Case Study: Influencer Marketing

A. Influencer I

Decision of the Federal Supreme Court of Germany (Bundesgerichtshof); 9 September 2021 – Case No. I ZR 90/20 (IIC 2022, 648)

…

2. An influencer who offers goods and services and promotes them through her presence in social media (here: Instagram) regularly engages in commercial practices for the benefit of her own business with her posts published in this manner.

3. If an influencer receives consideration for a promotional post in social media, this publication constitutes a commercial practice for the benefit of the promoted business.

4. If an influencer does not receive any consideration for a post containing a reference to a third-party business published in social media, this publication constitutes a commercial practice for the benefit of the third-party business if the post is excessively promotional in the light of its overall impression, i.e. if it contains a promotional excess so that the promotion of a third-party's competition plays a greater role than merely a necessarily accompanying one (continuation of decision of the Federal Supreme Court, 9 February 2006 – I ZR 124/03, GRUR 2006, 875 para. 23 = WRP 2006, 1109 – *Rechtsanwalts-Ranglisten*).

5. Whether a post by an influencer in social media contains the promotional excess necessary for the assumption of a commercial practice for the benefit of another business is to be assessed on the basis of a comprehensive assessment of the entire circumstances of the individual case, taking into account the interaction of the presentation features (e.g. posted product photos, editorial context, linking to websites of third-party businesses). The fact that the influencer added "tap tags" to images in order to designate the manufacturers of the depicted goods is not in itself sufficient to assume a promotional excess of the Instagram posts. A link to a website of the manufacturer of the product depicted, on the other hand, as a rule contains a promotional excess, even if the purchase of products is not directly possible on the manufacturer's linked page.

6. The reference to the commercial intent of a commercial practice required under Sec. 5a(6) Act against Unfair Competition must be made so clearly that it is obvious at first glance and beyond doubt from the point of view of the consumer who is reasonably well informed and reasonably observant and circumspect and who belongs to the group addressed. The reference to the commercial intent appearing in the text part of a post published in social

media is as a rule not sufficient to identify the commercial intent of a "tap tag" appearing on the image placed next to the text as being promotional.

7. The commercial intent of an influencer's advertising post published in social media for the benefit of a third-party business within the meaning of Sec. 5a(6) Act against Unfair Competition does not result directly from the fact that the influencer acts not only for purely private purposes but also for the benefit of her own business. It is not sufficient that some commercial intent of whatever kind is apparent to the addressees from the circumstances; instead, the commercial intent pursued with an act of communication must be recognisable.

8. The non-disclosure of the commercial intent of a "tap tag" containing a link to the website of a third-party business is as a rule capable of inducing the consumer to make a transactional decision to click on the link which he would not have made otherwise.

Facts:

1 The plaintiff is an association whose statutory tasks include the protection of the commercial interests of its members, including the prosecution of breaches of fair trading law. The defendant is a so-called influencer who is active on the social media platform Instagram under the profile name "lu_coaching", where she regularly publishes images and short video sequences, in particular of sports exercises as well as fitness and nutrition tips. In addition, she maintains a website on which she offers fitness courses and personal training for a fee and operates an online shop.

2 When the defendants profile on Instagram is accessed, a reference to her web address, her email address and an app called "Lu_Coaching" *inter alia* appear. Some of the defendants Instagram posts contain so-called "tap tags" inserted by the defendant. If the images provided with a "tap tag" and belonging to the posts are clicked on, the businesses or brands of the manufacturers of the products to be seen on the relevant image, in particular the defendants clothing, appear. By further clicking on these businesses or brands, the internet user is then redirected to the Instagram profile of the business in question.

3 The plaintiff considers this to be unlawful surreptitious advertising. It has requested that the defendant be ordered to cease and desist from presenting commercial content in the course of business in social media, for example in the social medium "Instagram", by depicting a person (e.g. under the name "lu_coaching"), without making the commercial intent of the publication clear, unless it is immediately apparent from the circumstances, this being done by publishing contributions as follows

- with the image of a person (e.g. under the name "lu_coaching") = 1st view,

- after calling up the 1st view by clicking on the display of the name of one or more businesses (or brands) on the same page = 2nd view
- and
- by a further click on the displayed names of the businesses (or brands) whose names are visible in the 2nd view, forwarding to the accounts of the business(es) in question = 3rd view,

without identifying the 1st or 2nd view as a commercial publication, provided this is done as reproduced in Annex K 4. …

6 The district court upheld the action (decision of the Göttingen District Court, 13 November 2019 – 3 O 22/19, juris). The defendant's appeal was unsuccessful (Braunschweig Court of Appeal, GRUR-RR 2020, 452). With her appeal, leave to file which was admitted by the appeal court and which the plaintiff seeks to have dismissed, the defendant continues to pursue her motion to dismiss the action.

Findings:

…

9 – B. The defendant's appeal … is unsuccessful. The action is admissible (see B I).

The appeal court rightly awarded the claim for injunctive relief (see B II), so that the claim for payment of the all-in amount for warning costs is also justified. …

23 – II. The action is well-founded. The appeal court rightly granted the asserted claim for injunctive relief pursuant to Sec. 8(1) first sentence 1, Sec. 3(1), Sec. 5a(6) Act against Unfair Competition. The action challenges commercial practices of the defendant which can be subjected to an examination under unfair competition law pursuant to Sec. 3(1) of the Act (see B II 1). As a result, the appeal court also correctly assumed that the requirements of Sec. 5a (6) of the Act were satisfied (see B II 2).

24 – 1. The publication of the Instagram posts at issue took place in the context of the defendant's commercial practices within the meaning of Sec. 2(1) No. 1 Act against Unfair Competition. On the basis of the appeal court findings, however, it can only be assumed that commercial practices were carried out for the benefit of the defendant's own business and the R. N. business, but not for the benefit of the other third-party businesses.

…

29 – b) Pursuant to Sec. 2(1) No. 1 Act against Unfair Competition, a commercial practice is any conduct by a person for the benefit of that persons or a third-party's business before, during or after the conclusion of a business transaction which is objectively connected with promoting the sale or the procurement of goods or services or with the conclusion or the performance of a contract concerning goods or services.

30 The characteristic of an objective connection is to be understood functionally and requires the act to be objectively directed at promoting the sale or procurement of goods or services of a person's own business or of another business by influencing the transactional decisions of

consumers or other market participants (see decisions of the Federal Supreme Court, 10 January 2013 – IR 190/11, GRUR 2013, 945 para. 17 = WRP 2013, 1183 – *Standardisierte Mandatsbearbeitung*; 11 December 2014 – I ZR 113/13, GRUR 2015, 694 para. 20 = WRP 2015, 856 – *Bezugsquellen für Bachblüten*; 6 June 2019 – I ZR 216/17, GRUR 2019, 1202 para. 13 = WRP 2019, 1471 – *Identitätsdiebstahl*; 23 April 2020 – I ZR 85/19, GRUR 2020, 886 para. 32 = WRP 2020, 1017 – *Preisänderungsregelung*). An indication of a commercial practice for the benefit of another business may be that a commercial relationship exists with that business (see decision of the Federal Supreme Court, GRUR 2021, 497 para. 25 – *Zweitmarkt für Lebensversicherungen*).

31 If the practice primarily serves objectives other than influencing the transactional decision of consumers with regard to products and if it merely has a reflex-like effect on the promotion of sales or procurement, it does not constitute a commercial practice within the meaning of Sec. 2(1) No. 1 Act against Unfair Competition (cf. decisions of the Federal Supreme Court, GRUR 2013, 945 paras. 18 and 29 – *Standardisierte Mandatsbearbeitung*; GRUR 2015, 694 para. 22 – *Bezugsquellen für Bachblüten*; 31 March 2016 – I ZR 160/14, GRUR 2016, 710 paras. 12 and 16 = WRP 2016, 843 – *Im Immobiliensumpf*; GRUR 2021, 497 para. 27 – *Zweitmarkt für Lebensversicherungen*). Accordingly, ideological, scientific, editorial or consumer policy statements by businesses or other persons that are not functionally related to the promotion of sales or procurements are not subject to the Act against Unfair Competition Act (see decision of the Federal Supreme Court, GRUR 2016, 710 para. 12 – *Im Immobiliensumpf*).

32 Contrary to the assumption of the appeal court, there is no presumption that the practice of an entrepreneur falling within the scope of his commercial or professional activity is objectively related to the promotion of the sales of his own business or the promotion of the sales of another business. Admittedly, until the amendment of Sec. 2(1) No. 1 Act against Unfair Competition by the First Act Amending the Act against Unfair Competition of 22 December 2008 (Federal Gazette I p. 2949), a competitive practice required the intention to promote one's own or another's competition (cf. decision of the Federal Supreme Court, 27 November 2014 – I ZR 67/11, GRUR 2015, 692 para. 14 = WRP 2015, 854 – *Hohlkammerprofilplatten*, with further references) and the defendant's intention to promote the competition of its own business was presumed, provided its actions were objectively suitable for such promotion (see decision of the Federal Supreme Court, 5 February 2009 – I ZR 119/06, GRUR 2009, 876 para. 17 = WRP 2009, 1086 – *Änderung der Voreinstellung II*, with further references). However, this principle has become obsolete with the new version of Sec. 2(1) No. 1 of the Act, as a subjective element in the sense of an intention to promote competition is no longer required (see Explanatory Memorandum to the Government Draft of a First Act Amending the Act against Unfair Competition, BT-

Drucks. 16/10145, p. 12; …). The question whether a practice primarily serves the promotion of one's own or another's sales or procurement of goods or services or other objectives is instead to be assessed on the basis of an appreciation of the entire circumstances of the individual case (cf. decision of the Federal Supreme Court, GRUR 2015, 694 para. 20 *Bezugsquellen für Bachblüten*).

33 – c) According to these standards, the publication of the Instagram posts took place in the context of a commercial practice by the defendant to promote her own business.

34 – aa) The defendant operates a business.

35 – (1) The term business describes the organisational entity in which a commercial, trade or self-employed professional activity is carried out (see Sec. 2(1) No. 6 Act against Unfair Competition; …). A commercial practice requires the independent and systematic offering of paid services on the market for a certain period of time (see decision of the Federal Supreme Court, 4 December 2008 – I ZR 3/06, GRUR 2009, 871 para. 33 = WRP 2009, 967 – *Ohrclips*, with further references).

36 The same applies to influencers, with the result that they also operate a business, provided they themselves sell goods or services … or market their own image and commercialise it through advertising revenue. …

37 – (2) The appeal court found that the defendant is engaged in commercial practices. The appeal on the law raises no objections to this, nor does it disclose any error of law, since the defendant offers fitness courses and personal training activities in return for payment and both operates an online shop and publishes advertisements for other businesses in return for payment.

38 – bb) Since, according to the findings of the appeal court, the defendant received a fee from the R. N. business for the Instagram post on page 21 et seq. of Annex K 4, this publication itself constituted a commercial practice within the meaning of Sec. 2(1) No. 1 Act against Unfair Competition because it was made for the purpose of performing a contract for the benefit of the defendant's own business.

39 – cc) However, the operation of the Instagram profile, in the context of which the posts at issue were published, is also objectively suitable for promoting the defendant's business.

40 – (1) The appeal court found that the defendant's Instagram profile served to cultivate her image and to build up her own brand. The appeal does not dispute this. The profile with the posts published therein is suitable for raising the defendant's profile, binding followers to her and increasing the number of comments and "likes" from followers.

41 Thus, firstly, the profile and the posts are capable of increasing the sales of fitness courses and personal training activities as well as of goods via the defendant's website, links to which, according to the appeal court findings, are to be found in the defendants Instagram profile. Influencers who themselves sell products via a social medium promote their own business through their posts in this social medium. …

42 Secondly, the appeal court found, unchallenged by the appeal, that increasing the awareness and loyalty of followers arouses the interest of third-party businesses in influencer marketing in cooperation with the defendant, who can generate sales in this way. Influencers such as the defendant also promote their own business by increasing their advertising value. …

43 – (2) The fact that posts that are superficially private are also published on the Instagram profile, such as the one on pages 24 and 25 of Exhibit K 4 in which the defendant discusses her summer holiday in Barcelona, does not change the business nature of the publication of all posts. An entrepreneur who uses private statements to promote the competition of her business gives such statements a commercial twist. … It is precisely the opening up of the private sphere of life that makes it attractive for the audience to follow influencers, as this makes them appear more credible, approachable and likeable. … The fact that the promotion of one's own image is a characteristic feature of influencers and the striving for an increase in reach is inherent in the circumstances of social networks and in the desire for attention cannot change the character as a commercial practice that is inevitably associated with this. …

44 – (3) The operation of an Instagram profile that, as in the case at issue, is suitable for increasing the sales of the influencer's goods or services or her advertising value is a commercial practice for the promotion of her own business irrespective of the fact that editorial posts are published therein. In this constellation, the publication of editorial posts primarily serves the purpose of influencing transactional decisions of consumers or other market participants with regard to products of the defendant's own business. …

46 In the case at issue, the self-serving commercial intent of the defendant's publications on Instagram comes to the fore because they have an effect for the benefit of the sale of the goods and services offered by the defendant. The defendant uses the following gained via Instagram to increase her product sales.

47 – (4) Finally the classification of the practices is also not at issue here as commercial practices for the benefit of the defendant's own business to be ruled out even if these practices are performed without financial consideration.

48 The lack of consideration does not preclude the classification as a commercial practice even in the light of Art. 2(f), second indent, of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. … The publication of an Instagram post can therefore be classified as a commercial practice even if there is no commercial communication within the meaning of Art. 2(f), 2nd indent, of Directive 2000/31/EC because the influencer does not receive any consideration in return.

49 For the assumption of a commercial practice, the gratuitous character of the conduct in question is irrelevant, provided that it serves to promote

the commercial practices of the trader (see decision of the Federal Supreme Court, 19 April 2018 – I ZR 154/16, BGHZ 218, 236 para. 21 – *Werbeblocker II*; …). This is the case here.

50 – d) The appeal court rightly assumed that the publication of the Instagram post on page 21 et seq. of Exhibit K 4, which contained a "tap tag" leading to the Instagram profile of the R. N. business according to page 23 of Exhibit K 4, constituted a commercial practice for the benefit of this business. The appeal on the law does not raise any objections to this either. If an influencer receives consideration for a promotional post, this publication unconditionally constitutes a commercial practice for the benefit of the promoted business. …

[51 – e) With regard to the other Instagram posts, however, it cannot be assumed on the basis of the appeal court findings that there are commercial practices for the benefit of the third-party businesses. However, this does not have an effect on the final result, since the defendant has in any case acted commercially for the benefit of her own business and the R. N. business.

52 – aa) With respect to the Instagram posts containing references to further third-party businesses, the appeal court did not establish that the defendant had a business relationship with the businesses to whose Instagram profiles the "tap tags" refer or received consideration for the publication of their posts. However, it rightly assumed that the receipt of consideration is not a mandatory prerequisite for the existence of a commercial practice for the benefit of another business.

53 – bb) Contrary to the view of the appeal on the law, the assessment does not have to differentiate between the contributions including illustrations on the one hand and the "tap tags" on the other. No objection can be raised to the appeal court's assumption that such a splitting of one and the same Instagram post would be unrealistic and artificial. Rather, the setting of the "tap tags" is to be included in the assessment of whether the Instagram posts at issue are commercial practices for the benefit of third-party businesses. Contrary to the opinion of the appeal, this applies despite the fact that the "tap tags" only become visible after the user has clicked on the respective image. This method of presentation does not lead to the names of the manufacturer and the brand being "hidden to such an extent" that for this reason alone it could not be said to be a targeted sales promotion.

54 – cc) Contrary to the opinion of the appeal court, the fact that the defendant seeks to promote the sales of her own product range within the framework of her Instagram presence and also endeavours to support the development of her own brand with her Instagram profile does not of itself support the conclusion that the defendant has engaged in commercial practices to promote the sales of third-party businesses. The existence of a commercial practice in the form of an entrepreneur acting for the benefit of her own business is not an indication that there is also a commercial practice for the benefit of another business. Although the appeal court correctly assumed in this context that, in such a commercial environment,

references to the goods and services of third-party businesses are not of a "purely private nature", this already follows from the fact that they are part of a commercial practice for the benefit of the defendants own business (see paras. 33 to 49 above) and is of no assistance with regard to the question whether there is (also) a commercial practice for the benefit of the third-party business.

55 – dd) Contrary to the appeal court's assumption, the fact that Instagram is the most popular social media platform for the use of "brand PR", that the defendant describes herself as an influencer and that she is willing to accept fees from third-party businesses for product placements, are also not decisive for the question whether the defendant has engaged in commercial practices for the benefit of businesses from which she has not been paid for "brand PR". Where the appeal court considers that it is sufficient that the defendant expects, as is obvious on the basis of these circumstances, that she will arouse the interest of third-party businesses in influencer marketing in cooperation with her and generate turnover in this way, it again focuses on an aspect which is relevant to the question of whether the defendant has engaged in commercial practices for the benefit of her own business. However, the promotion of another's competition does not follow from the widespread general interest on the part of influencers in attracting advertising customers by arousing their interest in a cooperation by placing "tap tags" that refer to their Instagram profiles (cf. decision of the Federal Supreme Court, 9 February 2006 – I ZR 124/03, GRUR 2006, 875 para. 28 = WRP 2006, 1109 – *Rechtsanwalts-Ranglisten*; …). The appeal court did not find that the defendant linked the placing of "tap tags" in any way to her advertising business.

56 – ee) Finally, the appeal court assumed that the defendant's posts largely lacked any editorial occasion for the product advertising carried out therein, since in these posts the defendant neither reported on enquiries from her followers about a certain item of clothing, mentioning the manufacturer's name in this context, nor, in referring to corresponding enquiries, confined herself to editorially informing about the manufacturers. This does not stand up to review on appeal on the law.

57 – (1) When examining whether the internet presence of influencers primarily serves to promote the sales of other businesses or serves other, in particular editorial, objectives, account must be taken of the informational interest of their followers. The latter are not only interested in the influencers' private lifestyles, but also in what clothes they wear or what other products they use. … The mere fact that the followers see the influencers' lifestyle as a suggestion for their own lifestyle and possibly imitate it does not mean that the internet presence primarily serves to promote the sales of other businesses. …

58 Social media in general and posts by influencers in particular have an information and entertainment function vis-à-vis a not insignificant, in particular younger part of the general public, this function appearing alongside the traditional media. The contributions of influencers may in

particular be comparable to those of classic fashion magazines or other special interest media. …

59 – (2) The assessment of the contributions of influencers in social media can have recourse to the criteria that have been developed for the classification of what are apparently editorial press articles as advertising. …

60 Even if a classical media business does not receive any consideration from another business for an apparently editorial publication, it may nevertheless be a commercial practice for the benefit of that business if the overall impression of the contribution is excessively promotional, i.e. contains a promotional excess, so that the promotion of another's competition plays a greater than necessarily accompanying role (cf. decisions of the Federal Supreme Court, GRUR 1990, 373, 374 [juris para. 13] – *Schönheits-Chirurgie*; 3 February 1994 – I ZR 321/91, GRUR 1994, 441, 442 [juris para. 13 et seq.] = WRP 1994, 398 – *Kosmetikstudio*; 30 April 1997 – I ZR 196/94, GRUR 1997, 912, 913 [juris para. 15] = WRP 1997, 1048 – *Die Besten I*; GRUR 2002, 987, 993 [juris para. 34] – *Wir Schuldenmacher*; 1 April 2004 – I ZR 317/01, BGHZ 158, 343, 348 [juris para. 25] – *Schöner Wetten*; GRUR 2006, 875 para. 23 – *Rechtsanwalts-Ranglisten*;. …

61 Accordingly, account has to be taken of whether the post fails to maintain a critical distance and only praises the advantages in a way that gives the public the impression that the product or service is practically being recommended by the influencer (see decision of the Federal Supreme Court, GRUR 1994, 441, 442 [juris para. 13] – *Kosmetikstudio*), or whether the third-party products or services are mentioned and praised by name (cf. decisions of the Federal Supreme Court, 19 September 1996 – I ZR 130/94, GRUR 1997, 139, 140 [juris para. 15] = WRP 1997, 24 – *Orangenhaut*; 19 February 1998 – I ZR 120/95, GRUR 1998, 947, 948 [legal para. 28] = WRP 1998, 595 – *AZUBI '94*) and the presentation thus goes beyond the scope of factually based information (cf. decisions of the Federal Supreme Court, 18 February 1993 – I ZR 14/91, GRUR 1993, 561, 562 [juris para. 14] = WRP 1993, 476 – *Produktinformation* I; 23 January 1997 – I ZR 238/93, GRUR 1997, 541, 542 et seq. [juris para. 17] = WRP 1997, 711 – *Produkt-Interview*; GRUR 2006, 875 para. 27 – *Rechtsanwalts-Ranglisten*; …). There can for instance be a promotional excess if the text of the Instagram post praises a product displayed in the picture in the euphoric manner typical of advertising …. …

64 In the case of editorial contributions by a media business that fall under the special protection of Art. 5(1) second sentence Basic Law, an objective connection with the promotion of the sales of another business within the meaning of Sec. 2(1) No. 1 Act against Unfair Competition is to be denied if the contribution serves solely to inform and shape the opinion of its addressees (cf. decisions of the Federal Supreme Court, GRUR 2012, 74 para. 15 – *Coaching-Newsletter*; GRUR 2015, 694 para. 34 – *Bezugsquellen für Bachblüten*; 18 June 2015 – I ZR 74/14, BGHZ

206, 103 para. 10 – *Haftung für Hyperlink*; 17 December 2015 – I ZR 219/13, GRUR-RR 2016, 410 para. 11). In the case of a promotional excess in the sense described above, however, this requirement is not met.

65 – (4) The fact that the defendant provided the images with "tap tags", in particular to designate the manufacturers of the items of clothing she wore, is not in itself sufficient to assume a promotional excess of the Instagram posts …, even if the defendant had a considerable number of followers. …

66 When assessing the content of the "tap tags" serving the public's interest in information, account must be taken of the fact that the details in the "tap tag" can provide further information on the text or image post, for example by naming the manufacturer of the product depicted in the "tap tag". … However, if the "tap tag" has no recognisable connection to the posted text or image from the relevant point of view of the averagely informed, attentive and reasonable visitor to the Instagram profile, this will generally speak in favour of a commercial practice for the benefit of the third-party business. …

67 – (5) The link to a website of the manufacturer of the depicted product as a rule contains a promotional excess. … Even if links generally provide access to additional sources of information on the internet …, by clicking on the link the reader of the Instagram post directly enters the manufacturing business's sphere of advertising influence. The assumption of a promotional excess is as a rule justified not only if there is a reference to an internet page via which the product depicted can be purchased (cf. decision of the Federal Supreme Court, GRUR 2015, 694 para. 30 – *Bezugsquellen für Bachblüten*; …, but also in the case of a reference to a website that does not directly enable the purchase. … In both cases, a sufficient promotion of the third-party's sales may lie in the fact that the consumer's access to the third-party's products is facilitated and accelerated.

68 – (6) Whether influencers' posts in social media are commercial practices for the benefit of the third-party businesses according to these standards requires a comprehensive assessment by the trial court. In this context, a decisive factor is whether the viewer can in the light of the entire circumstances of the individual case conclude that the influencer has commercial interests based on the interaction between a posted product photo, any editorial context and the linking. The appraisal made by the appeal court in the case in question does not fully meet these standards. However, this does not have an effect on the final result if only because the appeal court rightly assumed that the defendant acted commercially by using the contested internet presence in any case to promote her own business as well as to promote the R. N. business.

69 – 2. On the basis of the findings made by the appeal court, the commercial practice engaged for the benefit of the R. N. business is to be assessed as unfair within the meaning of Sec. 5a(6) Act against Unfair Competition (see B II 2 a to d). As far as the defendant acted

commercially for the benefit of her own business, on the other hand, there is a lack of findings by the appeal court, without this having any effect on the final result (see B II 2 e).

70 – a) Pursuant to Sec. 5a(6) of the Act against Unfair Competition, a person acts unfairly if he fails to disclose the commercial intent of a commercial practice, unless this purpose is directly apparent from the circumstances, and the failure to disclose the intent is likely to induce the consumer to take a transactional decision which he would not have taken otherwise. …

71 – b) No objection can be raised in the appeal on the law to the finding that there has been an infringement of Sec. 5a(6) Act against Unfair Competition with regard to the commercial practice to promote the R. N. business.

72 – aa) This commercial practice had the commercial intent of promoting R. N.'s business.

73 – (1) Just as with regard to the existence of a commercial practice, there is no presumption with regard to the commercial intent which would have to be rebutted by the defendant. … Rather, the entire circumstances of the individual case must be assessed. …

78 – (4) In the case at issue, too, the determination of the commercial intent of promoting the R. N. business must therefore be based on the same objective circumstances that are used to affirm the existence of a commercial practice (see above, para. 50).

79 – bb) The defendant did not indicate the commercial intent of the commercial practice for the benefit of the R. N. business.

80 – (1) How the commercial intent of a commercial practice is to be identified depends on the circumstances of the individual case. The reference must be made so clearly that the commercial intent pursuant to Sec. 3(4) first sentence Act against Unfair Competition is apparent at first glance and beyond doubt from the point of view of the reasonably well informed, reasonably observant and circumspect consumer who is a member of the target group. … The fact that influencers also address young users, some of whom are still minors …, does not fundamentally change this standard. Pursuant to Sec. 3(4) second sentence Act against Unfair Competition, the perspective of an average member of a clearly identifiable group of consumers who, due to mental or physical infirmity, age or credulity, are particularly vulnerable with regard to these commercial practices or the goods or services on which they are based, in particular children and adolescents, is not to be taken into account *a priori* if they are amongst those who might be influenced by the commercial practice in question, but only if the commercial conduct of this consumer group alone is likely and foreseeable to be significantly influenced (see decisions of the Federal Supreme Court, 12 December 2013 – I ZR 192/12, GRUR 2014, 686 Nos. 13 to 17 – *Goldbärenbarren*; 24 July 2014 I ZR 221/12, GRUR 2014, 1013 No. 33 = WRP 2014, 1184 – *Original Bach-Blüten*).

81 – (2) The appeal court assumed that the link to the Instagram presence of the R. N. business which was to be regarded as advertising was not accompanied by a notice identifying the commercial intent in the manner required by law. The post on the defendant's Instagram profile contained a reference to advertising only after the advertisement for the "brand new Raspberry Jam by R.", which was embedded in the continuous text and did not make it possible to recognise the advertising character at first glance. This stands up to legal scrutiny. …

83 Contrary to the view of the appeal on the law, the statement "*Advertising: new in the shop from tomorrow" in the text part of the Instagram post is not sufficient because it appears "simultaneously" with the image containing the "tap tag" with the link to the R. N. business's Instagram profile.

84 It is already doubtful whether the reference to "advertising" refers at all to an advertisement for the benefit of the R. N. business or to an advertisement for the defendant's online shop.

85 In any case, no objection can be raised in the appeal on the law to the fact that the appeal court did not consider this reference in the continuous text to be sufficient because the "tap tag" in question here is embedded in the image next to the text. Thus, the reference point of the "advertising" notice is ambiguous. It is not sufficiently clear whether it should refer to the "tap tag" embedded in the image, which, moreover, is only visible after clicking on it. Nor is the word "advertisement" clearly highlighted and set off in a different colour or by the design of the font, a previously inserted paragraph or similar stylistic device in such a way that the advertising character of the contribution could be recognised at first glance. …

86 – cc) Nor was the labelling of the commercial intent of promoting the R. N. business dispensable.

87 – (1) A labelling of the commercial intent is not necessary if the external appearance of the commercial practice is designed in such a way that consumers can clearly and unambiguously recognise the commercial intent at first glance. …

88 When assessing whether consumers can clearly and unambiguously recognise the commercial intent of an Instagram post, the decisive factor is not whether the average user only recognises its advertising effect after analysing the post. This indeed does not preclude the user from first paying closer attention to the post because he is under the mistaken assumption that it is a non-commercial statement. In this context, it is not sufficient that the public recognises, for example, an extremely positive description of a product. Rather, it must immediately and unequivocally recognise that this description serves to advertise the product (see decision of the Federal Supreme Court, GRUR 2013, 644 para. 21 – *Preisrätselgewinnauslobung V*;. …

89 It is therefore not sufficient if the advertising character of a post only becomes apparent to the consumer after he has already taken notice of it, because then he has already succumbed to the luring effect which the

labelling requirement is intended to prevent, and has been exposed to the advertising message unprepared. … The purpose of labelling is precisely to give the consumer the opportunity to adjust to the commercial nature of the practice so that he can critically assess it from the outset or avoid it altogether. … It is therefore not contradictory that labelling may also be required for Instagram posts whose promotional excess is only recognisable after studying the entire post. …

90 The frequent mixing of non-promotional and promotional posts can be in conflict with the assessment that the commercial intent of individual posts to promote third-party businesses is apparent from the circumstances. … In the case of such an intermingling of the posts, the commercial intent of individual posts does not already result from a possible verification of the profile (i.e. the labelling as a "real profile" of the named owner, which only occurs in the case of persons with a certain public profile or upwards of a certain number of followers, cf. decision of the Federal Supreme Court, 9 September 2021 – I ZR 125/20 para. 37 – *Influencer II* [IIC 4/2022, https://doi.org/10.1007/s40319-022-01181-y]; …), a particularly high number of followers or from a general reputation of the influencer. …

91 – (2) It was also from these principles that the appeal court proceeded. It assumed that it was precisely in the nature of influencer contributions that the advertising character was generally not recognisable at first glance. In the context of her Instagram profile, the defendant reported, for example, on her preference for Nike shorts, her seasonal habit of wearing leggings, her dreams of wearing sportswear and shorts in various colours, her cardio training and its benefits, as well as recreation drawn from her holidays. In this way, she orchestrates her life by presenting the appropriate brands. The defendant's profile did not contain any circumstances clearly indicating its commercial intent. It was not maintained as a business account, as was possible on Instagram, but as the defendant's private profile, albeit public in that it could be viewed by anyone, and which was separate from her commercial practices. There were no terms that were actually unambiguous and common in legal relations that consumers were accustomed to using, such as "advertising" or "advertisement". Nor did the header of the profile make its commercial intent clear beyond doubt at first glance. The fact that the defendant, as could be seen from the profile header, also maintained a website at www.lu-coaching.de and did not use her real name was not capable of indicating the commercial intent of the Instagram profile. This stands up to review on appeal on the law.

92 – (3) Contrary to the view of the appeal on the law, the fact that it is apparent that the influencer is not only acting for purely private purposes but also for the benefit of her own business and thus for commercial intents is not sufficient for it being apparent that she is acting for the benefit of another business. It is not only necessary that a commercial intent is in some way apparent to the addressees from the circumstances, but any commercial intent pursued with an act of communication must be recognisable. …

93 – dd) The non-disclosure was also likely to induce the consumer to take a transactional decision that he would not have taken otherwise.

94 – (1) The appeal court assumed the relevance of the infringement of the identification requirement. It was precisely the purpose of the defendant's advertising to induce her followers to purchase the advertised products from the manufacturers concerned, purchases that they would not otherwise have made or not at that time. The defendant's followers understood the defendant as a role model and followed her example in the selection of products in the manner of a recommendation, to which, due to its seemingly private nature, they would attach greater objectivity and neutrality than they would to an advertisement labelled as such. This withstands legal review in the final analysis.

95 – (2) According to Sec. 2(1) No. 9 Act against Unfair Competition, a transactional decision, the taking of which is capable of being induced by the non-disclosure within the meaning of Sec. 5a(6) of the Act, is any decision taken by a consumer or other market participant regarding whether, how and on what terms to conclude a transaction, make a payment for, retain or dispose of goods or services or to exercise a contractual right in connection with the goods or services, regardless of whether the consumer or other market participant decides to act. In addition to the decision to procure or not to procure, the term "transactional decision" also covers directly related decisions such as, in particular, entering a shop … or calling up a business's website in order to take a closer look at its range and products. … By contrast, the consumer's decision to take a closer look at an advertised offer in an advertisement does not in itself constitute a transactional decision in the absence of a direct connection with a purchase transaction. …

96 – (3) According to these standards, although the consumer's decision to take a closer look at the Instagram post with reference to the R. N. business and to have the "tap tag" displayed by a first click (on the image of the product) is not yet a transactional decision …, the second click (on the "tap tag") which brings the consumer to the Instagram profile of the linked business constitutes a transactional decision. It is of no relevance that the links were not directly to the products offered by the R. N. business. It is sufficient that the consumer was able to learn more about the business and its products via its Instagram profile, in particular because a link to its website was provided there. …

97 – (4) The failure to disclose the commercial intent of the commercial practice is capable of inducing users of the defendants Instagram post to click on the "tap tag".

98 Just as for the breach of the duty to inform under Sec. 5a(2) Act against Unfair Competition, the breach of the duty to inform under Sec. 5a(6) of the Act is subject to the assumption that the failure to disclose the commercial intent is usually capable of inducing a transactional decision by the consumer. This is because the consumer is more critical of a commercial practice from the outset if he recognises the commercial intent. … Therefore, the trader also bears the secondary burden of proof in

the context of Sec. 5a(6) of the Act for circumstances that speak against the relevance of the infringement of the identification requirement. …

99 The appeal on the law has not referred to the defendant's submission, ignored by the appeal court, on circumstances which speak against the relevance of the non-disclosure of the commercial intent of the commercial practice carried out for the benefit of the R. N. business. Instead, it argues unsuccessfully that this commercial intent does not need to be identified because it results directly from the circumstances.

100 Nor is the assumption of relevance precluded by the fact that the users of an Instagram profile generally know that not only editorial contributions appear on the pages of the influencers they follow, but that advertising is also carried out for the benefit of third parties. … Such knowledge does not affect the causal connection between the failure to identify a specific contribution as advertising in an individual case and the consumer's transactional decision.

101 – c) The assumption that the commercial practice for the benefit of the R. N. business is unfair pursuant to Sec. 5a(6) Act against Unfair Competition is consistent with the provisions of Sec. 6(1) No. 1 Trade Mark Act, Sec. 58(1) first sentence 1 Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty, since this practice also infringes these provisions. In the case at issue, it is therefore irrelevant that a commercial practice for the benefit of another's business which fulfils the requirements of Sec. 5a(6) Act against Unfair Competition is not to be regarded as unfair if it meets the requirements of these provisions because they are special provisions that take precedence (cf. in this respect decision of the Federal Supreme Court, 9 September 2021 – I ZR 125/20, paras. 58 to 61 and 71 – *Influencer II*).

102 – aa) The commercial practice for the benefit of the R. N. business violates Sec. 6(1) No. 1 Telemedia Act.

103 – (1) Pursuant to Sec. 6(1) No. 1 Telemedia Act, service providers must ensure that commercial communications that are telemedia or parts of telemedia must be clearly identifiable as such. …

107 … [T]he defendant is also a service provider, as she operates an independent profile on the social media platform Instagram.

108 – (4) The defendant's Instagram post is a commercial communication. …

110 According to both the old and the new version of Sec. 2 first sentence No. 5b) Telemedia Act, there is only a commercial communication for the benefit of a third-party business if a financial return is provided for it. The defendant received such financial return with regard to the Instagram post for the benefit of the R. N. business.

111 – (5) The commercial communication was not clearly recognisable as such. In this respect, the same applies as with regard to the sufficient identification or direct recognisability of the commercial intent pursuant to Sec. 5a(6) Act against Unfair Competition (see paras. 79 to 92 above).

112 – bb) The commercial practice for the benefit of the R. N. business also violates Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence 1 of the Interstate Media Treaty of 14 September 2020 (Lower Saxony Official Gazette p. 289), which replaced the Interstate Broadcasting Treaty with effect from 7 November 2020 after the appeal decision was handed down.

113 – (1) Pursuant to Sec. 58(1) first sentence 1 Interstate Broadcasting Treaty, advertising must be clearly recognisable as such and distinctly separate from the other parts of the offers provided. This provision corresponds to that in Sec. 22(1) first sentence Interstate Media Treaty. Both provisions are applicable to advertising in telemedia,. … …

115 – (3) The Instagram post for the benefit of the R. N. business contains advertising.

116 Pursuant to Sec. 2(2) No. 7 Interstate Broadcasting Treat, advertising is any statement made in the exercise of a trade, business, craft or profession which is broadcast on the radio by a public or private broadcaster or by a natural person, either in return for payment or for similar consideration or as self-promotion, with the aim of promoting the sale of goods or the provision of services, including immovable property, rights and obligations, in return for payment.

117 This definition is also to be applied to the concept of advertising in telemedia pursuant to Sec. 58(1) of the Treaty. …

118 Accordingly, the term advertising is now also defined in Sec. 2(2) No. 7 Interstate Media Treaty as any form of announcement that serves to directly or indirectly promote the sale of goods and services, including immovable property, rights and obligations, or the appearance of natural or legal persons engaged in an economic activity, and in return for remuneration or a similar consideration, or as self-promotion, and is recorded on the radio or a telemedia channel.

119 The Instagram post fulfils these requirements, as it served to promote the sale of the goods of the R. N. business and the defendant received a financial return for it.

120 – (4) The advertising was not clearly recognisable as such. In this respect, the same applies as with regard to the sufficient identification or direct recognisability of the commercial intent pursuant to Sec. 5a(6) Act against Unfair Competition (see paras. 79 to 92 above).

121 – d) The prohibition based on a violation of Sec. 5a(6) Act against Unfair Competition does not violate any of the defendant’s fundamental rights under Art. 5(1) Basic Law.

122 – aa) The defendant’s freedom of expression under Art. 5(1) first sentence Basic Law is not violated. …

125 In the overall assessment to be undertaken, in addition to the defendant’s interest based on fundamental rights, the general public’s interest in undistorted competition must be taken into account, to which the labelling obligation of Sec.

5a(6) Act against Unfair Competition, which serves consumer protection, also contributes. If the protective purpose of the functioning of performance-based competition under unfair competition law … is affected and, at the same time, it is established that the duty to label does not regulate the content of the expression of opinion, but only concerns the manner of its presentation …, the encroachment on fundamental rights inherent in the prohibition proves to be proportionate and therefore justified.

126 – bb) To the extent that contributions by influencers in social media fall within Art. 5(1) second sentence Basic Law (see para. 62 above), a question that need not be resolved here, this encroachment on fundamental rights also proves to be proportionate and therefore justified in the light of the overall circumstances, in particular in view of the fact that Sec. 5a(6) Act against Unfair Competition does not regulate the content of editorial reporting, but instead guarantees a transparency requirement related to advertising and serving consumer protection.

127 – e) With regard to the defendant's commercial practice contained in the contested Instagram presence and carried out for the benefit of her own business, a violation of Sec. 5a (6) Act against Unfair Competition cannot be assumed without this having an effect on the final result.

128 – aa) The appeal court did not make sufficient findings as to whether the defendant's commercial practice for the benefit of her own business, in the context of which the Instagram posts were published, was unfair under Sec. 5a(6) Act against Unfair Competition. It merely assumed that the commercial intent of the third-party advertising had not been made sufficiently clear. It thus did not make any findings as to whether the relevant public could recognise that the defendants Instagram posts (also) served the purpose of self-promotion, i.e. pursued the commercial intent of promoting the defendant's business, on the one hand by increasing sales of fitness courses, personal training and goods via the website and, on the other hand, by strengthening the defendant's image, which was intended to lead to an increase in her advertising value.

129 Furthermore, there is a lack of findings as to whether the non-disclosure of these commercial intents is capable of inducing consumers to make a transactional decision.

130 – bb) However, this does not have an effect on the final result because the claim for injunctive relief asserted is already well-founded with regard to the defendant's commercial practice for the benefit of the R. N. business.

…

B. Influencer II

Decision of the Federal Supreme Court of Germany (Bundesgerichtshof); 9 September 2021 – Case No. I ZR 125/20 (IIC 2022, 667)

1. The provisions of Sec. 6(1) No. 1 Telemedia Act for commercial communication in telemedia, and Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty for advertising in telemedia, are sector-specific provisions concerning market conduct in telemedia. The media law value decisions expressed in these special provisions must not be undermined by the application of the unfair competition law general provision of Sec. 5a(6) Act against Unfair Competition (continuation of decision of the Federal Supreme Court, 24 March 2016 – I ZR 7/15, GRUR 2016, 1068 para. 20 = WRP 2016, 1219 – *Textilkennzeichnung*).

2. The criterion of financial return provided for in Sec. 6(1) No. 1 Telemedia Act for commercial communication in telemedia and in Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty for advertising in telemedia only applies to promotional practices for the benefit of third parties, but not to self-promotion.

Facts:

1 The plaintiff is a registered association for combating unfair competition. Its statutory tasks include the protection of its members' commercial interests. The defendant is active as a so-called "influencer" on Instagram and maintains an account under the name "ohhcouture", which is used by her predominantly commercially and was subscribed to by 1.7 million registered users of this internet platform in May 2018. The defendant regularly publishes on it pictures of herself with short accompanying texts on the topics of beauty, fashion, lifestyle and travel.

2 The defendant's posts are accompanied by references to the manufacturers of the clothes worn in the image or other objects depicted. Some of these are "tagged", i.e. the defendant has linked her published image to the Instagram user profiles of companies or brands by placing so-called "tap tags". Clicking on the image causes the manufacturer's name to appear on the relevant dress, accessory, etc. displayed. Clicking on the name of the business redirects the user to the manufacturer's Instagram account. From there, another click leads to its website. There was no indication that these "tap tags" were advertising.

3 The plaintiff considers this to be unlawful surreptitious advertising. It requested that the defendant be ordered to cease and desist from presenting commercial content in the course of business in social media, for example in the social medium "Instagram", depicting a person (designation "ohhcouture"), without making the commercial intent of the

publication clear, unless it is immediately apparent from the circumstances, this being done by publishing posts as follows:

- with the image of a person (e.g. under the name "ohhcouture") = 1st view,
- after calling up the 1st view by clicking on the display of the name of one or more businesses (or brands) on the same page = 2nd view

  and
- by a further click on the displayed name(s) of the business(es) (or brands) whose name(s) are displayed in the image in the 2nd view, forwarding to the account of the business(es) in question = 3rd view,

without identifying the 1st or 2nd view as a commercial publication, in each case provided this is done as reproduced by Collection of Exhibits K 3. …

6 The Regional Court upheld the action (Hamburg Regional Court, decision of 28 March 2019 403 HKO 127/18, juris). On the appeal by the defendant, the appeal court dismissed the action (Hamburg Superior Regional Court, K&R 2020, 630). In its appeal, leave to file which was granted by the appeal court and dismissal of which is requested by the defendant, the plaintiff seeks the restoration of the Regional Court decision.

Findings:

9 – B. The plaintiff's appeal … is unsuccessful. There is no need to determine whether the action is admissible in its entirety (see B I). In any event, the plaintiff is not entitled to the injunctive relief asserted in the action and the claim for reimbursement of the warning costs as against the defendant (see B II).

18 – II. The denial of the asserted claim for injunctive relief pursuant to Sec. 8(1) first sentence, Sec. 3(1) Act against Unfair Competition and consequently also of the claim for reimbursement of an all-in amount for warning costs withstands review on appeal on the law. Admittedly, it must be assumed that the defendant has engaged in business practices that can be examined under unfair competition law pursuant to Sec. 3(1) of the Act (see B II 1). However, in its result, the appeal court rightly held that there was no unfairness in the form of a violation of Sec. 5a(6) of the Act (see B II 2) nor pursuant to Sec. 3a of the Act in conjunction with Sec. 6(1) No. 1 Telemedia Act and Sec. 58(1) first sentence Interstate Broadcasting Treaty (see B II 3), or illegality pursuant to Sec. 3(3) Act against Unfair Competition in connection with No. 11 of the Annex to that section (see B II 4).

19 – 1. It must be assumed that the publication of the Instagram posts at issue took place in the context of the defendant's business practices within the meaning of Sec. 2(1) No. 1 Act against Unfair Competition.

20 – a) Pursuant to Sec. 2(1) No. 1, a commercial practice is any conduct by a person for the benefit of that person's or a third party's business before, during or after the conclusion of a business transaction, which

conduct is objectively connected with promoting the sale or the procurement of goods or services or with the conclusion or performance of a contract concerning goods or services.

21 – b) The appeal court assumed that the posts at issue and the "tap tags" they contained were business practices, since the defendant had promoted both the sale of goods or services of the advertised businesses and her own business. The appeal on the law accepts this as being in its favour.

22 – 2. The appeal court assumed, to which no objection can be raised on appeal on the law, that the defendant did not violate Sec. 5a(6) Act against Unfair Competition by publishing the posts in the context of a commercial practice to promote her own business (see B II 2 a and b). It is not necessary to determine whether the appeal's objection is to be upheld that a violation of Sec. 5a(6) Act against Unfair Competition by the business practices to promote the third parties' businesses cannot be denied on the basis of the reasoning given by the appeal court; unfairness pursuant to Sec. 5a(6) Act against Unfair Competition is ruled out in this respect in any case because this practice does not prove to be unfair under the special provisions that apply to commercial communication or advertising in telemedia (see B II 2 c).

23 – a) Pursuant to Sec. 5a(6) Act against Unfair Competition, a person acts unfairly if he fails to disclose the commercial intent of a commercial practice, unless this intent is directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer to take a transactional decision which he would not have taken otherwise. The provision is intended to extend the prohibition of surreptitious advertising under media law to all forms of advertising (on Sec. 4 No. 3 Act against Unfair Competition, old version, cf. decision of the Federal Supreme Court, 31 October 2012 – I ZR 205/11, GRUR 2013, 644 para. 15 = WRP 2013, 764 – *Preisrätselgewinnauslobung V*; Justification of the Government Bill for an Act against Unfair Competition, BT-Drucks. 15/1487, p. 17). It thus aims to protect consumers from being deceived about the commercial background of commercial practices. In this respect, it also serves to implement Art. 7(2) of Directive 2005/29/EC …, according to which it is considered a misleading omission if a trader fails to identify the commercial intent of the commercial practice, unless this is directly apparent from the circumstances, and this causes or is likely to cause an average consumer to take a transactional decision that he would not have taken otherwise. The basis of the prohibition is the misleading effect on the reader who, due to the editorial character of the article, is less critical of it and attaches greater importance and attention to it (see decisions of the Federal Supreme Court, 29 March 1974, GRUR 1975, 75, 77 [juris para. 17] – *Wirtschaftsanzeigen-public-relations*; 18 February 1993, GRUR 1993, 561, 562 [juris para. 14] = WRP 1993, 476 – *Produktinformation I*; 6 July 1995 – I ZR 58/93, BGHZ 130, 205, 214 et seq. [juris para. 53] – *Feuer, Eis & Dynamit I*; GRUR 2013, 644 para. 16 – *Preisrätselgewinnauslobung V*; …).

24 – b) No objection can be raised in the appeal on the law to the finding that there has been no infringement of Sec. 5a(6) Act against Unfair Competition through the publication of the posts as part of a commercial practice to promote the defendant's own business.

25 – aa) This commercial practice had the commercial intent of promoting the defendant's own business.

26 – (1) Just as with regard to the existence of a commercial practice, there is no presumption with regard to the commercial intent which would have to be rebutted by the defendant. … Rather, the entire circumstances of the individual case must be assessed.

27 – (2) There is disagreement as to how "commercial intent" within the meaning of Sec. 5a(6) Act against Unfair Competition is to be determined. …

30 – (3) This question does not need to be decided, as the above-mentioned views do not come to different results in practical application. … Even if the commercial intent was based on the entrepreneur's subjective motivation, in practice this can nevertheless as a rule only be determined on the basis of objective evidence. … In this respect, the same would therefore apply as in the assessment of the question whether a use of editorial content financed by the entrepreneur pursuant to No. 11 of the Annex to Sec. 3(3) Act against Unfair Competition is "for the purpose of sales promotion". A use "for the purpose of sales promotion" within the meaning of this provision is to be assumed if an entrepreneur has the intention to promote the sale of his goods or services through the editorial content. In turn, such an intention is always to be assumed if the contribution objectively contains an advertisement. … 31 – (4) In the case at issue, too, the existence of the commercial intent of promoting one's own business therefore follows from the existence of a corresponding commercial practice.

32 – bb) As the appeal court found, the defendant did not identify the commercial intent of the Instagram posts.

33 – cc) However, the identification of the commercial intent of promoting her own business was dispensable.

34 – (1) An identification of the commercial intent is not necessary if the external appearance of the commercial practice is designed in such a way that consumers can clearly and unambiguously recognise the commercial intent at first glance (see decisions of the Federal Supreme Court, GRUR 2012, 184 para. 18 – *Branchenbuch Berg*; GRUR 2013, 644 para. 15 – *Preisrätselgewinnauslobung V*; …). Pursuant to Sec. 3(4) first sentence Act against Unfair Competition, the question of how the advertising is understood must be based on the view of the averagely informed, situationally adequately attentive and reasonable consumer who is a member of the target group. …

35 When assessing whether consumers can clearly and unambiguously recognise the commercial intent of an Instagram post, the decisive factor is not whether the average user only recognises its advertising effect after

analysing the post. This indeed does not preclude the user from first paying closer attention to the post because he is under the mistaken assumption that it is a non-commercial statement. In this context, it is not sufficient that the public recognises, for example, an extremely positive description of a product. Rather, it must immediately and unequivocally recognise that this description serves to advertise the product (see decision of the Federal Supreme Court, GRUR 2013, 644 para. 21 – *Preisrätselgewinnauslobung V*; …).

36 It is therefore not sufficient if the advertising character of a post only becomes apparent to the consumer after he has already taken notice of it, because then he has already succumbed to the luring effect which the identification requirement is intended to prevent, and has been exposed to the advertising message unprepared. … The purpose of identification is precisely to give the consumer the opportunity to adjust to the commercial nature of the practice so that he can critically assess it from the outset or avoid it altogether. … It is therefore not contradictory that identification may also be required for Instagram posts whose promotional excess is only recognisable after studying the entire post. …

37 – (2) It was also from these principles that the appeal court proceeded. It assumed that the defendant's Instagram account was a verified account due to the blue tick at the beginning, which Instagram only granted to persons with a certain public profile or a certain number of followers. This "status symbol" on the social media platform suggests an account that is very much dedicated to image cultivation and is operated for purely commercial reasons. Furthermore, the profile showed that the defendant had 1.7 million followers. It could also be inferred from the contested posts that 60,693 persons, 45,269 persons and 64,740 persons respectively had "liked" them. It was therefore impossible for individual consumers to assume, in view of these numbers of followers or visitors, that they were the defendant's private friends. Every consumer was immediately aware that this was a public appearance by the defendant. It was thus clear to every user that the defendant was not posting in order to inform her friends about her activities and to exchange information with them, but that the reason for doing so was commercial. Instagram accounts were primarily accessed by consumers who used this medium more or less regularly and were therefore informed that social media included not only private accounts but often also accounts that were used commercially. If individuals intended to maintain a purely private exchange with friends, they would not make their Instagram account accessible to the public, but only to a limited number of trusted persons.

38 Participation on Instagram is only possible after prior registration, so that it is a closed circle of users. Anyone who registers here is aware of the special features and the rules of this medium. At the latest when the user notices that the defendant provides the contested links to the businesses of the clothing worn by her on her website, it would become abundantly clear that the account was a commercial one. The defendant used an account name that differed significantly from her real name. Instagram users therefore either found the defendant's account by chance

or searched for it specifically because they knew the account name. This was also only possible for people who were familiar with the way Instagram worked. The posts in dispute showed the defendant in Munich and twice in Dubai, each time in different clothes and with different accessories. They were not "snapshots" but obviously well-arranged presentations that were also of high photographic quality.

39 Influencer marketing has developed into a respectable form of marketing in recent years. It was sometimes referred to as the most important digital marketing trend of all. In 2017 alone, a budget of over €560 million was invested in this sector. The reasons for Instagram's popularity are the wide age range of its users, and above all its global reach and ease of use. The number of users is over 500 million worldwide. Of these, 18 million are in Germany alone. These figures alone make it clear that the people who make their Instagram accounts public are usually people who are pursuing a commercial intent. This was also known to the target public. It was also in this context that the defendant described herself as a so-called "influencer", which are usually well-known and popular individuals who are paid to be depicted with a certain product.

40 The representation with which the defendant tried to give her posts a personal and private touch did not in itself prevent the commercial intent being clear. That commercial interests were dressed up in ostensibly private matters was clear in the defendant's posts and appeared as a marketing measure that did not remain concealed from consumers and of which they were also aware. This mixture was also used elsewhere to promote sales. In magazines, well-known persons are regularly portrayed as role models for a particular look, with the relevant manufacturers of the outfits being named. "Fashion bloggers" are mentioned by name and given the opportunity to present fashion and accessories over several pages, again naming the manufacturers. Journalists present their personal fashion favourites in magazines, naming the manufacturers or retailers. The only difference to the defendant's posts was that in a paper medium it is not possible to place a link directly to manufacturers. Otherwise, however, there was no difference in the presentation of the pages and the way they addressed consumers. All this showed that consumers were aware that a presentation of personal recommendations that looked private was nevertheless advertising or could at least be advertising.

41 This was not altered by the fact that consideration had to be taken of the safety of young users, some of whom were still minors, in the case of some accounts. The defendant was obviously not addressing a young audience, or at least the plaintiff, who was subject to the burden of proof, had not submitted anything to this effect with regard to the defendant. The defendant herself was 32 years old and thus hardly a role model for young adolescents in terms of age. In the contested posts, she presented herself with high-quality clothing and other luxury items in a price segment that young people were hardly likely to afford. Both the Kempinski Hotel Munich and fashion brands such as Chasing Unicorns and

Rejina Pyo appeal to female customers who value exclusivity and sophistication. As a rule, this does not appeal to young people.

42 Finally, the fact that the plaintiff's legal disputes with various female influencers had attracted a great deal of media attention in Germany could not be ignored. As a result, the commercial intent of the Instagram accounts of female influencers had become additionally or even more widely known, so that by now at the latest there could no longer be any doubt, even for the average consumer who was (only) averagely informed and situationally adequately attentive, that these accounts were operated for commercial intents. The same applied to the questions, also discussed in daily newspapers, surrounding the Federal Ministry of Justice and Consumer Protection's proposed regulation on the distinction between non-commercial communication for information and opinion-forming, and commercial practices.

43 No objection can be raised to this in the appeal on the law.

44 – (3) The determination of the public's perception is only subject to a limited review in the appeal on a point of law, namely as to whether the appeal court exhausted the factual material without procedural error and whether the assessment is in line with the laws of logic and the general principles of experience. … The appeal on the law does not indicate any corresponding errors of law. Almost throughout, it only argues that this reasoning cannot be used to reject the requirement to separately identify advertising for third-party businesses.

45 It is only in the context of its objection that it cannot be assumed that every newcomer who registers on Instagram for the first time is already familiar with the practices of this medium and that it was not true that the defendant did not from the outset address a young audience with her posts, that the appeal on the law is not directed solely at the appeal court's failure to hold that the third-party advertising required identification. However, these objections of the appeal are unsuccessful, since according to Sec. 3(4) first sentence Act against Unfair Competition it is the view of the averagely informed, situationally adequately attentive and reasonable consumer who is a member of the target public, that is to be taken into account. This is not a newcomer. The view of an average member of a clearly identifiable group of consumers who, due to mental or physical impairments, age or credulity, are particularly in need of protection with regard to these commercial practices or the goods or services on which they are based, in particular children and adolescents, is not to be taken into account pursuant to Sec. 3(4), second sentence, Act against Unfair Competition even if they might also be influenced by the commercial practice in question, but only if the commercial conduct of this consumer group alone is likely and foreseeably to be significantly influenced (see decisions of the Federal Supreme Court, 12 December 2013 – I ZR 192/12, GRUR 2014, 686 paras. 13 to 17 – *Goldbärenbarren*; 24 July 2014 – I ZR 221/12, GRUR 2014, 1013(3)3 = WRP 2014, 1184 – *Original Bach-Blüten*). The appeal court did not establish that this requirement was met in the case at issue, nor does the appeal

argue that the appeal court ignored the plaintiff's submission to this effect.

46 – c) It is not necessary to determine whether the appeal on the law can succeed with its objection that a violation of Sec. 5a(6) Act against Unfair Competition by the business practices to promote the third-party businesses cannot be denied on the basis of the grounds given by the appeal court. Even if, as can be assumed to the benefit of the appeal, the requirements of Sec. 5a(6) are met with regard to business practices for the benefit of third-party businesses, these business practices cannot be deemed unfair in the case at issue, because these practices in any event satisfy the overriding special provisions of Sec. 6(1) No. 1 Telemedia Act for commercial communication in telemedia and Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty for advertising in telemedia.

47 – aa) The contested practices satisfy the requirements of Sec. 6(1) No. 1 Telemedia Act for advertising in telemedia.

48 – (1) Pursuant to Sec. 6(1) No. 1 Telemedia Act, in the case of commercial communications that are telemedia or parts of telemedia, service providers must ensure that the commercial communications must be clearly recognisable as such.

49 – (2) The defendant's Instagram posts are parts of her Instagram profile, which is a telemedium, namely an electronic information and communication service within the meaning of Sec. 1(1) first sentence Telemedia Act.

50 – (3) The defendant is a service provider within the meaning of Sec. 2 first sentence No. 1 Telemedia Act.

51 Pursuant to Sec. 2 first sentence No. 1 Telemedia Act, … a service provider is anyone who provides his own or others' telemedia for use or provides access to use. The term service provider is to be defined functionally. He must enable the dissemination or storage of information through his instructions or his power over computers and communication channels and must appear to the outside world as the provider of services (see decision of the Federal Supreme Court, 15 October 2020 – I ZR 13/19, GRUR 2021, 63 para. 16 = WRP 2021, 56 – *Stoererhaftung des Registrars*). In addition to the owner of a website, in the case of internet portals such as social media in particular, where users maintain subpages with a communication-related autonomy, these users are therefore also service providers. …

52 According to this criterion, the defendant is also a service provider, as she operates an independent profile on the social media platform Instagram.

53 – (4) However, the defendant's Instagram posts do not constitute commercial communications within the meaning of Sec. 6(1) No. 1 Telemedia Act, with the consequence that the defendant's contested commercial practice for the benefit of third-party businesses does not violate this provision.

54 Pursuant to Sec. 2 first sentence No. 5 of the German Telemedia Act, a commercial communication is any form of communication which serves the direct or indirect promotion of the sale of goods, services or the image of a business, another organisation or natural person who works in a trade, commerce or crafts or a profession service. According to Sec. 2 first sentence No. 5b of the Act, the transmission of details referring to goods and services or the image of a business, an organisation or a person which are made independently and in particular with no financial return does not represent a commercial communication. According to an addition to Sec. 2 first sentence No. 5b of the Act by the Act Amending the Telemedia Act and Other Acts of 19 November 2020, this also includes such details made independently and in particular with no financial return or other benefits by natural persons that enable a direct connection to a user account of further natural persons with service providers.

55 According to both the old and the new version of Sec. 2 first sentence No. 5b Telemedia Act, there is only a commercial communication for the benefit of a third-party business if a financial return is provided for it. However, the defendant did not receive any financial return for her Instagram posts.

56 – bb) The provision of Sec. 6(1) No. 1 Telemedia Act as a special provision takes precedence over Sec. 5a(6) Act against Unfair Competition, so it cannot be assumed that there has been a violation of Sec. 5a(6) in the case at issue. …

59 It is recognised in the judicial practice of the Federal Supreme Court that sector-specific provisions may limit the scope of application of general provisions of fair trading law. …

60 Section 6(1) No. 1 Telemedia Act constitutes such a sector-specific special provision and lays down the requirements for the recognisability of commercial communication in the field of telemedia. Because this provision is a market conduct regulation that has effect under unfair competition law via the actus reus of Sec. 3a Act against Unfair Competition …, the special media law value judgements expressed in the sector-specific provision of Sec. 6(1) No. 1 Telemedia Act must not be undermined by the application of the general provision of Sec. 5a(6) Act against Unfair Competition.

61 This is not in conflict with the provision of Sec. 6(5) Telemedia Act, according to which the provisions of the Act against Unfair Competition remain unaffected. On the one hand, it follows from Sec. 6(5) Telemedia Act that conduct in breach of Sec. 6(1) No. 1 Telemedia Act may also be prohibited under the provisions of the Unfair Competition Act (e.g. Secs. 3a and 5a(6)). On the other hand, Sec. 6(5) Telemedia Act clarifies that commercial communication properly identified under Sec. 6(1) to 4 Telemedia Act may well be prohibited under aspects of unfair competition law other than the recognisability of commercial communication (e.g. as misleading within the meaning of Sec. 5 Act against Unfair Competition).

…

62 – cc) The contested conduct also satisfies the requirements of Sec. 58.1 first sentence Interstate Broadcasting Treaty and Sec. 22.1 first sentence Interstate Media Treaty for advertising in telemedia.

63 – (1) Pursuant to Sec. 58(1) first sentence 1 Interstate Broadcasting Treaty, advertising must be clearly recognisable as such and distinctly separate from the other parts of the offers provided. This provision corresponds to that in Sec. 22(1) first sentence Interstate Media Treaty. Both provisions are applicable to advertising in telemedia, both being contained in Section VI of the Interstate Broadcasting Treaty and Subsection 2 of the Interstate Media Treaty, respectively, each of which is entitled "Telemedia".

64 – (2) The Instagram posts for the benefit of the third-party businesses do not constitute advertising.

65 Pursuant to Sec. 2(2) No. 7 Interstate Broadcasting Treat, advertising is any statement made in the exercise of a trade, business, craft or profession which is broadcast on the radio by a public or private broadcaster or by a natural person, either in return for payment or for similar consideration or as self-promotion, with the aim of promoting the sale of goods or the provision of services, including immovable property, rights and obligations, in return for payment.

66 This definition is also to be applied to the concept of advertising in telemedia pursuant to Sec. 58(1) of the Treaty. The fact that Sec. 2(2) No. 7, according to its wording, only covers advertising "in broadcasting", is a systematic weakness. …

67 Accordingly, the term advertising is now also defined in Sec. 2(2) No. 7 Interstate Media Treaty as any form of announcement that serves to directly or indirectly promote the sale of goods and services, including immovable property, rights and obligations, or the appearance of natural or legal persons engaged in an economic activity, and in return for remuneration or a similar consideration, or as self-promotion, and is recorded on the radio or a telemedia channel.

68 Since the defendant did not receive any financial return for the contested Instagram posts, they do not constitute advertising in the aforementioned sense and are not subject to the requirement of recognisability pursuant to Sec. 58(1) first sentence Interstate Broadcasting Treaty or Sec. 22(1) first sentence Interstate Media Treaty.

69 – (3) The application of other provisions of the Interstate Broadcasting Treaty or the Interstate Media Treaty regulating advertising or sponsorship is excluded in the case at issue. …

70 – dd) The provisions of Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty also take precedence over Sec. 5a(6) Act against Unfair Competition as special provisions, so that the assumption of an infringement of Sec. 5a(6) is to be ruled out in the case at issue.

71 The provisions of Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty also regulate

the requirements for the recognisability of advertising in telemedia sector specifically. Since these provisions are also market conduct regulations within the meaning of Sec. 3a Act against Unfair Competition …, the specific media law values they express may not be undermined by the application of the general provision under unfair competition law of Sec. 5a(6) Act against Unfair Competition. …

72 – 3. The appeal court also rightly assumed that the plaintiff was not entitled to injunctive relief on the grounds of unfairness under Sec. 3a Act against Unfair Competition in conjunction with Sec. 6(1) No. 1 Telemedia Act or Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty.

73 – a) With regard to the commercial practices to promote the third-party businesses, there is, for the reasons stated, no commercial communication within the meaning of Sec. 2(1) No. 5 Telemedia Act (see paras. 53 to 55 above) and no advertising within the meaning of Section 2(2) No. 7 Interstate Broadcasting Treaty and Sec. 2(2) No. 7 Interstate Media Treaty (see paras. 64 to 68 above).

74 – b) Nor, with regard to the publication of the Instagram posts in the context of a commercial practice to promote the defendant's own business, has there been an infringement of Sec. 6(1) No. 1 Telemedia Act or Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty.

75 – aa) However, a violation of Sec. 6(1) No. 1 Telemedia Act or Sec. 58.1 first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty is not excluded on the grounds that there has been no financial return in the case at issue. The aforementioned provisions do not require the granting of a financial return in the case of self-promotion.

76 – (1) The exemption under Sec. 2 first sentence No. 5b Telemedia Act, which serves to implement Art. 2f second indent of Directive 2000/31/EC, according to which statements relating to goods, services or image of the company, organisation or person compiled in an independent manner and in particular when there is no financial consideration, do not as such constitute a form of commercial communication, only refers to commercial communication for the benefit of third parties.

Statements relating to goods or services which serve to promote an entrepreneur's own business are generally made by the entrepreneur "in an independent manner" and without receiving financial consideration from anyone. It does not correspond to the sense and purpose of the provision to exclude large parts of commercial communication from the scope of application of the Telemedia Act or Directive 2000/31/EC. The exemption therefore only covers cases in which commercial communication is carried out by independent third parties for the benefit of other businesses, for example, through the activities of private individuals who offer information on certain topics or types of goods on the internet, or through product test reports by independent institutes. …

77 – (2) Section 2(2) No. 7 Interstate Broadcasting Treaty and Section 2(2) No. 7 Interstate Media Treaty do not require a fee or similar consideration to be paid for self-promotion.

78 – bb) However, the assumption of an infringement is ruled out because the commercial communication pursuant to Sec. 6(1) No. 1 Telemedia Act as well as advertising pursuant to Sec. 58(1) first sentence Interstate Broadcasting Treaty and Sec. 22(1) first sentence Interstate Media Treaty is clearly recognisable as such.

79 The appeal on the law unsuccessfully argues that since the defendant also promotes the sale of her own (advertising) services, the contributions at issue constitute commercial communications or advertising within the meaning of these provisions and that the defendant must fully disclose the commercial intents she pursues within the framework of her commercial communication or advertising by means of appropriate notices. In this context, too, the appeal on the law fails to show that the appeal court's finding that a separate identification was not necessary because this commercial intent was directly apparent from the circumstances was erroneous.

80 – 4. Finally, the appeal court rightly held that the plaintiff was not entitled to injunctive relief on the grounds that the defendant's commercial practices were unlawful under Art. 3(3) Act against Unfair Competition in conjunction with No. 11 of the Annex to Art. 3(3).

81 – a) Number 11 of the Annex to Sec. 3(3) presupposes using editorial content for the purpose of sales promotion where the entrepreneur has paid for this promotion, without such connection being clearly identifiable from the content or by images or sounds.

82 – b) These conditions are not satisfied in the case at issue, if only because the defendant's contested Instagram posts have not been financed by third parties.