.de*.

[31] Cf. critical of this view Neumann, 'Meinprof.de', p. 147.

[32] ECtHR 16/6/2015, Complaint 64569/09, Delphi AS v Estonia; 7/12/2021, Complaint 39378/15, Standard Verlagsgesellschaft v Austria.

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serious encroachments on personality rights, such as stigmatisation and exclusion, are prohibited.[33]

D. On the personality rights of §§ 16 and 1330 ABGB – protection of the name, honour and economic reputation

The right to anonymity of name invoked by the plaintiff, like the right to privacy, arises from the general right of personality under section 16 of the General Civil Code and protects the individual from having their name mentioned without their consent or without a factual reason in contexts that affect their personal interests.[34] However, the mention of a name is not unlawful in and of itself; rather, a balancing of interests with the public's interest in information and the right to freedom of expression is required.[35] The OGH does not enter into this line of argumentation in any detail; however, it should be noted that it is already questionable whether the plaintiff, through his activity as a teacher and his behaviour in class, did not in any case give a factual reason for his name to be mentioned in connection with an evaluation of his teaching activity by his pupils. Furthermore, what has already been said above about the worthiness of protection of the social sphere and the legitimate interest of the app users in the evaluation also applies here.

While the focus of the German *meinprof.de* judgements was the question of the violation of the plaintiff's honour by grossly disparaging comments in the evaluations (including "psychopath"), this aspect only plays a subordinate role in the case at hand. Nevertheless, the plaintiff also based his claim on § 1330 ABGB. This is the central norm of the so-called civil-law protection of honour in Austrian law.[36]

§ 1330 (1) ABGB protects against encroachments on personal honour arising from the general personal dignity of § 16 ABGB, in particular through insults, ridicule, real injuries or the dissemination of defamatory statements. The scope of protection of paragraph 2, on the other hand, is opened up if false factual allegations are disseminated which are capable of damaging the credit, the income or the

[33] The same view is taken by the German doctrine and case law; cf. inter alia Georgios Gounalakis, 'Schutz der Persönlichkeit und Reputation in Online-Medien', in Horst-Peter Götting/Christian Schertz/Walter Seitz, *Handbuch Persönlichkeitsrecht*, 2nd edn. (Munich: C.H. Beck, 2019), chapter 11 § 24, 483–537, part 6 para 58.

[34] Cf. Irene Faber, '§ 43' in Attila Fenyves/Ferdinand Kerschner/Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang-Kommentar*, 3rd edn. (July 2014, lexisnexis at) para 190 seqq; Meissel, '§16', para 99 seqq, esp. para 119 seqq.

[35] Cf. Aicher, '§ 16', para 35 with further references.

[36] Cf. Meissel, '§ 16', para 99 seqq.

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economic advancement of the person concerned, i.e. endangering his or her economic reputation. The fact that the offending statements are also defamatory in the sense of paragraph 1 is not a prerequisite for the offence. Moreover, in certain cases, true factual allegations can also fall under § 1330 if they were disseminated with the obvious intention to harm and violate the private or intimate sphere of the person concerned.[37]In this respect, the OGH in its case law distinguishes between purely subjective value judgements and allegations that are based on verifiable facts.[38] According to the OGH, both paragraphs can be used as the basis for a claim for injunctive relief regardless of fault.[39]

With regard to the case at hand, it should be noted that statements about the poor quality of goods or services are generally not qualified as defamatory within the meaning of § 1330 (1).[40] Hence, statements about the (in)adequacy of a person's professional performance can likewise not be regarded as impinging on that person's honour, so that the star ratings made possible by the app are not per se defamatory. Since the design of the app does not allow the entry of verbal comments precisely with a view to preventing inadmissible or excessive statements, an interference with the honour of the rated teachers within the meaning of § 1330 (1) can be ruled out from the outset.

With regard to § 1330 (2), it should be emphasised that the OGH correctly classifies the ratings entered as value judgements and therefore not accessible to objective review.[41] This also applies to the category "punctuality", notwithstanding the plaintiff's view to the contrary. It is undoubtedly the case that the punctual presence of the teacher in the classroom at the beginning of the lesson and their punctual departure with the sounding of the break bell are empirical facts. However, the app does not ask the users about these but only gives them an

[37] Cf. Rudolf Reischauer, '§ 1330' in Peter Rummel/Meinhard Lukas (eds), *ABGB*, 3rd edn. (1/1/2004, rdb.at) para 1.

[38] See in detail Gottfried Korn/Johannes Neumayer, *Persönlichkeitsschutz im Zivil- und Wettbewerbsrecht* (Wien: Verlag Medien und Recht 1991) 26 seqq; Reischauer, '§ 1330', para 8, para 8d, para 10 with further references, para 12.

[39] Cf. inter alia Reischauer, '§ 1330', para 23; Korn/Neumayer, *Persönlichkeitsschutz*, p. 73.

[40] Cf. Reischauer, '§ 1330', para 1 with further references to case law.

[41] Thus, the Higher Regional Court of Cologne had also taken the view – later confirmed by the BGH – that the plaintiff's name and subjects were (true) statements of fact, but that the evaluations of the individual categories were value judgements. Jahnel's view ('Meinungsäußerungsfreiheit und Datenschutz am Beispiel von Online-Plattformen' (2015) S&R 35–41, p. 36) that personal evaluations are usually a mixture of facts and opinions cannot be followed.

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opportunity to rate them on a scale of one to five stars. Since the criteria for the rating are not disclosed and can vary greatly from pupil to pupil - for example, one pupil may deduct one star for lateness even if the teacher is late only on rare occasions, while another may award five stars precisely because the teacher regularly arrives a little late or ends the lesson early - it cannot be assumed that there is an implied statement of fact in the sense that the underlying factual substrate can be inferred from the students' ratings. Rather, the evaluations of all categories are purely subjective value judgements, which from the outset elude objective verification and thus do not fall within the scope of application of § 1330 (2). While the OGH - following the case law of the ECtHR - usually also requires the existence of a factual basis to justify value judgements that encroach on the honour of the person concerned within the meaning of § 1330 (1),[42] it correctly left this out of consideration here.

Consequently, the OGH does not consider evaluations made by persons who were not taught by the plaintiff to be inadmissible primarily because the evaluation lacks a factual basis. Rather, it is emphasised that every evaluation implicitly carries the factual claim that the person evaluating is actually a student of the plaintiff, so that illegitimate evaluations by third parties are also to be qualified as incorrect factual claims that are capable of misleading the public on an important point. It is in line with existing case law that the dissemination of inaccurate factual claims is not covered by the freedom of expression.[43] The OGH rightly argues that the public has no legitimate interest in such evaluations but subsequently overlooks the fact that this argumentation would also have to be extended to non-objectively motivated evaluations by persons actually taught by the plaintiff: Even those students who give evaluations for non-objective reasons, such as revenge for bad grades, have - in accordance with the terms of use of the app - actually implicitly declared that they have given their evaluation on the basis of objective criteria ("according to the truth"). If this is not the case, their evaluations are also to be qualified as incorrect factual assertions and in which, according to the OGH's case law, there can be no public interest in information under Art 10 ECHR. However, the OGH does not follow its argumentation to its logical conclusion on this point but merely states that even non-objectively motivated value judgements are

[42] RIS-Justiz RS0032201 [T11, T18]; cf. e.g. 4 Ob 60/08i.

[43] See inter alia Reischauer, '§ 1330', para 7b; RIS-Justiz RS0107915.

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covered by the right to freedom of expression, as long as the value judgements are not excessive.[44]

III. Summary and critical evaluation

In the criticism of the German *spickmich.de* ruling, it was emphasised that the weighing of the personality rights of the rated and the freedom of expression of the raters must also be based on the informational value that the opinions expressed have for the public. Since these were subjective statements by individual students, this value was low, so that the justification of the resulting encroachment on the personal sphere of the teachers was questionable.[45] As *Gounalakis*[46] correctly points out with regard to anonymous statements in online media, however, this is a circular argument: if the informational value of a statement is low – and if this is clearly recognisable to the recipient[47] - the statement cannot be considered a serious encroachment on the personality rights of the person affected by it, if only because of the low significance attributed to it. It should be noted here, however, that it would not be appropriate to make the freedom of information of Art 10 ECHR dependent on the objective significance of the information exchanged; moreover, such an approach would also be in clear contradiction to § 1330 ABGB, which does not sanction value judgements - with the exception of clear value judgement excesses, which in the case at hand are precluded by the design of the app.

Consequently, these considerations can only lead to the conclusion that the respective evaluations are inadmissible in the sense of a lack of legitimate interests of the users concerned, but not to the inadmissibility of the *Lernsieg* app itself. It is obvious that every communication medium also entails the possibility of misuse: this is always the case even in the analogue exchange of opinions among pupils - such as during breaks

[44] The question of whether and to what extent the defendants, as operators of the app, would have to accept responsibility for such factually incorrect statements by third parties, was left open by the OGH, since the factuality of the matter within the meaning of section 1330 (2) was only discussed in the context of the legitimate interest of a third party required by Article 6 (1) seq.

[45] Cf. Michelle Petruzzelli, 'Bewertungsplattformen. Überdehnung der Meinungsfreiheit zu Lasten der Betroffenen vs. gerechtfertigte Einschränkung zu Lasten der Bewertenden' (2017) MMR 800–803, p. 800; Greve/Schärdel, 'Der digitale Pranger', p. 648; Kühling, 'Im Dauerlicht der Öffentlichkeit', p. 448; see also Gounalakis, 'Schutz der Persönlichkeit', part 6 para 92.

[46] Cf. Gounalakis, 'Schutz der Persönlichkeit', part 6 para 92.

[47] The fact that every publicly accessible forum carries the danger of unobjective statements is undoubtedly well known to everyone who uses this forum for the purpose of exchanging information. This awareness can certainly be expected of secondary school students; it can be even more assumed of interested adults who use the app to get a picture of the teaching activities of the rated.

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in the schoolyard. However, this consideration alone can by no means lead to its prohibition; something else could possibly only apply where the primary purpose of such a medium is the dissemination of false reports or where these at least far outweigh the factual assessments. However, the plaintiff did not claim that this was the case in relation to the app in question, nor do the findings of the court of first instance warrant such an interpretation. Furthermore, it should be noted that the app's terms of use explicitly state that misuse of the app would be sanctioned. Although this is a relatively toothless threat since it can hardly be implemented technically, it must also be taken into account that the target group of the app is teenagers, who are not unlikely to assume that the programmers of the app could have ways and means of finding out about cases of misuse. Despite the actual inadequacy of the technical control measures, the psychological effect of the measures taken should not be underestimated.

With regard to these considerations, the OGH is therefore right to take the view that even misuse is to be tolerated to a certain extent. The necessary balancing of the plaintiff's interest in not being evaluated by persons who have no legitimate interest in doing so and the interest of the (legitimate) app users to freely express their opinions about and receive information on the plaintiff's teaching is clearly in the students' favour.[48] This does not stand in opposition to Section 1330, because the app does not allow either dishonourable comments or incorrect factual assertions about the plaintiff's teaching; furthermore, it is not recognisable in what way negative evaluations could affect the economic reputation of the person concerned, since the professional advancement of teachers does not usually depend on the opinions that their students express about them in an informal context.[49] This argument also finds further support in the case law of the ECtHR on Art 10 ECHR, in which it is generally assumed - in contrast to the case law of the German and Austrian national courts - that even untruthful statements are covered by the scope of protection of freedom of expression.[50]

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[48] Even in the case of a conflict of interests that are largely equivalent, it is generally assumed that the processing is permissible (Philipp Reimer, 'Art 6' in Gernot Sydow (ed.), DSGVO, 2nd edn. (Munich: C.H. Beck, 2018) para 63; cf. also Schulz, 'Art 6 DS-GVO', para 59).

[49] For example, Petruzzelli, 'Bewertungsplattformen', p. 800; Holger Greve/Florian Schärdel, 'BGH: Zulässigkeit eines Bewertungsportals' (2009) MMR 608–615, p. 614.

[50] Cf. inter alia Gerhard Muzak, 'Art 10 MRK' in Gerhard Muzak (ed.), B-VG 6th edn. (1/10/2020, rdb.at) para 3; Magdalena Pöschl, 'Neuvermessung der Meinungsfreiheit?', in Helmut Koziol (ed.), *Tatsachenmitteilungen und Werturteile* (Wien: Jan Sramek Verlag, 2018) 31–59, p. 41; both with further references.

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While the core question in the *spickmich.de* case of the BGH was whether the linking of the plaintiff's name and (negative) ratings was permissible per se, the present case focuses on the question of whether the possibility of abusive ratings (including the insufficient possibility of complaints by those affected) makes a rating forum impermissible. This question is rightly answered in the negative: a ban on the app with the aim of protecting the personality rights of those rated would be a disproportionate encroachment on the rights to freedom of expression and information; the inherent susceptibility to abuse of anonymous online media cannot under any circumstances justify such a profound encroachment on the rights of legitimate users. The possibility of abuse is ultimately inherent in online rating forums and cannot be controlled with the available technical possibilities - also with regard to the protection of users' privacy. In principle, however, every form of communication carries the risk of unwanted or non-objective comments; to restrict the ability of legitimate users to express themselves for this reason would be an intolerable encroachment on the right to freedom of expression in almost all areas of life.

In connection with the German *spickmich.de* and *meinprof.de* decisions, critics argued that the possibility of online ratings was detrimental to the culture of communication and feedback between raters and rated.[51] To this, one can counter the following: Where such a culture already exists, it cannot be destroyed by the availability of an app. Where such a culture has not been established in the years and decades before the *Lernsieg* app was developed, the reason for this failure cannot be laid at the door of the app. Conversely, given the right conditions otherwise, the app could not prevent the emergence of such a culture in these places. On the other hand, the fear that "the product evaluation so valued for goods" is "transferred to the person of the service provider" through forums such as *spickmich.de* or *Lernsieg* and could thus lead to "existential problems"[52] overlooks the fact that it is not the person of the teacher but their performance in the classroom that is the focus of the evaluation. Almost in passing, the OGH hits the psychological core of the problem quite accurately when it points out, in accordance with the German case law[53] and that of the ECtHR,[54] that basically, even bad evaluations are to be accepted by the persons

[51] Cf. Neumann, 'meinprof.de', p. 148.

[52] Ansgar Staudinger, 'Case report: BGH 1.9.2009, VI ZR 196/08' (2009), jusIT 191–192, p. 192 (my translation); along similar lines cf. also Jahnel, 'Meinungsäußerungsfreiheit', p. 36.

[53] Cf. BGH 20/2/2018, VI ZR 488/19, *Ärztebewertung IV*.

[54] ECtHR 24/11/2015, Kucharczyk v. Poland.

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concerned because the general possibility of taking legal steps against negative evaluations would render any public evaluation useless. The protection of individuals against critical assessment of their professional performance cannot be the task of the judiciary.

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