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Starting an E-Commerce Business in Austria

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**Bachelor's Programme in International Legal Studies
Preparatory Materials for Admissions Procedure 2021**



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Disclaimer:

These materials are intended for admission candidates who have applied to the *BA International Legal Studies* programme. The information provided in these materials has been simplified for didactic purposes and is not sufficiently detailed or complete to be used as the basis of any kind of business or legal decision. Neither the University of Vienna nor the author can accept any liability whatsoever for any damage that may be caused to any party relying on the information. A party wishing to start an e-commerce business is strongly advised to seek professional legal advice and to consult official sources, such as the [USP portal](#) set up by the Austrian government with the support of the European Commission, or the online information provided by the [Austrian Chamber of Commerce](#) (in German).

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Note that these boxes indicate where in the curriculum a particular subject matter will be addressed.

‘CM’ stands for ‘Compulsory Module’, and the numbers refer to the numbers of the relevant modules in either the BA curriculum or the MA curriculum.

You find an overview of both curricula on the inner side of the back cover.

These materials are intended for admission candidates who have applied to the *BA International Legal Studies* programme and are required to answer knowledge questions based on these materials in the 2021 entrance examination. Their aim is to give candidates an idea of the typical legal issues that may arise in an everyday situation, such as the starting of a new e-commerce business by two individuals.

Candidates are expected to study and understand the content in order to be able to answer multiple-choice questions, but not to learn details (such as the §§ numbers in a legal instrument or a list of requirements) by heart. Hyperlinked documents (such as the full text of legal instruments provided by [RIS](#) or [eurlex](#)) are not an integral part of these materials and candidates are not expected to study the hyperlinked documents and know their content.

List of Abbreviations

ABGB	Allgemeines bürgerliches Gesetzbuch (Austrian General Civil Code)
ADR	Alternative Dispute Resolution
AG	Aktiengesellschaft (Public Limited Company)
AI	Artificial Intelligence
AMD-G	Audiovisuelle-Mediendienste-Gesetz (Audiovisual Media Services Act)
AMS	Arbeitsmarktservice (Public Employment Service Austria)
ArbVG	Arbeitsverfassungsgesetz (Labour Constitution Act)
AStG	Alternative-Streitbeilegung-Gesetz (Alternative Dispute Resolution Act)
ASVG	Allgemeines Sozialversicherungsgesetz (General Social Insurance Act)
AsylG	Asylgesetz (Asylum Act)
AuslBG	Ausländerbeschäftigungsgesetz (Employment of Foreign Nationals Act)
B2B	business to business
B2C	business to consumer
BG	Bezirksgericht (district court)
B-VG	Bundes-Verfassungsgesetz (Federal Constitutional Law)
BGStG	Bundes-Behindertengleichstellungsgesetz (Disability Equality Act)
C2C	consumer to consumer
c.f.	confer/conferatur (compare)
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COE	Council of Europe
DE	German
DSM	digital single market
DLG	Dienstleistungsgesetz (Services Act)
DTA	double taxation agreements
DSG	Datenschutzgesetz (Data Protection Act)
ECG	E-Commerce-Gesetz (E-Commerce Act)
E-Commerce	electronic commerce
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EEA	European Economic Area
EFTA	European Free Trade Agreement
e.g.	exempli gratia (for example)
EN	English
Est	Einkommensteuer (personal income tax)
e.U.	eingetragener Unternehmer (registered sole proprietor)
EU	European Union
EUIPO	EU Intellectual Property Office
FAGG	Fern- und Auswärtsgeschäftegesetz (Distance and Off-Premises Contracts Act)
FPG	Fremdenpolizeigesetz (Aliens Police Act)
GAFAM	Acronym for the big five tech companies (Google, Apple, Facebook, Amazon, and Microsoft)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDPR	General Data Protection Regulation
GesbR	Gesellschaft bürgerlichen Rechts (Civil law partnership)
GewO	Gewerbeordnung (Austrian Trade Act)
GISA	Gewerbeinformationssystem Austria (Austrian Business Licence Information System)
GIBG	Gleichbehandlungsgesetz (Equal Treatment Act)
GmbH	Gesellschaft mit beschränkter Haftung (private limited company)
GSVG	Gewerbliches Sozialversicherungsgesetz (Social Insurance Act for Trade and Industry)
ICJ	International Court of Justice
i.e.	id est (that is)
IOSS	Import One-Stop Shop

IP	intellectual property
LG	Landesgericht (regional court)
KartG	Kartellgesetz 2005 (Cartel Act)
KESSt	Kapitalertragsteuer (capital gains tax)
KG	Kommanditgesellschaft (Limited Partnership)
KÖSt	Körperschaftsteuer (corporate income tax)
KSchG	Konsumentenschutzgesetz (Consumer Protection Act)
MedienG	Medien-Gesetz (Media Act)
MSchG	Markenschutzgesetz (Trademark Protection Act)
MSR	Market Surveillance Regulation
MFN	Most Favoured Nation Principle
NAG	Niederlassungs- und Aufenthaltsgesetz (Settlement and Residence Act)
NATO	North Atlantic Treaty Organization
ODR	Online Dispute Resolution
OECD	Organisation for Economic Co-operation and Development
OG	Offene Gesellschaft (General Partnership)
OGH	Oberster Gerichtshof (Supreme Court)
OLG	Oberlandesgericht (Higher Regional Court)
OSS	One-Stop Shop
P2B	platform to business
PHG	Produkthaftungsgesetz (Product Liability Act)
PrAG	Preisauszeichnungsgesetz (Price Indication Act)
RCS	reverse charge system
RIS	Rechtsinformationssystem (Legal Information System of the Republic of Austria)
RTR	Rundfunk und Telekom Regulierungs-GmbH (Regulatory Authority for Telecommunications and Broadcasting)
SCC	Standard Contractual Clauses
SCE	Societas Cooperativa Europaea
SE	Societas Europaea
StGB	Strafgesetzbuch (Criminal Code)
TCA	Trade and Cooperation Agreement between the EU and the UK
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TKG	Telekommunikationsgesetz (Telecommunications Act)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UGB	Unternehmensgesetzbuch (Commercial Code)
UID	Umsatzsteuer-Identifikationsnummer (VAT registration number)
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UrhG	Urheberrechtsgesetz (Copyright Act)
U.S.	United States of America
USP	Unternehmensserviceportal (Business Service Platform)
UWG	Gesetz gegen unlauteren Wettbewerb (Act Against Unfair Competition)
VAT	value added tax
VbVG	Verbandsverantwortlichkeitsgesetz (Corporate Criminal Liability Act)
VCLT	Vienna Convention on the Law of Treaties
VGG	Verbrauchergewährleistungsgesetz (Consumer Warranty Act)
VKI	Verein für Konsumenten Information (Consumer Information Association)
VStG	Verwaltungsstrafgesetz (Administrative Offence Act)
WettbG	Wettbewerbsgesetz (Competition Act)
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WKÖ	Wirtschaftskammer Österreich (Austrian Chamber of Commerce)
WTO	World Trade Organization

The Case

Selma and Sebastian made it – both successfully passed admissions and are now enrolled in the new BA programme ‘International Legal Studies’ at the University of Vienna. They are very excited about what they are going to learn over the coming years, and also about the vibrant international student community they are going to be part of and the wealth of opportunities that is lying ahead of them. There is just one little problem: They will have to move to Vienna, and Vienna is an expensive place.

So what they need is a business idea, ideally something digital as they are both IT-savvy. Other students purportedly started digital businesses in their student dorms and are now billionaires in Silicon Valley. Why not try the same? They are also inspired by their fellow student Zhang Xu from China, whose parents make their living by selling products to Europe via platforms such as Amazon or Alibaba, and by Matteo from Italy and John from the UK, who are making good money with similar businesses.

Selma and Sebastian are determined to give it a try. They want to start by selling some really ‘cool’ clothing and accessories to young people, such as T-shirts with quotes and pictures referring to current trends or political developments, focussing on local communities. ‘Make a Statement with your Stuff’ is to be their core marketing slogan, and they hope that, if pictures with some of their products go viral on social media, they will be able to reach really large communities.

They are wondering, however, whether there are any legal requirements or restrictions to consider in setting up their business ...

1. Where could legal requirements originate from?

Such requirements or restrictions might arise from a variety of sources, including domestic law, EU law, and international law.


1.1. Sources of the law in Austria

1.1.1. Austrian domestic law

Domestic law is law enacted by the Austrian national legislator. Austria being a **federal legal system**, there is law both at federal and at state level, but the law relevant for doing business in Austria and cross-border is almost exclusively federal law. The important policy decisions are taken by democratically elected legislative bodies. For federal law, this is the National Council (*Nationalrat*), in cooperation with the Federal Council (*Bundesrat*), a second Chamber consisting of state parliament representatives. Given that the Federal Government can usually count on a majority in the National Council and that the preparation of draft bills is often in the hands of Federal Ministries, it has considerable influence on law-making.

Constitutional law is law of a very special nature, as it is higher in rank than all other law and lays down the very foundations on which the whole State and its legal system are built. Federal constitutional law (*Bundesverfassungsrecht*), also referred to as **'the Constitution'**, is not one comprehensive document like in many other countries, but rather contained in a broad range of different legal instruments.

These include, above all, the 1920 Federal Constitutional Law as revised in 1929 (*Bundes-Verfassungsgesetz*, B-VG), and inter alia the 1867 Basic Law on the General Rights of Nationals (*Staatsgrundgesetz*), the 1947 National Socialism Prohibition Act (*Verbotsgesetz* 1947), the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria (*Staatsvertrag von Wien*) and the [European Convention on Human Rights](#). For law to be enacted as constitutional law, special procedures and majorities are required. The whole legal order must comply with the Constitution. The Constitutional Court (*Verfassungsgerichtshof*) is in charge of deciding whether or not a law is in conformity with the Constitution.



You will study constitutional law and the role of state institutions in BA CM 12 (Constitutional Law).

The history of constitutions and legal systems in general will be discussed in BA CM 3 (European and Global Legal History).

While only law enacted by the legislative bodies counts as **law in a formal sense** (*Gesetz im formellen Sinn*) it would be much too cumbersome if all law had to go through parliamentary procedures. This is why law passed by parliament often authorises the administration (at federal, state or lower levels) to determine the details by way of **administrative regulations** (*Verordnungen*). Such regulations also count as law in a broader sense. The legislator may also declare that instruments issued by other bodies have legislative effect, such as collective bargaining agreements.


In addition to law in the sense of general standards of conduct directed at any person fulfilling the requirements there are also legal sources that apply exclusively to the parties in an individual case, such as court judgments (*Gerichtsurteile*), administrative decisions (*Verwaltungsbescheide*), and contracts (*Verträge*). It is to be noted that **'case law'** generated by Austrian courts is not a recognised source of the law with effect beyond the individual case, e.g. a lower court is not strictly under an obligation to follow the rulings even by the Supreme Court if the lower court is convinced these rulings are incorrect (but in practice the lower court will normally follow the higher courts).

Austrian legal sources, including preparatory materials, can best be searched in the Legal Information System of the Republic of Austria (*Rechtsinformationssystem*, RIS). For some sources there is an English translation, but this is normally not kept up to date and therefore not reliable.

1.1.2. European Union law

Sources and scope of EU law

The European Union (EU) is a political and economic union of currently 27 Member States. Since the 2009 Lisbon Treaty, the most important sources of **primary EU law** (also referred to as ‘the Treaties’), i.e. the instruments setting out the distribution of powers and responsibilities between the EU and its Member States and between the EU institutions, are the [Treaty on European Union \(TEU\)](#) and the [Treaty on the Functioning of the European Union \(TFEU\)](#), accompanied by the [Charter of Fundamental Rights of the European Union \(CFREU\)](#). The Charter applies to activities by the European institutions and by national institutions when they implement EU law.



You will study EU law in BA CM 2 (Introduction to International Law) and CM 5 (European Law).

Law enacted by the competent EU institutions is referred to as **secondary EU law**. The most important types of such secondary law are

- **EU Regulations**, which take direct effect in the Member States, i.e. are directly binding on natural and legal persons and are directly applied by courts and authorities; and
- **EU Directives**, which are only addressed to the Member States and do not normally take direct effect, i.e. need to be implemented by national legislators, and courts and authorities will only apply the national implementing law.

Secondary law is made jointly by the three most central EU institutions, the European **Commission**, the European **Parliament** and the **Council** of the EU (not to be confused with either the European Council, which is the assembly of heads of government, or with the Council of Europe, which is a separate international organisation). All three institutions together are often simply referred to as ‘the European legislator’. Their exact roles are complex and not identical with the roles of institutions at national level. Very roughly speaking, the Commission is the executive power and ‘guardian of the treaties’. It takes the initiative by proposing draft new legislation (note that since recently also the Parliament has the right of initiative), but the legislative process itself is predominantly in the hands of the Parliament and of the Council.

EU legal sources (including preparatory materials) can easily be searched via the [Eurlex portal](#), which is available in all official languages of the EU.

A large part of EU secondary law applies also in the non-EU Member States of the **European Economic Area (EEA)**, which includes the EU Member States as well as Iceland, Liechtenstein and Norway. Whether or not an EU legal instrument is relevant also for the EEA (and thus references to ‘Member State’ or ‘Union’ must be read as including EEA countries) is indicated in the heading. **Switzerland** is not part of the EEA, but only of the European Free Trade Agreement (EFTA). However, there is a series of bilateral treaties through which Switzerland is associated with the EU and on the basis of which Switzerland has adopted various provisions of EU law in order to participate in the Single Market without joining either the EU or the EEA.

Since the **United Kingdom** left the EU it has a special relationship with the EU, in particular as laid down in the [Trade and Cooperation Agreement \(TCA\)](#). This relationship is much looser than that with Switzerland, and it is not based on EU law, but on international treaties.

The primacy of EU law

Although an EU Directive is not directly applicable and national institutions will only apply the national implementing law, the fact that national law is based on a Directive has a huge impact on the way this national law is interpreted and applied. In particular, national law must always be applied in a manner that is in conformity with EU law. Where the **Court of Justice of the European Union (CJEU)** has issued an authoritative interpretation of EU law (Regulation, Directive, or other) this interpretation is binding also on Member States' institutions. Where a national court of last instance is confronted with a case whose decision depends on the correct interpretation of EU law, and where that correct interpretation is not clear (i.e. is not a so-called *acte claire*), that court must (and lower courts may) submit the issue for a **preliminary ruling**, i.e. refer the matter to the CJEU to give binding guidance on the correct interpretation. Also, under certain circumstances, failure by a Member State to implement a Directive may lead to that Directive taking (limited) direct effect.

The case law of the CJEU can best be searched on the [Curia portal](#), which is available in all official languages of the EU.


Where there is a conflict between a national legal provision and EU law, it is EU law that prevails according to the principle of **primacy** or supremacy of EU law. The national provision is not annulled, but set aside and must be disapplied by Member State institutions (*Anwendungsvorrang*). According to the CJEU, European law even takes precedence over national constitutional law, which is, however, a view not generally shared by the constitutional courts in the Member States. So far, open clashes between national constitutional courts and the CJEU have largely been avoided.

1.1.3. International law

The term '(public) international law' is usually reserved to legal relations with, in particular, other **states** and entities that have historically acquired a similar status (such as the Holy See, the International Committee of the Red Cross, or the Sovereign Military Order of Malta). Apart from sources such as customary international law and universally recognised general principles of law, the main **sources** of international law are treaties (international agreements, conventions).

Treaties can be bilateral or multilateral, depending on the number of parties to a treaty. After the text of a treaty has been finalised by the states participating in negotiations, it is usually signed by these states. However, a state is usually not bound before **ratification**, i.e. the formal act in which a state indicates its consent to be bound by a treaty and its entry-into-force. In the case of multilateral treaties, the usual procedure is for a designated depositary (e.g. an international organisation) to collect ratification documents, and there is often an agreement that the treaty will enter into force only after a specified minimum number of ratification documents have been received. For states that are not among the initial signatory states, the formal act indicating that a state will be bound by a treaty is called '**accession**'. The [Vienna Convention on the Law of Treaties](#) (VCLT) comprises comprehensive provisions on the procedure for the conclusion of treaties, their entry into force and how treaties are defined, amended and interpreted.

Some treaties contain provisions that are **self-executing**, i.e. that become directly applicable and judicially enforceable in the national legal system. Often treaties are non-self-executing, i.e. they can be relied upon by e.g. private parties only after the relevant Contracting State has implemented them in its national law. This is similar to the difference between Regulations and Directives in EU law (see p. 4).



You will study international law in BA CM 2 (Introduction to International Law) and CM 6 (International Law).

By way of treaties between states and similar entities, **international organisations** and other ‘derivative’ new legal entities have been created, many of which have been granted the power to enact and/or enforce further international law. The European Union is, strictly speaking, such a derivative legal entity, and EU law is strictly speaking just a subset of international law, but it has developed into a body of law very much of its own and is better characterised as ‘supranational law’.



The **Council of Europe (CoE)** is an international organisation founded in 1949 with the aim to uphold human rights, democracy and the rule of law in Europe. It has currently 47 member states. Its headquarters are in Strasbourg (France). The CoE cannot make binding laws, but has been afforded the power to enforce select international agreements made by its member states. Most notably, the **European Convention on Human Rights (ECHR)**, which enjoys the status of constitutional law in Austria (see p. 1.1.13), is interpreted and enforced by the **European Court of Human Rights (ECtHR)**.



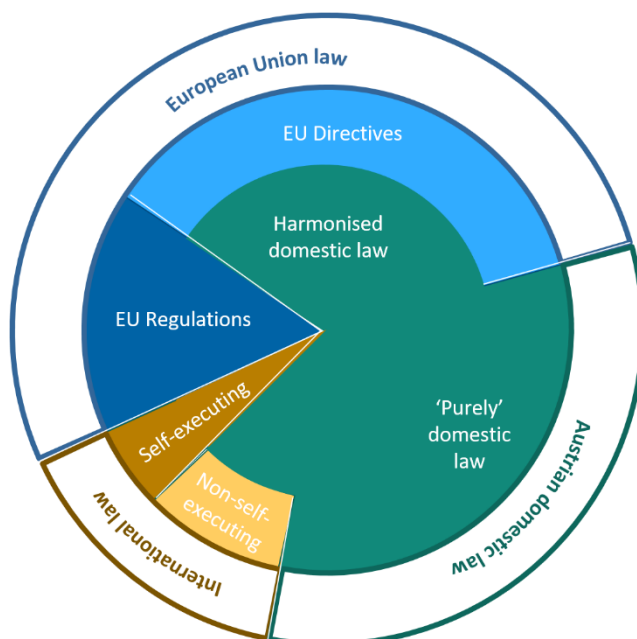
The **World Trade Organization (WTO)** is an international organisation focussed on the regulation of cross-border trade by way of international trade agreements and has currently 164 member states worldwide. The WTO's dispute-settlement system involves case-specific panels, whose priority it is to settle disputes, preferably through a mutually agreed solution. WTO member nations have accepted the WTO dispute settlement procedure as exclusive and compulsory, but it cannot be used to resolve trade disputes that arise from political disagreements.



The **United Nations (UN)** is an international organization that aims to maintain international peace and security, develop friendly relations among nations and achieve international cooperation. Founded in 1945, it currently boasts 193 Member States. Its headquarters are in New York and it has offices in other cities, notably in Vienna. Its organs include the International Court of Justice (ICJ) located in The Hague (Netherlands). The UN has established a number of specialised agencies, such as the World Health Organization (WHO) or the World Intellectual Property Organization (WIPO). Other sub-units include the United Nations Commission on International Trade Law (UNCITRAL) whose Secretariat is located in Vienna.

In the State Treaty, Austria declared that it will maintain full **neutrality**, i.e. will not join any military alliances and not permit the establishment of any foreign military bases on its territory. This is why Austria has not joined NATO, but it is part of, e.g., UN-led peacekeeping and humanitarian missions.

1.2. How national is ‘national law’?



You will study these interrelationships in BA CM 1 (Introduction to Law and its International Aspects).


Meanwhile, a large part of Austrian national law has either been derogated by EU Regulations, or relies on EU Directives, or is indirectly affected by EU or international law. This means that even in purely domestic cases (e.g. where all elements of the case are located in Austria) other than domestic legal sources must be taken into account.

More or less all issues addressed by these preparatory materials are either fully harmonised or at least heavily influenced by EU law and/or international law, even where this has not been specifically mentioned.

1.3. Cross-border situations

The international dimension of law in Austria is even more apparent in cases with an international element, e.g. where a party to a legal relationship has a foreign nationality or is located in a foreign state. Generally speaking, laws (in the sense of specific sets of legislation, or whole areas of the law) deal with such cross-border situations in one or more of the following four ways:

1. A law may directly and **specifically regulate** cross-border situations (e.g. free trade agreements p. 10, asylum law p. 12, UN Convention on the International Sale of Goods p. 51);
2. Elements of a law may address the international dimension indirectly, such as by requiring a particular nationality, law of incorporation etc. or, conversely, by **recognising** as equivalent foreign nationalities, laws of incorporation etc. (e.g. trade regulation law p. 9, social security law p. 24);
3. A law may set out rules for dealing with particular situations in a general manner and clarify in separate sections the **territorial reach** of these rules and under which conditions they apply to cross-border situations (e.g. Austrian Criminal Code p. 14, General Data Protection Regulation p. 38);
4. A law may stay silent on cross-border situations in the first place, but have to be read together with a separate body of law called '**conflict-of-laws**' that tells a court or authority which out of several different national laws governs the issue at hand (e.g. the law of contractual and extra-contractual obligations, property law, family law, and the law of succession, see e.g. p. 50).



Cross-border aspects will normally be taught as part of the course dealing with the relevant subject matter itself. In private law, where foreign domestic law may become applicable, there is a separate course which is an integral part of BA CM 10 (Civil Law and Private International Law).

Differences and similarities between legal systems worldwide will be discussed in MA CM1 (Comparative Law).

So while Austrian courts and other authorities generally only apply Austrian law (which includes Austrian domestic law, directly applicable EU law, and self-executing international law applicable in Austria) when they have international jurisdiction, the fourth of the four scenarios means that an Austrian court or other authority may also have to apply foreign domestic law.

2. Starting a business – registration and permission requirements

As a first step, Selma and Sebastian have to become traders. They do not really know whether they can just give themselves a trade name and start doing business or whether they need a permission or need to meet any other formal requirements. It cannot be that difficult to start an online shop, can it?

Well ... there are some legal steps that need to be taken...

2.1. Trade regulation law (*Gewerberecht*)

2.1.1. Who needs a trade licence?

Opening a business in Austria


Starting a business in Austria requires that all necessary permits are granted. For starting a trade (*Gewerbe*), including a craft, the most relevant legal instrument is the **Trade Act 1994** (*Gewerbeordnung 1994*, GewO). This instrument applies to any economic activity that is

- self-employed;
- at least potentially conducted on a regular or continuous basis or at a larger scale; and
- for profit.

A range of economic activities that would, as such, satisfy the above criteria are nevertheless excluded from all or most of the requirements of the Trade Act 1994. Some of these economic activities are wholly or largely exempt because the legislator felt there was no need for regulation, e.g. agriculture and forestry, the arts, and household activities (such as self-employed cleaning or babysitting) or other very simple activities. Other economic activities are not governed by the Trade Act 1994 because they are subject to more specific (and usually stricter) requirements under other laws. This applies, e.g., for the regulated liberal professions (such as doctors, attorneys-at-law, notaries or tax advisors).

Trade regulation law is part of special administrative law (*Besonderes Verwaltungsrecht*), together with a wide range of other areas, such as asylum law, planning and building law, energy law, waste management law and genetic engineering law, to name but a few. Since trade regulation law deals with economic activities it is specifically considered to be part of ‘economic administrative law’ (*Wirtschaftsverwaltungsrecht*).

In contrast, general administrative law (*Allgemeines Verwaltungsrecht*) deals with cross-cutting issues, such as the structure and competence of administrative authorities, administrative procedure, or remedies against administrative decisions. Together, they form the body of administrative law, which is part of the wider area of public law (*Öffentliches Recht*).



You will study administrative law in BA CM 13 (Public Law).

Some aspects of economic administrative law will be dealt with in BA CM 11 (Business Law).

E-commerce businesses targeting Austria from EU and EEA countries

Selma is wondering why she needs a trade licence in Austria while Matteo, who has been operating his online shop from Rome for some time and makes good money with Austrian professional customers, is only registered in Italy.

Traders established in other EU Member States may, without any restrictions, sell goods or provide services into Austria from abroad. This is based on the very cornerstones of the European Single Market, the ‘**Four Freedoms**’, as laid down in the Treaties. The same rules apply for the Member States of the EEA and, due to bilateral agreements, for Switzerland (see p. 4).

These Freedoms are

- Free movement of goods
- Free movement of capital
- Freedom to establish and provide services
- Free movement of persons



You will study EU law in BA CM 2 (Introduction to International Law) and CM 5 (European Law).

The free movement of goods implies, inter alia, a prohibition between Member States of customs duties on imports and exports with regard to products originating in Member States and to products coming from third countries which are in free circulation in Member States, as well as of all charges and other measures having equivalent effect (Article 28 TFEU). The freedom of establishment includes the right to take up and pursue activities on a permanent basis as self-employed persons and to set up and manage undertakings in another Member State (Article 49 TFEU), whereas the freedom to provide services means the right to offer and provide services in other Member States on a temporary basis while remaining in one's country of origin (Article 56 TFEU).

With the emergence of e-commerce, the delineations between these freedoms have become somewhat blurred because, for being an online retailer 'in Austria' on a permanent basis (i.e. targeting Austrian customers in a similar way as a shop established in Austria) one does not have to be physically present in Austria any more. A number of EU legal instruments address in a cross-cutting manner the phenomenon of the 'Digital Single Market'.


E-commerce businesses targeting Austria from third countries

Selma understands that Matteo from Italy may be a somewhat special case, but how can the parents of her friend Xu from China sell goods to Austria on a regular basis, through big online platforms, without having an Austrian trade licence? And what about John from the UK?

Other third countries, such as China, may be associated with the EU and Austria through free trade agreements, notably the rules of the **World Trade Organization (WTO)**, of which both Austria and China are member states. The three most important 'pillars' of WTO law are the [General Agreement on Tariffs and Trade \(GATT\)](#), the [General Agreement on Trade in Services \(GATS\)](#) and the [Agreement on Trade-Related Aspects of Intellectual Property Rights \(TRIPS\)](#). The fundamental principles of the trading system include:

- The Most Favoured Nation (MFN) rule, which requires a WTO member to grant the most favourable conditions under which it allows trade in a certain product type with one other WTO member to all other WTO members (in practice, this most importantly implies that customs duties must be levied on a non-discriminatory basis, but the establishment of specific free trade zones between particular WTO members, such as the EU, is still permissible).
- The National Treatment rule, which means that foreign goods, once they have entered the WTO member's market, should be treated no less favourably than domestically produced goods.

A trader established in China is free to sell and deliver goods into Austria, but has to declare goods at customs and possibly pay customs duties (tariffs) and taxes (on which [see p. 24](#)) when the goods enter the EEA. Charging customs duties on import is considered to be compatible with the National Treatment rule.



You will study international trade law in BA CM 2 (Introduction to International Law) and CM 6 (International Law).

The amount of customs duties due depend on the product type and can easily be identified with the help of the [Access2Markets](#) tool. Import of goods shipped in consignments with a value not exceeding EUR 150 (low value goods) is exempt from customs duties, but not from VAT (see p. 24).

It is important to note that all goods imported from outside the EU/EEA must comply with EU/EEA **product safety standards**. Compliance with such requirements is indicated by the ‘CE’ marking. Responsibility for CE marking lies with whoever puts the product on the market in the EU/EEA, i.e. an EU-based manufacturer, the importer or distributor of a product made outside the EU/EEA, or an EU/EEA-based office of a third country manufacturer.



Duties are difficult to enforce against parties outside the EU/EEA who sell their products directly into the EU/EEA by way of online marketplaces. Under the new [Market Surveillance Regulation](#) (MSR) which will apply from July 2021, producers who want to make their products available on the EEA market must appoint an authorised representative within the EEA. According to Article 6 MSR products offered for sale online or through other means of distance sales shall be deemed to be made available on the EEA market if the offer is targeted at end users in the EEA, i.e. if the seller directs, by any means, its activities to a Member State. In a case of non-compliance with safety standards, the authorities may take rigorous action and, as a means of last resort and in serious cases, also force the operator of an online intermediary platform to remove content or even block access to the platform for EEA users (Article 14(4)(k) MSR).

Strictly speaking, acting as a retailer is also a service, and the provision of services by traders established in other WTO members into Austria is governed by GATS and is much less liberal than the delivery of goods (e.g. a Chinese trader could not simply fly in from Beijing once a week, on the basis of their Chinese trade licence, and provide services in Austria). However, although e-commerce is not exactly a new phenomenon, the WTO is still struggling with how to deal with e-commerce. Already in 1998, there was a ‘Work programme on electronic commerce’, which included a moratorium in which WTO members agreed to continue the current practice of not imposing customs duties or other restrictions on electronic transmissions. This moratorium has been renewed several times so far. Since 2019, a ‘**Joint Statement Initiative on E-Commerce**’ is underway within the WTO, which a fair number of States have joined, but potential results are still not clear.

When Selma asks her about this, Xu confirms that dealing with customs requirements has always been a major obstacle for her parents. Since recently, they have outsourced this to a provider of global parcel delivery services, which is working reasonably well. However, they are worried about this new Market Surveillance Regulation.

John, who has overheard the conversation, complains that Brexit has made things really complicated for him.

Since the **United Kingdom** left the EU, relationships between the EU and UK are governed by WTO law and special international agreements, notably the [Trade and Cooperation Agreement](#) (TCA). As far as goods are concerned, the Title on trade in goods provides, inter alia, freedom of transit (i.e. traffic in transit to or from the territory of either EU or UK and any other third country) and prohibition of customs duties on all goods ‘originating in the other Party’, and in some other cases. It is, in particular, the requirement of ‘originating in’ that makes customs procedures necessary, and the rules on ‘origin’ are complicated. The Title on trade in services facilitates the cross-border provision of services, but provides for less liberal rules than the Title for goods.

Other than current WTO law, the TCA provides for a separate Title on ‘Digital Trade’, which includes both trade in digital content or services (i.e. where the traded commodity is digital) and trade in traditional goods or services by digital means (i.e. e-commerce in the proper sense). However, the TCA has to use the WTO regime as a backbone, and this Title, while featuring a number of special provisions, largely qualifies digital trade as the supply of services. The relevant Title on services does not contain provisions that address e-commerce more specifically.

2.1.2. How to obtain a trade licence in Austria?

Selma and Sebastian accept that they cannot just start selling stuff but have to get a trade licence first.

They will have to file an application, accompanied by a range of documents, with the competent trade authority (Gewerbebehörde). Normally, this can also be done electronically using the Austrian Business Licence Information System (GISA).

They just hope that this is not going to be too difficult. They are both of age, but Selma is from Bosnia and resident in Austria on the basis of her student visa, so she is worried whether there are any restrictions.

General requirements

If an economic activity falls under the GewO, this may still mean very different things. The majority of trades is 'free' in the sense that no special certificate of qualification is required. The only requirement is the **registration** with the competent trade authority (*Anmeldungsgewerbe*). In order to register, a natural person has to fulfil the following requirements (cf. §§ 8 to 15 GewO):

- Full legal age and capacity;
- Citizenship of an EU Member State, or another Member State of the European Economic Area (EEA), or equivalent status under international law, or residence permit that includes self-employed economic activities; and
- No grounds for exclusion (on which [see p. 13](#) further below).

Full legal age and capacity is very rarely a problem. What is usually more problematic is whether the **residence permit** (*Aufenthaltstitel*) of a third-country national (i.e. a person who is not a citizen of an EU/EEA Member State) allows self-employed commercial activities.

The most important provisions can be found in the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*, NAG) and the Asylum Act 2005 (*Asylgesetz 2005*, AsylG), but there are also specific provisions for diplomats, employees of international organisations etc., and special visa for temporary activities under the Aliens Police Act (*Fremdenpolizeigesetz*, FPG).


§ 8 **NAG** lists 13 different types of residence permits, each of which has its own rules as to the permissibility of employment or self-employed activities. For employment, many types of residence permits require an additional employment permit (*Beschäftigungsbewilligung*) issued by the Public Employment Service Austria (*Arbeitsmarktservice*, AMS) under the Employment of Foreign Nationals Act (*Ausländerbeschäftigungsgesetz*, AuslBG).

The most important categories of individuals addressed by the **AsylG** are:

- Recognised refugees (*Asylberechtigte*, § 3 AsylG);
- individuals with subsidiary protection status (*subsidiär Schutzberechtigte*, § 8 AsylG);
- Asylum seekers (*Asylwerber*) enjoying de facto protection (§ 12 AsylG) and a temporary residence permit after the asylum procedure has been admitted (§ 13 AsylG); and
- Individuals with a residence permit for exceptional circumstances (§§ 54 to 57 AsylG).

Recognised refugees and individuals with subsidiary protection status may engage in the same economic activities as Austrian nationals. Asylum seekers whose asylum procedure is admitted and individuals with a residence permit for exceptional circumstances require an additional employment permit under the AuslBG for employed activities, but may pursue a self-employed economic activity.

Selma holds a visa for third-country students (§ 64 NAG). If she were seeking employment, she would need a separate employment permit, which would normally be issued for employment not exceeding



Asylum and migration law will be addressed in BA CM 6 (International Law) and CM 13 (Public Law)

20 hours/week because her work may not seriously impair her studies (no such permit would, by the way, be required if Selma sought employment in academic research and teaching, e.g. as a student assistant at Vienna University). There is no explicit restriction for self-employed traders but, of course, Selma must prove that she is actually and successfully pursuing her studies if she seeks an extension for her student visa.

Specific requirements for regulated trades

An enumerative list of trades (§ 94 GewO) are regulated trades (*reglementierte Gewerbe*), which require a specific **qualification** (§§ 16 et seq. GewO). Those among the regulated trades for which the law requires particular ‘reliability’ are sometimes referred to as ‘reliability trades’ (*Zuverlässigkeitsgewerbe*, § 95 GewO).

Regulated trades are a subset of the wider notion of ‘regulated professions’, which can, for EU/EEA Member States, be identified by way of a search in the EU [Regulated Professions Database](#). Where a professional qualification has been obtained in another EU/EEA country (or Switzerland), there are, in general, three different types of **recognition**, depending on the type of profession concerned:

- Recognition on the basis of coordination of minimum training conditions (e.g. for doctors)
- Recognition of professional experience (e.g. for many crafts)
- Recognition of an attestation of competence issued by the competent authorities of a Member State (for all other regulated professions)

An attestation of competence does not preclude the host Member State from requiring the applicant to complete an adaptation period of up to three years or to take an aptitude test (*Eignungsprüfung*), e.g. if the training the applicant has received covers substantially different matters than those required in the host Member State. This applies, inter alia, for lawyers who have obtained their law degree in another Member State and wish to practice as attorneys in Austria.

For professional qualifications obtained in third states there exist a wide range of bilateral and multilateral agreements on recognition. Practical guidance is provided by the [Recognition Guide](#) of the Austrian Integration Fund.

Selma and Sebastian browse the list of regulated trades and note with a degree of relief that running an online shop and platform is not among them, but is a ‘free’ trade. They later learn that it is in fact an explicit requirement set out in the E-Commerce Act (E-Commerce-Gesetz, ECG) that no specific procedures are imposed.

Nevertheless, they have to specify the type of trade in their application. They will primarily choose ‘Handelsgewerbe’. Depending on whether or not they plan to engage in further activities, such as working more extensively with customer data and providing digital services, including marketing services for third parties, they may also wish to add ‘Dienstleistungen in der automatischen Datenverarbeitung und Informationstechnik’ and/or ‘Ankündigungsunternehmen’.

2.1.3. Who is excluded from obtaining a trade licence?

When filling in the relevant forms Selma and Sebastian have to tick a range of boxes concerning possible exclusion criteria, mentioning criminal convictions and something about insolvency. Suddenly, new worries emerge because of a criminal conviction for forgery of documents, which Sebastian committed as a 19-year-old high school student. Moreover, he became a partner in his father’s company when he was 18, and the company went insolvent during the Covid-19 crisis.

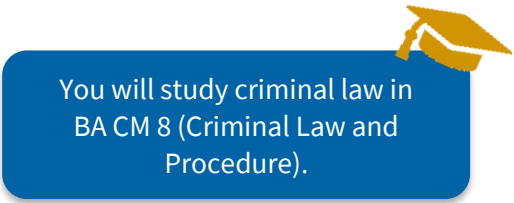
There are exclusion criteria both for natural persons and for companies (§ 13 GewO). It is immaterial whether the facts giving rise to exclusion occurred in Austria or abroad. Where a natural person would be excluded, a company on whose operations that natural person has a significant influence

is likewise excluded. In a similar vein, a natural person that had significant influence on the operations of a company that would be excluded is also excluded.

Criminal convictions

For natural persons, exclusion criteria are the final conviction by a court of an enumerative list of criminal offences (such as fraudulent withholding of employees' social security contributions or organised undeclared work, for persons seeking a licence for the catering trade also drug crimes); or a final sentence for other criminal offences to more than three months imprisonment or to a fine of more than 180 daily rates, unless the crime has already been expunged. There is also a list of financial offences that serve as exclusion criteria where the financial authority has imposed a fine of more than 726 EUR or imprisonment.

Criminal law (*Strafrecht*) is an independent part of public law dealing with sanctions and other measures imposed by the State for qualified unlawful and culpable behaviour (including for cases where the offender is not criminally responsible due to insanity). Behaviour that is qualified as a crime must be clearly defined as such in the law. In Austria, criminal law can be divided into two main areas: judicial criminal law (*Kriminalstrafrecht*), and administrative criminal law (*Verwaltungsstrafrecht*). Criminal law normally addresses only natural persons, but companies can be prosecuted if a decision-maker or employee has committed a judicial crime that can be attributed to the company under the Corporate Criminal Liability Act (*Verbandsverantwortlichkeitsgesetz*, VbVG).



You will study criminal law in
BA CM 8 (Criminal Law and
Procedure).

Judicial criminal law is adjudicated exclusively by fully independent judges in the general (judicial) courts (*ordentliche Gerichte*), including by lay judges where so provided (e.g. murder, political offences). Jurisdiction in the first instance is either with the district courts (*Bezirksgerichte*, BG) or the regional courts (*Landesgerichte*, LG), depending on the severity of the offence. Regional courts also deal with appeals against decisions of district courts. Appeals against decisions of regional courts are dealt with partly by one of the four higher regional courts (*Oberlandesgerichte*, OLG) and partly by the Supreme Court (*Oberster Gerichtshof*, OGH), which is the highest instance of judicial courts in Austria.

Crimes are mostly defined in the Criminal Code (*Strafgesetzbuch*, StGB), but may also be defined in other statutes. The main forms of punishment are fines (*Geldstrafe*) and imprisonment (*Freiheitsstrafe*), but there is also a range of further measures (e.g. confiscation, forfeiture) that can be imposed. Crimes are divided into felonies (*Verbrechen*) and misdemeanours (*Vergehen*), with felonies being defined as serious intentional crimes punishable by a maximum term of imprisonment of more than three years. Criminal convictions by courts, once they are final and can no longer be challenged by way of appeal, are entered into the **criminal records** (*Strafregister*). This concerns all convictions by Austrian courts and convictions by foreign courts where the convict is an Austrian citizen or has their domicile or habitual residence in Austria. After the lapse of a certain period of time, which is normally counted from the time when the sentence has been fully served or remitted, an entry in the criminal records is expunged. The length of that period (*Tilgungsfrist*) depends on the nature of the crime and the severity of the sentence imposed. Life-sentences and (at least in principle) sentences of over five years imposed for sexual crimes cannot be expunged from the criminal records.

Administrative criminal law is applied by administrative authorities. Since 2014, appeals are, however, dealt with by administrative courts (*Verwaltungsgerichte*) and not by the administration itself. Administrative authorities in charge of the prosecution of administrative offences may also impose both fines and imprisonment (generally limited to a maximum period of six weeks), but the sentences are not entered into the criminal records. While administrative offences are listed in a broad range of different statutes, cross-cutting issues are addressed in the Administrative Offence Act (*Verwaltungsstrafgesetz 1991*, VStG).

To a large extent, it is within the discretion of the Austrian legislator whether a particular offence is qualified as a crime under judicial criminal law or under administrative criminal law. Normally, the

more serious offences with rather high maximum punishment will be classified as crimes under judicial criminal law. However, administrative offences, such as under cartel law or data protection law, can also trigger fines of several million Euros.

Sebastian is relieved - forgery of documents is not among the crimes that would disqualify him from starting a business in Austria, and he was only sentenced to a fine of 15 daily rates. But what about that insolvency?

Insolvency law

For companies, there is also the exclusion criterion of a denial of the opening of insolvency proceedings for want of sufficient assets, unless the period during which insolvencies are listed in the insolvency registry has lapsed.

In Austria, there are several different types of **insolvency proceedings**, in particular different types of restructuring proceedings (*Sanierungsverfahren*), which aim at the rescue of a company, as well as bankruptcy proceedings (*Konkursverfahren*), which head directly towards the winding up of the company and the sale of remaining assets or, in many cases, the sale of the business as a whole. There are also special proceedings for natural persons, so-called ‘private insolvency’ proceedings (*Privatinsolvenz*), which are available to both traders and consumers.

You will study insolvency law in MA CM 4 (Law of Civil Procedure).

Insolvency proceedings are opened where the debtor is in a state of being unable to pay the debts (*Zahlungsunfähigkeit*) or, in the case of certain companies, of over-indebtedness (*Überschuldung*). A petition for insolvency proceedings can be filed by the debtor or any creditor, but the debtor is obliged to initiate proceedings within 60 days at the latest (failure to do so may amount to a crime or result in personal liability). The petition is entered into the insolvency register (*Insolvenzdatei*). When bankruptcy proceedings are opened, an insolvency practitioner (receiver) is appointed to take over the administration of the estate. In restructuring proceedings and ‘private insolvency’ proceedings, the debtor may perform the administration of the estate themselves under the supervision of the court and a special administrator. Creditors must file their claims, which are normally converted into monetary claims irrespective of their nature. Unsecured creditors, i.e. creditors that cannot rely on security interests such as a pledge or a mortgage, must be treated equally (with very few exceptions) and will receive an equal quota of their claims, whether after restructuring and partial discharge of residual debt or after sale of the debtor’s assets.

However, proceedings are opened only where there are sufficient assets to cover the likely costs of the proceedings or where the applicant or the officers or shareholders of an insolvent company make an advance payment to cover these costs. If there are no sufficient assets left and the officers or shareholders are not able to pay the amount of up to EUR 4,000 required for opening proceedings, the court will **refuse to open proceedings**, which means that the debtor will lose their trade licence and will not be granted a new licence before the entry in the register has been expunged. The latter is normally the case after three years.

While this applies to companies, there are some significant differences that apply to **natural persons** and private insolvency proceedings. Inter alia, proceedings are cheaper, and it is possible to obtain debt discharge after a certain period even against the will of the creditors. The opening of insolvency proceedings does not affect a trade licence, and it would even be possible to register a new trade during proceedings.

After having studied insolvency law, Sebastian is once again relieved, because in the case of their family company insolvency proceedings were opened and properly conducted. So are they all set?

Well, Selma and Sebastian come across some other boxes they have to tick...

2.1.4. When is the appointment of a manager under the Trade Act required?

Companies, natural persons without full legal capacity, and persons that are not resident in Austria and where proper service of documents concerning administrative sanctions, and the enforcement of such sanctions, is not otherwise guaranteed, may start a trade in Austria, but have to appoint a manager under the Trade Act (*gewerberechtlicher Geschäftsführer*, § 39 GewO) who must fulfil the requirements and make sure that all obligations under trade regulation law are met. The same applies if a person wants to start a regulated trade, but does not hold the relevant qualification themselves. In the case of a company, the manager must fulfil a number of minimum requirements concerning their actual role in the company and their actual influence on the company's operations.

So, when filling in the form, Selma and Sebastian suddenly realise that some important decisions still need to be taken ...

2.2. Company law (*Gesellschaftsrecht*)

Before Selma and Sebastian file an application, they have to decide precisely in whose name that application will be made, and whether they need one or two applications. In other words, they have to make up their mind whether they will act as sole proprietors or whether they will establish a company, and if the latter, what type of company.

Starting a new business in Austria requires choosing between the different types of companies provided by the Austrian legal system.



You will study company law in
BA CM 11 (Business Law).

2.2.1. Sole proprietorship (*Einzelunternehmen*)

A sole proprietor (also: sole trader) is a **single natural person** who operates the business alone in their own name and for their own account. Of course, the sole proprietor can engage employees, subcontractors, or other third parties on a contractual basis, but these persons would not join the trader in leading the business. No further formalities are required in order to establish sole proprietorship. Support for taking all necessary steps electronically are provided by the [USP portal](#).

The sole proprietor is liable for debts with business assets as well as private assets, without limitation. This means that, where the sole proprietor has incurred a debt in the course of their business activities, the creditor can sue the sole proprietor and, at the end of the day, have even the sole proprietor's private assets seized by the court in enforcement proceedings if the debt cannot be paid otherwise.

Sole proprietors do not have to register in the company register until their annual turnover exceeds a particular threshold (EUR 1,000,000 in one or EUR 700,000 in each of two consecutive business years, which is the threshold that triggers formal accounting duties). Even if these thresholds are not reached, voluntary registration is possible. Sole proprietors who are registered may choose a trade name (see below p. 19) and must use the designation 'eingetragener Unternehmer' or an abbreviation such as 'e.U.'.

2.2.2. Business partnerships (*Personengesellschaften*)

Selma and Sebastian are determined to run the trade jointly, i.e. not separately, nor with one of them being the other's employee. Therefore, they are wondering whether there are other options, such as business partnerships ...

Partnerships are companies formed by two or more natural or legal persons (partners), which may have legal personality, but are not clearly detached from the partners in legal and financial terms (e.g. in terms of liability).

Civil law partnership (*Gesellschaft bürgerlichen Rechts, GesbR*)

The GesbR is a company in which two or more persons participate by contributing labour or assets for a common undertaking, e.g. in a consortium or joint venture. There are no particular formalities, but usually a written agreement is drawn up. The company itself has **no legal personality** and cannot be entered in the company register, but the partners may operate under a common name, which must indicate the nature as a GesbR. If the turnover exceeds the threshold for formal accounting requirements, the company must be transformed into a general partnership or limited partnership. The partners are fully liable with their business as well as their private assets and without limitation. Each individual partner must obtain all the necessary trade licences.

General partnership (*Offene Gesellschaft OG*)

The OG is established by the conclusion of a partnership agreement between two or more natural or legal persons. It must be entered in the **company register** and only comes into existence upon entry in the company register. No minimum share capital is required and, therefore, no cash has to be raised on the occasion of the formation. The OG can acquire rights and incur liabilities in its name and can sue and be sued (*rechtsfähige Personengesellschaft*). The partners are **personally and jointly liable** for the company's debts, including with their private assets, without any limitation. Unless agreed otherwise and noted in the company register, each partner is authorized to manage the company and can also represent the OG alone. The trade licence must be in the name of the company, which requires the appointment of a manager under the Trade Act.

Limited partnership (*Kommanditgesellschaft KG*)

A limited partnership is similar to the OG, but the liability vis-à-vis the company's creditors of at least one partner is limited. This limitation is entered into the company register. Such a partner is called a '**limited partner**' (*Kommanditist*). There must also be at least one partner who has unlimited liability, and this partner is called a '**general partner**' (*Komplementär*). The legal situation is similar to that of an OG, but most rules applicable in an OG only apply to the general partners. For instance, only the general partners are authorized to represent the company (a limited partner can theoretically be appointed an authorized signatory under the law of agency, though).

2.2.3. Corporations (*Kapitalgesellschaften*)


Selma and Sebastian want to have a 'real' company that is registered in the company register, and they want to run the company on equal terms and with equal liability, so an OG would be an option. But they know that there are also company types with just limited liability, which sounds attractive ...

As contrasted with business partnerships, corporations are legal persons of their own that are – legally and financially – fully detached from the shareholders. The most important forms of corporations are the private limited company and the public limited company. There are also other forms, such as cooperatives, which are less frequently used.

Private Limited Company (*Gesellschaft mit beschränkter Haftung, GmbH*)

A private limited company (also: limited liability company) is a corporation whose share capital is divided into shares in accordance with initial capital contributions of the shareholders. The

company is a legal entity of its own. In principle, only the company is liable with its entire corporate assets, i.e. there is **no direct or personal liability** of the shareholders. The GmbH is subject to the accounting regulations under company law and must therefore prepare annual financial statements, which must also be submitted to the competent authorities. Unlike partnerships, a limited liability company can be established by only one person.



You will study accounting law in MA CM 6 (Economic Competence in Law)

The company needs written articles of association, and the founding agreement of the company must be in the form of a notarial deed (but one-person companies can also be established electronically via the [USP portal](#)). The company is represented by one or several **managing directors** (who may or may not be identical to the manager under the Trade Act). The GmbH comes into existence only upon entry in the company register. The trade license must be in the name of the company.

The absence of personal liability creates a risk for creditors. The law provides for minimum amounts of share capital to protect future creditors and reduce incentives to create 'fake' companies. The share capital, which must be raised by the shareholders, must be at least EUR 35,000. Half of this amount must normally be paid up in cash at the time of formation. Newly established limited liability companies can take advantage of the so-called foundation privilege: The articles of association may provide that capital contributions are initially (and for a period of up to 10 years) limited to EUR 10,000, and that only at least EUR 5,000 must be paid up immediately in cash.

Public Limited Company (*Aktiengesellschaft, AG*)

Another company form is the public limited company. The AG is also a separate legal entity. The share capital of the AG is at least EUR 70,000 and is to be raised by subscription of the shares by the shareholders. For many AGs, shares are traded on the stock market. Shareholders are not personally liable for debts of the AG, and all they can lose is the value of shares subscribed for. Like the GmbH, the AG comes into existence upon registration in the company register. The mandatory bodies of an AG are the Management Board (*Vorstand*), Supervisory Board (*Aufsichtsrat*) and General Meeting (*Hauptversammlung*). The management and representation of the AG is carried out by the Management Board, whose members are appointed by the Supervisory Board, which is in turn elected by the General Meeting.

While Selma and Sebastian are convinced their company will be really big one day, they realise that an AG is beyond reach. A GmbH would be an option, but they are not sure they want to face the formal accounting requirements (and associated costs) that come with establishing a GmbH immediately. So after considering all the pros and cons of the various company forms they tend towards an OG ... but they want to check first whether they also have the option of a European or foreign company form.

2.2.4. Cross-border situations

While most companies operate cross-border, there are only few truly European company forms, such as the Societas Europaea (SE), a kind of public limited company, and the Societas Cooperativa Europaea (SCE). This is why the vast majority of companies are established under domestic law.

Foreign companies can in any case open a **branch office** (*Zweigniederlassung*) in Austria, which has to be registered in the company register. A branch office of a foreign company does not have its own legal personality and is normally not established under Austrian law. A branch office is not to be confused with a **subsidiary** (*Tochtergesellschaft*) in Austria, which is a separate company with its

own legal personality, but dominated by a foreign parent company (*Muttergesellschaft*) within a group of companies (*Konzern*).

Freedom of establishment is one of the fundamental principles of Union law (Articles 49 and 54 TFEU). In a long line of judgments, the CJEU has stressed the right of a company duly established under the law of one Member State to continue operating under this law, and maintain its foreign legal form, while **moving** its registered office, central administration or principal place of business to another Member State. This is why also foreign company forms from EU/EEA countries may also be entered into the Austrian company register. From 2023, new legal provisions implementing the [Mobility Directive](#) will apply for particular types of cross-border mobility of corporations.

Subject to international agreements, companies established under the law of third countries do not benefit from freedom of establishment and must, if they wish to move their seat to Austria, normally be dissolved and re-established under Austrian law.

Selma and Sebastian realise they have to go for an Austrian company form. So their final choice remains an OG. So they first need to establish the company and register it in the company register before they can apply for a trade licence.

However, when filling in the forms required for this step, they realise they also have to decide on a name for their company

2.3. Trade name law and trademark law

2.3.1. Trade name law (*Firmenrecht*)

The trade name (*Firma*) of a sole proprietor or company is the name under which that trader pursues their economic activities. It is not to be confused with a trademark (on which [see below p. 20](#)). A trade name must be a legible and pronounceable designation that may serve as a name (as contrasted with, e.g., purely figurative characters). There are different types of trade names, which must, in each case, be followed by a suffix indicating the company type:


- Trade name based on the name of an individual subject to unlimited liability (*Namensfirma*)
- Trade name based on the business purpose (*Sachfirma*)
- Trade name based on a fancy designation (*Phantasiefirma*)

The above-mentioned forms can also be mixed or combined, e.g. the name of an individual can be combined with the business purpose. The trade name must fulfil a number of requirements and serve a number of purposes. In particular, it must allow the company name to be **distinguishable** from other company names in the relevant geographical area (which means that, if everyday words are used, it is advisable to add another component) and must **not be misleading**, i.e. the trade name must not create an incorrect impression about the company (e.g. its purpose, size or economic significance). If a trader wishes to include a geographical term (e.g. 'Creative Stuff Vienna') there must already be a certain economic significance in the geographical area, to be verified and confirmed by the Chamber of Commerce.

Selma and Sebastian decide to create their trade name out of their marketing slogan 'Make a Statement with your Stuff' and call their company 'MaSwyS' OG – looks a bit weird at first sight, but people may start wondering what it means and become interested.



The logo for 'MaSwyS' is written in a stylized, orange, rounded font. The letters are bold and have a slight shadow effect. The 'S' is particularly large and prominent.



You will study trade name law as well as trademark law in BA CM 11 (Business Law).

They are just wondering whether someone else, be it in Austria or abroad, might simply open a shop with the same or a similar name. Maybe they should go for a better form of protection?

2.3.2. Trademark law (*Markenrecht*)

Entering a trade name in the company register only affords the trader limited protection against other traders who wish to use the same or a similar name. This is why it is possible to register a trademark, which is a special type of intellectual property right. Conversely, before choosing a trade name or a distinctive design for one's website or one's products and services it is highly advisable to check whether this infringes someone else's registered trademark.



National trademark

Trademarks are recognisable signs or designs which serve to identify products or services as coming from a particular company and to distinguish the products or services of a company from similar products and services of other companies (identifying and distinguishing function). The sign must be graphically representable and can consist of numbers, letters or words (word mark), in a graphic design (figurative marks) including a particular colour or combination of colours (colour mark) or a special written form (word-image mark). The mark can also be a physical (three-dimensional) mark or a sound mark.

A national trademark within the meaning of the Trademark Protection Act (*Markenschutzgesetz*, MSchG) is registered with the national Patent Office. It is valid for a period of 10 years and may be renewed an indefinite number of times.

A trademark confers on the registered owner a bundle of exclusive rights. Most importantly, it gives the trademark holder the **right to exclusive use** of the mark for the types of products or services for which it is registered. Thus, competitors are not allowed to use identical or very similar signs for similar types of products or services. A sign is considered to infringe a trademark if a consumer or the public could be confused as to the identity of the source or origin of products or services. It is sufficient for confusion if there is a certain likelihood a consumer will associate the products or services with the registered owner.

However, the use of a sign similar to a well-known trademark (e.g. 'Coca-Cola') may be an infringement of trademark law, even though there is no risk that the public would confuse the products or services with those of the registered owner of the well-known trademark. The higher level of protection is based on the rationale that no one should in an unjustified manner exploit or impair the reputation associated with a well-known trademark.

EU and international trademarks

A national trademark offers protection only for the national territory of the Republic of Austria (including protection against goods produced elsewhere to be imported into the national territory). Where a trader wishes to be protected also on other markets that trader must register the trademark also in the relevant countries.

The so-called **Madrid System** of the WIPO is a convenient and cost-effective solution for registering and managing trademarks worldwide as it allows to file one single application and pay one set of fees to apply for protection in up to 123 participating states.

Alternatively, the **EU trade mark** is obtained by registration in the Register kept by EU Intellectual Property Office (EUIPO) and has EU-wide effect. Filing an application to register an EU trade mark is much cheaper than filing separate national applications in all EU Member States. However, if an application is rejected on grounds which apply in only one or several Member States, such as following opposition by the holder of a national trademark, things may become more expensive.

Selma and Sebastian would hate to incur further costs and have absolutely zero appetite for still more bureaucracy. Something to be dealt with later ...

2.4. Tax law (*Steuerrecht*)


So Selma and Sebastian make a simple written contract to establish an OG, then fill in the form for registering the company in the company register. Their signatures on the form require authentication (Beglaubigung) by a notary or by the court. It is only after having taken all these steps that they can apply for a trade licence. They appoint Sebastian as manager under the Trade Act.

They hope that these were the last formalities they have to deal with, but there is still something missing....

2.4.1. Types of taxes and taxable entities

Whoever wants to start a business must think about taxes and about registering with the tax authorities. There are different types of taxes.

Direct taxes are taxes levied directly from the person that will ultimately bear the economic burden resulting from the tax and include, e.g., taxes on income and property. **Indirect taxes** are taxes levied from a person or company that will openly pass the economic burden on to other parties. This includes, e.g., value added tax or VAT (*Mehrwertsteuer*), also referred to as sales tax or turnover tax (*Umsatzsteuer*), excise duties (*Verbrauchssteuern*) on certain goods and services (such as alcoholic beverages or tobacco products), and payroll tax (*Lohnsteuer*) for employees.



You will study tax law in
MA CM 5 (Tax Law)

The question who is the taxable subject depends on the type of company:

- Sole proprietors are liable for both direct and indirect taxes.
- Partnerships are considered an independent tax subject only with regard to VAT and other indirect taxes, but not with regard to income tax. The company and the individual partners need their own tax numbers.
- Corporations (such as GmbHs) are taxable entities in their own right and liable for both direct and indirect taxes

Selma and Sebastian realise that they each need their own tax number (luckily, at least Sebastian already has one), plus a tax number and UID for the MaSwyS OG. They are a bit worried, though, about taxation as they do not have much of a clue what kind of taxes they will have to pay ...

2.4.2. Income tax

Personal and corporate income tax

All natural persons who have a domicile or habitual residence in Austria, including sole proprietors and partners in a business partnership, are subject to unlimited liability for **personal income tax** (*Einkommensteuer*, Est). ‘Unlimited’ means that, in principle, all domestic and foreign income is subject to income tax in Austria. Personal income tax is calculated on the basis of the sum of all taxable income, whatever its source. In Austria, there is a progressive income tax scheme, i.e. the first EUR 11,000 are not taxed at all, and beyond this threshold tax rates range from 25 percent to 55 percent, depending on the amount of annual income.

Corporations (such as GmbHs) are taxable entities in their own right. Profits are taxed at 25% **corporate income tax** (*Körperschaftsteuer*, KÖSt). For GmbHs, there is a minimum corporate income tax that must be paid in any case, even if the company makes no or only small profits. A 27.5% capital gains tax (*Kapitalertragsteuer*, KESt) must be withheld from the profit distributions to the shareholders and paid directly to the tax office.

International tax law

Selma and Sebastian have read in the media that digital businesses, in particular of the GAFAM type, often get away with paying close to zero taxes. Is that an option for them? After all, they want to engage in a digital business. ...

In the context of cross-border economic activities, **double taxation agreements** ('DTA') are in place between most states to avoid that the same income is taxed twice. In these agreements, contracting states formulate rules as to which state's rights of taxation prevail under which circumstances.

In respect of business income derived from countries other than the place of residence taxing rights under DTA usually require a permanent establishment (*Betriebsstätte*). A main argument in favour of taxation in the state of establishment is that companies benefit from public institutions, services and infrastructures provided by that state and should therefore participate in its financing. Digitalization has changed the situation because it is no longer necessary to have a relevant (physical) establishment in a country in order to profit from its institutions and infrastructures. So typical online companies have a motivation to have their establishment in a place where taxes and wages are low, do business and make profits elsewhere, and not contribute in any way to the financing of the systems they benefit from (free riding). Experience shows that big cross-border digital companies can reduce effective taxation to almost zero through aggressive **tax planning**.

The debate about 'digital tax'

The OECD and the EU are currently working to find solutions. Since January 2020, Austria has levied a digital tax on **online advertising** services, the details of which are laid down in the Digital Tax Act 2020 (*Digitalsteuergesetz 2020*). Online advertising services are subject to digital tax if and to the extent that they are provided by online advertisers in Austria against payment. An online advertising service is deemed to be provided in Austria if it is received on a device of a user with an Austrian IP address and is (also) targeted at Austrian users in terms of content and design. The person liable for the tax is the company entitled to remuneration for the provision of the online advertising service.

The Austrian digital tax only applies to online advertising operators with a worldwide annual turnover of at least EUR 750 million and that generate sales of at least EUR 25 million in Austria from the provision of online advertising services. The tax rate is 5 percent of the tax base. Of course, online advertising companies (e.g. Facebook) will normally pass the additional costs on to the companies on whose behalf the advertising is made.

2.4.3. VAT

While Selma and Sebastian are determined to market their goods cross-border, they accept that they are probably not able, at least not for the time being, to profit from international tax havens (and who knows how much profit they will be making anyway).

They have heard, though, that VAT is really difficult for e-commerce traders, in particular when trading cross-border. So they are worried whether they will be able to cope. ...

VAT in domestic cases

Sole proprietors, partnerships and corporations must pay turnover tax, which is passed on to customers as value added tax (VAT) on all supplies and services provided. In most cases, VAT amounts to 20% of the net remuneration. There are also reduced rates, such as for food, books and tickets for cultural and sporting events.

If the trader's annual turnover is below EUR 35,000, no VAT must be charged and paid and, in return, no input tax deduction can be claimed. However, the trader can apply for being submitted to standard taxation (*Regelbesteuerung*) instead, which may make sense in certain constellations.

For business customers, VAT is an on-and-off item because they can deduct any VAT paid to their suppliers from their own tax debt by way of input tax deduction (*Vorsteuerabzug*). Only end users not charging VAT to their customers (e.g. consumers, but also legal entities other than businesses, such as the University of Vienna) cannot deduct VAT paid to suppliers and therefore have to bear the ultimate burden in economic terms.

Cross-border VAT in pure EU/EEA cases

VAT poses major challenges to cross-border trade, even within the EU/EEA, as VAT rates and other provisions differ vastly across the EU/EEA. Generally speaking, VAT taxation follows the **place-of-supply principle**, but the rules may be different depending on whether the recipient is a taxable person or not. Generally speaking, efforts are made to tax cross-border transactions in the customer's state rather than in the supplier's state to ensure a level playing field for businesses throughout the EU/EEA.

Where both the supplier of goods or services and the recipient are taxable persons (i.e. have to charge VAT and hold a VAT number) in their respective Member States,

- for most deliveries of goods, only the recipient will pay taxes for intra-community acquisition (*innergemeinschaftlicher Erwerb*) to the financial authorities in its Member State and at the VAT rates applicable in its Member State;
- for the intra-community provision of most services only the recipient will pay VAT to the financial authorities in its Member State and at the rate applicable in its Member State (reverse charge system, RCS).

Where the recipient of goods or services is a non-taxable person (such as in the case of B2C sales), VAT must be charged and paid by the supplier, preferably also in the recipient's state. Until recently, there was a complicated system under which the place of supply switched from the supplier's state to the recipient's state where turnover from distance sales to that state exceeded a particular threshold. From July 2021, the system for e-commerce traders has been greatly facilitated through the **Union-One-Stop Shop (EU-OSS)** system.

The EU-OSS simplifies VAT obligations for businesses selling goods and supplying services to non-taxable persons throughout the EU by allowing them to register for VAT electronically in one single Member State for all the eligible sales of goods and services to customers located in all the other 26 Member States, to declare in a single electronic VAT OSS return, and to make a single payment of the VAT due on all these sales of goods and services.

For **micro enterprises** there are further facilitations. Where a trader does not have a permanent establishment in another Member State and turnover from distance sales to all other EU Member States does not exceed EUR 10,000, that trader may apply Austrian VAT rates and pay VAT to Austrian financial authorities, unless the trader prefers to be subject to the regular scheme.

This change in the law is really good news for Selma and Sebastian because it means they can start with very little bureaucracy, and once their cross-border sales exceed the threshold they only have to

deal with the authorities of one other Member State (and they may choose one with no language barriers, e.g. Germany).

Cross-border VAT in cases involving third countries

They have read in the media, though, that goods from Chinese e-commerce businesses are flooding the European market without being subject to VAT. While they really like their friend Xu they find this utterly unfair. But they are wondering whether it is at all true or just some ‘fake news’. ...

In principle, similar considerations as for EU/EEA cases apply in cross-border cases involving third countries. Where goods enter the EEA, not only customs duties are collected (see above p. 10), but also **import VAT** (*Einfuhrumsatzsteuer*) payable to the financial authorities in the Member State of destination at the VAT rate applicable in that Member State. Where the recipient is a taxable person, import VAT is owed by the recipient. Where the recipient is a non-taxable person, VAT must be paid by the supplier.

Until July 2021, low value consignments of goods (under EUR 22) were exempt from VAT, resulting in a massive competitive advantage of third country e-commerce sellers. From July 2021, even low value goods will be subject to VAT and have to comply with customs formalities, but there will be a simplified customs procedure for consignments whose value does not exceed EUR 150. Third country suppliers will be able to make use of an OSS scheme for services and an **Import OSS (IOSS)** scheme for goods, which will greatly facilitate trade from third countries to the whole EU.

As third country e-commerce suppliers often make use of **online marketplaces** and similar intermediaries, such an intermediary becomes a ‘deemed supplier’ for certain supplies made via its electronic interface with the effect that it is the intermediary who owes import VAT. This concerns goods supplied to a customer in the EU/EEA where they are

- imported in the EU/EEA in consignments of an intrinsic value not exceeding EUR 150, irrespective of whether the underlying supplier is established outside the EU/EEA (e.g. goods directly sent to Austria by a Chinese seller) or in the EU/EEA (e.g. a German business sells goods to an Austrian customer, but the goods are directly delivered from China); or
- sold by an underlying supplier not established in the EU, irrespective of the value of the goods and whether they are already in the EU/EEA (e.g. a Chinese business sells goods to an Austrian customer, even if the goods are warehoused in Germany).

Selma and Sebastian are relieved to hear that a number of steps have meanwhile been taken to ensure more of a level playing field! Matteo absolutely agrees, whereas Xu is quite upset...


2.5. Social security law (*Sozialversicherungsrecht*)

Now that tax issues have been dealt with, Selma and Sebastian are wondering whether there is anything else in terms of formalities and registrations they have to bear in mind.

Well, something is still missing...

The sole proprietor who holds a trade licence is automatically a member of the Chamber of Commerce (WKÖ) and thus is insured with the Social Insurance for Trade and Industry (*Gewerbliches Sozialversicherungsgesetz*, **GSVG**).

Contributions to health insurance, to pension insurance and, in case of opting-in, to unemployment insurance are calculated as a percentage of the self-employed income. Percentage rates are a bit lower than the amounts due for employees under the General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*, ASVG). For accident insurance, a fixed amount per month is to be paid irrespective of income. Young entrepreneurs who become self-employed for the first time are granted preferential health insurance coverage in the first two years of their self-employment. Sole proprietors with very low turnover and income can be exempted from pension and health insurance payments upon their application if they meet particular requirements.



You will study social security law and labour law in MA CM 3 (Labour Law and Law of Social Security)

Largely the same rules apply to partners of an OG and to general partners of a KG if the relevant company holds a trade license. Limited partners are not automatically subject to compulsory insurance, but they can – depending on the situation – be insured as employees of the limited partnership under the ASVG, or under the GSVG if they take on typical entrepreneurial tasks.

Executive board members of an AG are insured under the ASVG. The same can be true for a managing director of a GmbH, although they might also be insured under the GSVG.

If the managing director of a GmbH does not hold a share (third-party managing director) or a share of up to 25% (shareholder managing director) they are normally subject to compulsory insurance under the ASVG. Where shares are higher, there may be compulsory insurance under the ASVG or the GSVG, depending on the size of the share and the individual circumstances. For shares of 50% or more, only the GSVG applies.

Employers must register their **employees** with the social security system of the **ASVG**. Failure to register employees before they start work or to pay the contributions properly is considered social security fraud, i.e. a crime that can lead to the loss of one's trade licence, amongst other consequences. Disguised employment (*Scheinselbständigkeit*) triggers largely the same legal effects as if the parties had concluded an employment contract right away.

Needless to say, having employees entails a host of further obligations under a separate body of law called **labour law** (*Arbeitsrecht*). The area of individual labour law (*Individualarbeitsrecht*), which is scattered across many legal instruments, regulates the legal relationship between an employer and an employee. Important aspects of individual labour law are, for example, rules concerning working hours, annual leave, parental leave, working time or protection against wrongful dismissal. Austrian law has traditionally made a distinction between blue collar workers (*Arbeiter*) and white collar workers (*Angestellte*), but legal differences between both have been reduced over the years.

Collective labour law (*Kollektivarbeitsrecht*), regulated inter alia in the Labour Constitution Act (*Arbeitsverfassungsgesetz*, ArbVG), concerns, amongst others, the relationship between employee representatives (e.g. trade unions, works councils) and individual employers or employer representatives (e.g. the WKÖ). It includes works constitution law, collective agreement law and industrial action law. One characteristic of collective labour law is the existence of collective bargaining agreements and works agreements as separate sources of law, which have the same effect as laws. There is no statutory minimum wage, but around 98 % of employment relationships are covered by collective bargaining agreements which provide for minimum wages of at least EUR 1,500.

For the time being, Selma and Sebastian cannot afford to have employees, so this is something to worry about later.

3. Starting a website and commercial communications

Selma and Sebastian have finally received the trade licence, their tax numbers and company UID number, and are insured with the GSVG. After having struggled with all these formalities, they are really keen to get going and to set up a trading website.

This is probably a technical issue, right, so there can't be much to consider from a legal point of view ... well, actually, there can.

Setting up an online shop has become a very complex matter, and legal requirements follow from a variety of different legal sources.

3.1. Choosing a domain name

The first step is usually to select a domain name. When selecting a domain, care must be taken to ensure that the chosen Internet address (domain) does not infringe the rights of third parties. Internet registrars will normally allocate domains on a 'first-come-first-serve' basis, but will not investigate whether any third party rights could be infringed.

In Austria, such rights of third parties can arise in particular from **trademark protection** (see above p. 20), i.e. the domain chosen must not infringe someone else's registered trademark, such as by creating confusion as to a link between the website and the trademark owner. Even beyond registered trademarks, using a distinctive name or other designation in such a way that confusion can be caused with a competitor may amount to **unfair competition** under the Act Against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*, UWG). Note that also 'domain grabbing', i.e. registering domains with the sole purpose of blocking them for others in order to sell it to them at a high price, amounts to unfair competition. Finally, domain names can also interfere with another person's **right to a name** that is protected under the ABGB (this can be a natural person, but also e.g. a company, municipality or country). Names the creation of which represents a specific intellectual achievement may also be protected by **copyright** (see below p. 28).

Luckily, nobody has ever thought of registering the domain 'www.maswys.eu', and they made this name up entirely by themselves, so Selma and Sebastian are pretty safe in this regard.

3.2. Dealing with content generated by others

Corporate design is the next step. They browse the Internet and find some designs they are really fond of. They like background photos that fill the whole page, and moving photo banners, and they have already found some great photos on the Internet that are available in high resolution. The Internet is just wonderful, as everything is there for free ...

... well, not quite, actually.


Setting up a trading website requires a website design, photos, descriptions of products and services, and many other elements. It is very tempting to take them from 'the Internet', as so much content seems to be 'freely' available. However, simply copying photos, text etc. from other people without their permission is often illegal.

3.2.1. Content protected under copyright law (*Urheberrecht*)



The most important restrictions follow from copyright law, which is part of a wider body of the law called ‘intellectual property (IP) law’ (*Recht des geistigen Eigentums, Immaterialgüterrecht*). Unlike industrial property rights such as patents or trademarks (*gewerbliche Schutzrechte*), copyright and related rights arise without any formal act such as registration. Rather, these rights arise automatically and with regard to an extremely broad range of human activities, which means they are very easily overlooked and infringed.

In particular, these rights arise irrespective of whether or not someone has added the copyright notice ‘©’; under Austrian law, this notice does not produce any additional legal effects.



You will study IP law in BA CM 11 (Business Law) and to some extent in CM 7 (Digital Law).

Protection in Austria

Copyright protection exists for certain concrete expressions of human intellectual achievements, and for a certain period of protection (*Schutzdauer*). The expression may be in various forms, such as in writing, or code, or even made orally (e.g. in a speech), but mere ideas are not protected. Protection is only afforded for a limited number of types of works (*Werkkategorien*), but the categories are rather broad and include literature, music, photos, films, videos, but also computer programs and databases. There must be a minimum degree of originality (*Eigentümlichkeit, Werkhöhe*) in the sense of being the own intellectual creation of an author, but the threshold is very low, which means that even characteristic tweets or posts may be copyright-protected.

In addition to copyright (*Urheberrecht*) in the proper sense, particular achievements may be protected by **related rights** (*verwandte Schutzrechte*) even where the necessary degree of originality is not met. Most importantly for anyone wishing to set up a website, any kind of photos are protected, even where these photos have zero artistic value and are not an expression of the photographer’s creative skills and therefore do not qualify for copyright in the proper sense.

Whether, e.g., a photo is protected by copyright in the proper sense or just by a related right does not make a great difference in practice for someone who wishes to use content created by others, except for the period of protection. The main difference is that copyright is a bundle of rights consisting of **moral rights**, especially the author’s personality right (*Urheberpersönlichkeitsrecht*), and a number of economic **exploitation rights**, while the related rights are only about economic exploitation. The moral rights component of copyright in the proper sense means that copyright as such cannot be freely transferred, that the author has a right to be credited as author, that copyright is always vested in the concrete author and not in the author’s employer, and that works are protected also against activities such as unauthorised modification.

Beyond the rights of the person generating the photo one must not forget the persons displayed, e.g., on a photo, who may rely on a ‘**right to one’s own image**’ (*Recht am eigenen Bild*) or similar aspects of personality rights that may be infringed by use of their photos in advertising or in a context that is likely to harm their legitimate interests without their consent.

Some works are excluded from copyright and related rights, in particular the text of legislative instruments and other documents produced by the State in the exercise of sovereign power (e.g. court judgments).

Protection of foreign material

Selma and Sebastian did not previously know that photos on the Internet are not really free for everybody to use. They find this rather difficult to understand. And some of the really cool stuff they saw

is not from Austria at all and not even from Europe, but was uploaded by someone in the U.S. They are wondering whether this changes things in their favour.....

IP law is generally governed by the principle of **territoriality**, which means that a person conducting activities ‘in Austria’ must respect foreign copyright (only) to the extent that Austria is, under EU law or international law, bound to recognise this copyright.

With online activities it is often not clear whether an activity takes place ‘in Austria’ or also in other countries, if not worldwide. It is indeed held that online publication of content that infringes someone else’s copyright takes place in all countries worldwide from where the relevant site is accessible (i.e. is not blocked by geo-blocking measures) except in countries where, e.g. for language reasons, the infringement has but negligible effect.

Austria is bound by EU copyright law and, directly or indirectly, by a broad range of international agreements, such as the **Universal Copyright Convention (UCC)** or the **Berne Convention**. As far as this is the case, foreign works enjoy, in Austria, largely the same level of protection as works created by Austrians.

3.2.2. Activities requiring the rightholder’s consent

Selma and Sebastian are not giving up – they find all this hard to believe. Why would they need anybody’s consent if all they are doing is copying and displaying a photo that has already been published on the Internet? Surely, this cannot require anybody’s consent, can it? Well, as a matter of fact, it can.

Activities covered

Where someone has copyright in a particular intellectual achievement this means that this person has an exclusive right to authorise or prohibit certain forms of utilisation of this achievement by others. The forms of utilisation are listed in the law and include, inter alia, any **reproduction**, modification or translation, **making available to the public**, rental and lending to others, or **distribution** (by sale or otherwise).

In the tangible world, the distribution right is normally ‘exhausted’ in respect of the original or copies of the work where the first sale is made by the rightholder or with their consent (e.g. the rightholder cannot prevent the buyer of a printed book from transferring ownership in the volume to others). However, this is different in the digital world. While the CJEU has accepted that there is exhaustion with regard to computer programmes marketed with a license for an unlimited period of time, this is not so with other digital content (e.g. the buyer of an e-book does not necessarily have the right to pass the e-book on to a friend).

Mere **consumption** of protected content (e.g. the viewing of a video, the reading of a text) is not included in the activities the rightholder can control, unless that consumption involves reproduction. Also the recommendation of content published elsewhere, i.e. telling others where they can find that content, is not included. However, where others are led to protected content by way of a **hyperlink** or by way of **embedded content** that may amount to ‘making available to the public’ where, by setting the hyperlink, the protected content is effectively made available to a ‘new audience’ that would otherwise not have been reached, such as when content would normally have been behind a paywall.

The famous Article 17 of the [DSM Directive](#), better known from the public debate about ‘**upload filters**’, provides that an ‘online content-sharing service provider’ (e.g. YouTube) performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An online content-sharing service provider must therefore obtain consent from the rightholders, for instance by concluding a licensing agreement.

Statutory categories of free use

Selma and Sebastian are now completely confused. So are their law professors in class infringing IP law when they use photos for illustration purposes (duly indicating the source) on their slides? Actually, most probably not...

In a number of cases, the law provides for exceptions from or limitations to copyright and related rights, i.e. there are some statutory cases of free use (*freie Werknutzungen*). Such exceptions and limitations follow the ‘**three-step-test**’, i.e. they must (i) only be applied in certain special cases which (ii) do not conflict with a normal exploitation of the work or other subject-matter and (iii) do not unreasonably prejudice the legitimate interests of the rightholder. Exceptions and limitations with particular relevance in the online world include, inter alia:

- Temporary acts of reproduction which are **transient** or incidental and an integral part of a technological process required to enable a lawful use or transmission and which have no independent economic significance (e.g. data in the cache from a streamed video);
- **incidental** inclusion of a work or other subject-matter in other material (e.g. a painting is visible in the background of a photo primarily displaying a group of persons);
- reproductions on any medium made by a natural person exclusively for **private use**;
- **quotations** for purposes such as criticism or review in accordance with fair practice; and
- use for the sole purpose of illustration for **teaching** or scientific research and other public interest activities as listed in the UrhG and under the relevant conditions imposed.

Note that the Austrian legislator has not yet included an explicit exception for use for the purpose of caricature, parody or pastiche (e.g. memes), but arguably there exists an unwritten exception, in line with EU law and fundamental rights considerations.

Free activities with regard to illegally uploaded content?

In their private lives, Selma and Sebastian love watching the latest blockbusters, but they often do not want to invest in cinema tickets. And the stuff is usually online very quickly, via one of those dodgy platforms with servers located in far-away territories ... simply watching must be OK, everybody does it, or is there a risk after all?

It is to be noted that even activities that are normally ‘free’, such as setting a hyperlink without making the content available to a ‘new audience’, or making a copy for private use, are unlawful where the person engaging in the activity knew or could reasonably be expected to know that the content had initially been made available without the proper consent by the rightholder.

Thus, setting **links to illegally uploaded video material**, or downloading illegally uploaded video material onto one’s private hard disk drive, is in itself a violation of copyright. In a commercial context,



Copyright law is a highly contested area of the law.

To what extent should information and knowledge be free for everyone? Is it fair that intellectual achievements of humanity are monopolised by some few? Why do we need property rights at all? And must Artificial Intelligence (AI) at some point be afforded similar author’s rights as humans?

These and many other questions are reflected in MA CM 2 (Legal and Political Philosophy).

there is even a presumption that the person setting a link etc. was aware of the illegality. It is a point of controversy whether already the transient and incidental reproduction of video and similar material in the cache of the viewer's device is illegal where the viewer was or should have been aware of the fact that upload of the content itself was illegal, i.e. whether viewing illegally uploaded content with one's device is in violation of copyright.

3.2.3. Consent of the rightholder

Selma and Sebastian are now really desperate. So much of what they and their friends are doing on a regular basis seems to be totally illegal! How can you ever share stuff on social media without violating the law?

The fact that content generated by others is protected by copyright or a related right and that the activity envisaged is not a free activity means that the activity is subject to the rightholder's consent, which is often referred to as a '**license**'. Licenses can be exclusive, excluding even the rightholder from engaging in that activity (*Werknutzungsrecht*), or non-exclusive (*Werknutzungsbevolligung*).


Consent to particular activities can be given in any form, even tacitly, e.g. by inserting icons and functionalities that invite the sharing of content with others via social media channels. Just posting something on the Internet does, however, not amount to tacit consent. Even where consent is given, this normally still means that you have to name the author when using content generated by others (to be decided by the author, who may waive this right).

Where a rightholder has given consent to particular activities to the public for free this may lead to a situation where others create something new with the help of that content, acquire copyright in the new content (possibly shared with the initial rightholder), and exploit that right commercially. In order to prevent this, the initial rightholder can also give consent only under conditions, e.g. permit modifications of the content only under the condition that the person modifying the content makes it freely available to others on the same basis. This is the idea underlying **open access** and **open source** development, such as by way of the 'Creative Commons' standard licenses.

3.2.4. Similar restrictions

Selma and Sebastian are wondering whether the same holds true for designs in the broader sense, e.g. combinations of font, colour, and the way things are arranged on the website ...

While copyright already poses far-reaching restrictions on anyone who wants to use or be inspired by content generated by others, there may be further and similar restrictions arising from other considerations and areas of the law. Use of names, colours, logos etc. may violate someone else's registered **trademark**, see above p. 20 (and the same holds true, by the way, for using someone else's trademark for metatags or keyword advertising, e.g. it would normally not be allowed to use the name of a famous fashion brand for search engine optimisation if one is not a recognised trader of that brand). Use of content generated by others can also violate **unfair competition law** (*Lauterkeitsrecht*, *Recht des unlauteren Wettbewerbs*) under doctrines of **parasitic copying** and similar doctrines even where that content does not qualify for copyright or a related right, or any other IP right in the proper sense.




You will study unfair competition law in BA CM 11 (Business Law) and personality rights in BA CM 9 (Civil Law) and CM 10.

3.3. Imprint and disclosure requirements

OK, they got it – either create your photos, designs etc. yourself or buy them on the market, if you want to be on the safe side. But are you entirely free how to design your website, or are there any binding requirements?

A range of different laws require that websites and/or commercial communications disclose the identity and further details of the person operating the website or making the communication. As far as the requirements of all the different laws are fulfilled, the information does not have to be given more than once, of course.



You will study these requirements in different modules, including in BA CM 7 (Digital Law)

3.3.1. General provisions for traders

According to § 63 **GewO**, traders who are natural persons and are not registered in the company register have to disclose their name and the location of their trade licence in emails and on websites.

The main aim of the **Services Act** (*Dienstleistungsgesetz*, DLG) is to realize the freedom to provide services in the internal market. According to § 22 DLG, providers of services must make a long list of items of information available to the recipients of the services.

According to § 14 of the **Commercial Code** (*Unternehmensgesetzbuch*, UGB) commercial letters and forms, including electronic, that are directed at particular persons (such as offers, order forms or invoices) as well as websites must disclose particular details about the company.

3.3.2. Special provisions for websites

According to § 25 **Media Act** (*Mediengesetz*, MedienG), every website must disclose, at least, the name or trade name of the media owner (i.e. the person operating the website), the geographic location of the media owner (i.e. the place of residence or seat) and if applicable the business purpose (so-called ‘small disclosure’).

Note that a media owner (*Medieninhaber*) may be a simple online shop or even a private person operating a website, not to be confused with a media business (*Medienunternehmen*), which is a business whose core activities, or part thereof, consist in providing information (e.g. a newspaper or TV channel).

If a website goes beyond the general presentation of the company by including content that is likely to influence other people’s opinions, a range of further information must be disclosed (so-called ‘big disclosure’).

Providers of so-called information society services, including online shops, have to comply with the duties under the **E-Commerce Act** (*E-Commerce-Gesetz*, ECG). There are three categories of information and related duties under the ECG: general disclosure duties, information duties in the context of commercial communications, and information as well as related duties in the context of contracting (on which [see below p. 51](#)). General disclosure duties include the name and trade name, geographic address of establishment where official documents can be served, contact details which allow the trader to be contacted rapidly and communicated with in a direct and effective manner (including electronic mail address, but at least one other means of communication), the trade register and registration number, and the VAT registration number (UID). There are further disclosure duties for regulated trades and professions.

3.3.3. Special provisions for electronic advertising and marketing

Selma and Sebastian find all this rather complicated. They draw up a checklist and tick off all the items that have to be on the website and in every commercial electronic message they send, e.g. by email or on social media. Now that they have finally finished this task they are wondering whether they can send marketing messages to all the students in their class...

Commercial communications must always be clearly identifiable as such, e.g. clearly separated from other content and/or specifically **flagged as advertising**. Furthermore, the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable.

There are also special rules in the ECG for **pricing**, but for most cases, in particular for B2C contracts, the Price Indication Act (*Preisauszeichnungsgesetz*, PrAG) provides for more specific rules. They include that the selling price (*Verkaufspreis*) indicated is the final price for a unit, including VAT and all other taxes, and that in the case of goods offered by volume, weight or length the price per unit of measurement (*Grundpreis*) must normally be displayed in addition to the selling price.

The ECG provides that traders undertaking unsolicited commercial communications by electronic mail consult regularly and respect the **opt-out register** in which natural persons not wishing to receive such commercial communications can register. In Austria, all those who do not want to receive unsolicited e-mails can register on the 'ECG list', which is maintained by the Regulatory Authority for Telecommunications and Broadcasting (RTR).

Further details are provided by § 107 Telecommunications Act (*Telekommunikationsgesetz*, TKG). The use of automated electronic mail for the purposes of direct marketing is normally allowed only in respect of users who have given their prior **consent**. However, where a business has (i) rightfully obtained from its customers their electronic contact details, in the context of the sale of a product or a service, the same business may use these contact details for direct marketing of (ii) its own similar products or services provided that (iii) customers clearly and distinctly are given the opportunity to object to such use of electronic contact details at the time of their collection and on the occasion of each message. In any case, such electronic mail must not be sent where (iv) the customer has initially refused such use, including by way of an entry in the ECG list.

Generally speaking, the **UWG** prohibits a broad range of unfair commercial practices, including any kind of commercial communications that are aggressive or misleading (such as by pretending that products or services are available only in an extremely limited quantity and for an extremely limited period of time and thus putting consumers under pressure to make rash decisions).

3.4. Non-Discrimination Law

When Matteo tells them that when he set up his webshop, he had to deal with non-discrimination law, Selma and Sebastian are totally confused. How can selling goods and services on the Internet discriminate? After all, everyone has equal access to an online shop ...

3.4.1. General non-discrimination law

Not every website is barrier-free for persons with disabilities, but rather a website has to be set up in a particular way in order to ensure interoperability with commonly used assistive technologies (e.g. that read out the text of a website to a blind person). The **Disability Equality Act** (*Bundes-Behindertengleichstellungsgesetz*, BGStG) prohibits the discrimination of persons with disabilities

and promotes and requires barrier-free access, including of websites offering goods or services to the public.

The **Equal Treatment Act** (*Gleichbehandlungsgesetz*, GIBG) applies mostly to labour relations and similar specific areas, but §§ 30 et seq. GIBG prohibit discrimination on grounds of sex or ethnic origin with regard to any provision of goods or services which are available to the public irrespective of the person concerned, including residential homes. Direct discrimination means that one person is treated less favourably, on grounds of sex or ethnic origin, than another would be treated in a comparable situation. Indirect discrimination means that an apparently neutral provision, criterion or practice would put persons of one sex or ethnic origin at a particular disadvantage compared with persons of the other sex or ethnic origin, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Aspects of equality and of how the law should deal with gender will be discussed in depth in MA CM 2 (Legal and Political Philosophy).

Online shops would normally not openly discriminate on grounds of sex or ethnic origin, but pricing algorithms, or equivalent ranking algorithms, might well have discriminative effects. For instance, a self-learning algorithm (so-called ‘artificial intelligence’) might ‘learn’ by way of pattern recognition that customers who were interested in ladies’ fashion are, statistically, prepared to pay higher prices for fabric-gentle washing liquids than other customers, and thus offer those customers a higher price for such washing liquids. Even if the operator of the online shop is not aware of this effect, it amounts to indirect discrimination.

3.4.2. Prohibition of geo-blocking

The **Geo-Blocking Regulation** prohibits **unjustified geo-blocking** and other forms of discrimination based on customers’ nationality, place of residence or place of establishment. In essence, a trader must not

- block or limit a customer's access to the trader's online interface for reasons related to the customer's nationality, place of residence or place of establishment;
- redirect a customer to a version of the trader's online interface that is different from the online interface to which the customer initially sought access, by characteristics that make it specific to customers with a particular nationality, place of residence or place of establishment, unless the customer has explicitly consented to such redirection;
- apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, for a defined range of contracts;
- accept or decline payment instruments issued in another Member State on a discriminatory basis.

For instance, an online retailer selling to Austria and Romania, with different trading websites for each of these countries, may not prevent Austrian customers from shopping on the Romanian website. Nor may that trader prevent a German customer from shopping on the Romanian website. However, the trader cannot be forced to deliver goods to Germany, but may insist the customer collect the goods in either Austria or Romania.

It is important to note that the Geo-Blocking Regulation does not prevent traders from offering general conditions of access, including net sale prices, which differ between Member States or within a Member State and which are offered to customers on a specific territory or to specific groups of customers on a non-discriminatory basis.

3.5. Alternative Dispute Resolution

Selma and Sebastian truly hope that this is everything and that they can start selling things. But, unfortunately, there is more to consider already when setting up a trading website....

Additional duties for traders exist with regard to alternative dispute resolution, at least when traders intend dealing with consumers. ‘Alternative’ dispute resolution is dispute resolution other than by State courts (also referred to as ‘out-of-court dispute resolution’).

3.5.1. Dispute resolution in general

‘Regular’ dispute resolution between private parties occurs before **State courts**, where independent State judges resolve disputes by way of passing a judgment or other binding decision that is then, if necessary, subject to enforcement by the court.

Jurisdiction in the first instance is either with the district court or with the regional court, depending on the type of dispute and the value of the claim (*Streitwert*). Generally, disputes are resolved under the general rules of civil procedure (*Zivilprozessverfahren*), but for some types of disputes (e.g. company register matters) a special type of non-contentious proceedings (*Außerstreitverfahren*) exists. Appeals against judgments of the district court go to the regional court, appeals against judgments of the regional court go to the higher regional court. In important cases, in particular where legal issues of general significance are to be resolved, a second appeal (*Revision*) to the Supreme Court is still possible.


The Commercial Court of Vienna (*Handelsgericht Wien*) is a regional court specialised in corporate law for the federal capital Vienna. Inter alia, it has jurisdiction for contractual claims with a value of over EUR 15,000 against businesses registered in the company register as well as for particular matters such as unfair competition and copyright. It also deals with insolvencies of companies and keeps the company register. For the whole of Austria, the Commercial Court of Vienna decides, e.g., in trademark, design and patent law matters.

Many disputes before State courts are not resolved by way of a judgment, but by way of court settlement (*gerichtlicher Vergleich*), i.e. the parties agree, under the auspices of the court, on a binding solution, which usually strikes some kind of middle ground between the positions originally taken. This is not considered as ‘alternative’ dispute resolution but as one out of several ways in which proceedings before State courts can be brought to an end.

Mediation is a type of alternative dispute resolution in which one or several mediators support the parties in developing an amicable solution themselves. Often a court suggests to the parties putting proceedings on hold and trying mediation.

A different form of dispute resolution is **arbitration** (*Schiedsgerichtsbarkeit*), which means that parties agree (usually in advance, when they enter into a contractual or other relationship), on ‘private’ judges who are authorised to issue an arbitral award (*Schiedsspruch*) that is binding between the parties and can be challenged before State courts only under very narrowly defined circumstances.

Arbitral awards may still have to be enforced by State authorities, but thanks to international conventions, notably the [New York Convention](#), this is usually provided for in a large number of countries worldwide. Arbitration is usually quicker, provides better confidentiality (proceedings not public, award not published), and the parties can choose judges who are experts in a particular subject matter. However, this is not suitable for everyday small value claims, and there are particular safeguards for B2C contracts (e.g. the agreement may only be made after the dispute has arisen).



You will study dispute resolution mechanisms in MA CM 4 (Law of Civil Procedure)

B2C dispute resolution may also be addressed in BA CM 9 and CM 10 (Civil Law and Private International Law).

3.5.2. Consumer ADR and ODR

Alternative Dispute Resolution Act

Online traders may wish to participate in an alternative dispute resolution (ADR) regime when dealing with consumers. This is dealt with in the Alternative Dispute Resolution Act (*Alternative-Streitbeilegung-Gesetz*, AStG). ADR entities do not issue binding decisions, but they assist in settling the dispute amicably by way of agreement between the parties, and using their services is free.

There is an enumerative list of businesses that are obliged by law to participate in such a regime, but running an online shop is not among them. An online shop established in Austria has a choice between the [Internet Ombudsman](#) and the general Conciliation Board for Consumer Contracts (*Schlichtung für Verbrauchergeschäfte*), but may also commit to neither of them, or to both.

A business established in the EU/EEA that deals with consumers must **inform** consumers about the ADR entity or ADR entities by which those traders are covered. That information must include the website address of the relevant ADR entity. It must be provided in a clear, comprehensible and easily accessible way on the business website and, if they exist, in the general terms and conditions.

In any case, i.e. irrespective of whether or not the business generally commits to an ADR scheme, the business has certain duties whenever there is a **dispute** between that business and a consumer that could not be settled amicably after a complaint had been submitted directly by the consumer to the business. In this case, the business must (i) provide the consumer with the website address of the relevant ADR entity and (ii) specify whether the business will make use of the relevant ADR entity to settle the dispute in the concrete case or not. That information must be provided on paper or on another durable medium, such as by email. So a business that does not generally commit to an ADR scheme may still decide to make **ad hoc use** of such a scheme.

Regulation on consumer ODR

Additional rules and duties apply to businesses established within the EU/EEA that engage in online sales or service contracts, or run an online marketplace. They are connected with the [ODR platform](#) operated by the European Commission. Contrary to what might be the immediate assumption, the ODR platform does not resolve disputes itself, but serves as a **single point of entry** for consumers and traders seeking the out-of-court resolution of their disputes. Its functions include, inter alia

- to provide an electronic complaint form which can be filled in by the complainant party;
- to inform the respondent party about the complaint, identify the competent ADR entity and transmit the complaint to the ADR entity which the parties have agreed to use;
- to offer an electronic case management tool and the translation of information which is necessary for the resolution of the dispute; and
- to provide additional support, transparency, and feedback mechanisms.

Every business established within the EU/EEA that engages in online sales or service contracts or runs an online marketplace must provide on its website an **electronic link** to the ODR platform. That link must be easily accessible for consumers. The business must also state its e-mail addresses, ideally close to the relevant link and irrespective of whether the email address has already been provided elsewhere. Where a business has committed to use an ADR scheme, it must **inform** consumers on its website (and, if an offer is made by e-mail, in that e-mail) about the existence of the ODR platform and the possibility of using it for the resolution of disputes. The information must also be provided in the general terms and conditions if such general terms and conditions exist.

4. Dealing with personal data

Selma and Sebastian know from their own experience with digital services that they are often confronted with 'privacy notices' and the like and prompted to confirm that they have read the terms and give their consent. Like most of their friends, Selma and Sebastian have never in their lives read any of those documents, which are usually in incomprehensible legalese, and click 'OK' or 'Accept all' on the button that is placed in the most convenient location. After all, they want to have the service, and not bother with this data stuff, which their parents and some of their friends are so concerned about ...


... but now they are on the other side, and may be forced to deal with it.

4.1. Which activities are affected by data protection law?

Data protection law affects more or less any activity by a business, from setting up a trading website to sending an invoice to a customer to making a contract with a cloud provider or bookkeeping company.

4.1.1. General data protection law

The most important source of data protection law for the private sector is the **General Data Protection Regulation** (GDPR) which became applicable in May 2018, replacing the 1995 Data Protection Directive. While the GDPR is, as a regulation, directly applicable in the Member States and not in need of implementation by the national legislator, it leaves leeway to the Member States for a broad range of issues. This is why there is also a host of national data protection law. Most of these national rules are included in the Data Protection Act (*Datenschutzgesetz*, DSG), but others are scattered across very different statutes.



You will study data protection law in BA CM 7 (Digital Law) and in CM 9 (Civil Law)

Traditionally, data protection law has, in Austria, enjoyed the status of constitutional law and has protected natural as well as legal persons. Article 1 § 1 DSG, which enshrines the constitutional rank of the law and refers to 'every person', is still in place but has lost much of its significance.

Material scope

Any economic activity, and in fact more or less any other activity, must nowadays comply with the rules of data protection law. Data protection law applies to the processing of personal data. Both the notions of 'processing' and of 'personal data' are extremely broad.

'**Personal data**' means any information relating to an identified or identifiable natural person. It is immaterial whether a natural person is acting as a business or as a consumer. To determine whether a natural person is identifiable, account is taken of all the means reasonably likely to be used, considering, inter alia, the costs and amount of time required for identification, the available technology and future technological developments. With exponential increase of computing power and of data stored globally, (re-)identification of individuals has become easier and cheaper.

Personal data that has undergone pseudonymisation, i.e. which could be attributed to a natural person by the use of additional information (such as an IP address, or a matriculation number – given that the identification of a student is easily possible by matriculation number or the device behind the IP address, this constitutes personal data). Only where it is impossible to trace data back to some natural person by way of means reasonably likely to be used, data counts as anonymous and thus as non-personal data.

‘Processing’ means any operation or set of operations which is performed on personal data, whether or not by automated means, such as collection, recording, structuring, storage, alteration, retrieval, transmission, making available to others, or erasure. It transpires that there is hardly any activity that does not, in some way or another, include the processing of personal data.

What is excluded is activities by a natural person in the course of a purely personal or household activity (e.g. entries in a personal diary, unless that diary is made available to a wider audience). Also, the GDPR does not apply to processing that occurs neither by automated means nor as part of a filing system (e.g. scribbling names on a piece of paper is not included, as long as the paper is not scanned, or made part of paper files in a way that the information is accessible for future reference).

The protagonists: Data subjects, controllers, and processors

The **‘data subject’** (*betroffene Person*) is the identified or identifiable natural person to whom information recorded in the data relates. That person must be still alive to enjoy protection under the GDPR (without prejudice to protection of ‘post-mortal personality rights’ recognised under national law).

The **‘controller’** (*Verantwortlicher*) is the natural or legal person that, alone or jointly with others, determines the purposes and means of the processing of personal data. This means that the controller is the person ‘holding’ the data and having the (at least de facto) power to decide whether and how the data is collected, used, disclosed to others, erased, etc. In contrast, a **‘processor’** (*Auftragsverarbeiter*) means a person that processes personal data on behalf of a controller and is subject to the controller’s directions. It is often not easy to draw a clear line between controllers and processors, but the distinction is of vital importance, not least because many obligations under the GDPR are primarily on the controller (see below p. 45).

Territorial scope

Already from what they have read so far, Selma and Sebastian are quite upset. Why do they, just because they are in Europe, have to bother with all this, while probably their friend Xu’s parents in China do not have to observe anything of the kind...

The GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU/EEA, regardless of whether the processing takes place in the EU/EEA or not. It applies, however, also to the processing of personal data of data subjects who are in the EU/EEA by a controller or processor not established in the EU/EEA, where the processing activities are related to:

- the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the EU/EEA; or
- the monitoring of their behaviour as far as their behaviour takes place within the EU/EEA.

So as far as Xu’s parents in China are marketing goods or services to customers in Europe they have to comply with the whole set of requirements set up by the GDPR. Needless to say, infringements in China are even more difficult to detect than they are in Austria, and the law is significantly more difficult to enforce against someone in China...

4.1.2. E-privacy law

There exists another body of data protection law, e-privacy law. Initially, the European legislator had planned to replace the 2002 **E-Privacy Directive** with a new E-Privacy Regulation at the same time as the Data Protection Directive was replaced by the GDPR. However, only in early 2021, Member States

reached an agreement in the Council, and the Regulation has not yet passed the European Parliament. Generally speaking, e-privacy law particularises and complements general data protection law by specifically dealing with the processing of electronic communications data and electronic communications services and equipment within the EU/EEA.

In Austria, the E-Privacy Directive has mostly been implemented in §§ 92 et seq. of the Telecommunications Act (*Telekommunikationsgesetz*, TKG). While most of the rules are relevant only for communication service providers (such as a mobile network operators), some few rules are relevant also for online shops (see [above p. 33](#) and [below p. 41](#)).

4.2. What can you do with data?

For Selma and Sebastian, all this is still quite abstract. It is interesting to learn about the scope of the GDPR, and about basic notions of data protection law, but what does it all mean for their daily work? At the end of the day they want to sell goods, not data ...

4.2.1. Requirement of a legal ground

One of the most distinctive features of data protection law is that any sort of processing activity requires a **legal ground** for being lawful. This comes into play at two levels:

- Article 6 applies to any kind of data processing activity; and
- Article 9 applies specifically to the processing of sensitive categories of data, such as health data or biometric data, but also e.g. data revealing ethnic origin, political opinions, philosophical beliefs, or sexual orientation.

While even an online shop cannot exclude that some data it is processing belongs to a sensitive category (e.g. an individual's name may reveal ethnic origin, and the books ordered by a person may reveal that person's political opinion) it is in practice close to impossible to take that into account, so the average online shop will normally ignore Article 9 and focus on Article 6. In the private sector, the most relevant (but not the only) legal grounds under Article 6(1) are the following:

- the data subject has given **consent** to the processing of his or her personal data for one or more specific purposes (a);
- processing is necessary for the performance of a **contract** to which the data subject is party or in order to prepare for a contract at the request of the data subject (b);
- processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party and such interests are not overridden by the interests of the data subject (f).

Contract

In the first place, an online shop will rely on the legal ground of contract, i.e. on Article 6(1)(b), for the processing of any transactional data and any data necessary to deal with a customer request or order. For instance, a customer's name, delivery address, billing address, payment data etc. and the items ordered by a customer are all clearly necessary for the performance of the contract. It is important to note that (b) justifies processing of data only to the extent this is really necessary for the main purpose of the contract, i.e. an online shop that trades in goods, services or digital content cannot simply 'invent' personalised ads and news feeds as an 'additional service'.

Legitimate interests

In the second place, an online shop will rely on (f) for ‘legitimate interest use’ of personal data. This is to be construed narrowly, but would include, for instance, age verification (given that contracting with a minor can be very dangerous for a business, but also for the minor), fraud prevention and in-house quality control procedures. It also covers direct marketing, but only within the narrow confines set by the E-Privacy Directive and TKG, i.e. to one’s own customers and for one’s own similar products or services (see above p. 33 and 41).

Furthermore, unless the grounds are really compelling (such as age verification or fraud prevention), processing based on (f) is still subject to the data subject’s **right to object** under Article 21 GDPR. For direct marketing, the E-privacy Directive and TKG provide additional details.

Consent

Selma and Sebastian are wondering whether maybe the safest way for them is to act like all the big players on the Internet: Put any kind of possible data use into one long consent form, and then force anyone who wants to contract with them to click the box ‘I agree’. After all, this is their shop, and anyone who wants to make a contract with them has to abide by their rules ... or is this maybe a bit too simplistic?

Any use that goes beyond what has just been described must normally be justified by the data subject’s consent. This concerns, in particular, any direct marketing to individuals who are not already customers, or any direct marketing of a third party’s products, or any sharing of data with other controllers for commercial purposes (i.e. the ‘selling’ of customer data).

Consent is often problematic because the data subject is overwhelmed by the decision, not being able to estimate the potential implications (e.g. for future personalised offers) and inclined to click on ‘OK’ without further reflection. Consent as a legal ground is, however, also difficult for the business because the threshold for valid consent is – at least theoretically – very high. In particular, consent must be ‘freely given’, ‘specific’, ‘informed’, ‘unambiguous’ and by an ‘affirmative act’. This could include ticking a box when visiting a website or choosing from a menu of different technical settings. Silence, pre-ticked boxes or inactivity do not constitute consent. If the data subject’s consent is given in the context of a written declaration which also concerns other matters, the request for consent must be presented in a manner which is clearly distinguishable from the other matters.

It is particularly important to stress the **prohibition of ‘tying’ or ‘bundling’** consent with the provision of a service or the conclusion of a contract (*Koppelungsverbot*). According to Article 7(4) GDPR, such ‘tying’ or ‘bundling’ may mean that consent is not freely given. An online shop must therefore avoid in any case to make consent to data processing activities a condition for the conclusion of a contract.

Prior to giving consent, the data subject must be informed that they have the **right to withdraw** consent at any time without giving reasons. It must be as easy for the data subject to withdraw as to give consent, and the data subject must not suffer any detriment as a consequence of exercising that right. Withdrawal of consent means the business may no longer rely on this legal ground, but the lawfulness of processing based on consent before its withdrawal is not affected.

4.2.2. Purpose limitation

Selma and Sebastian now realise that consent is not a panacea for everything. At least not if you really take the law seriously. But certainly, once Selma and Sebastian have collected their customers’ data based on contract or on legitimate interests, these data belong to Selma and Sebastian and they can even sell them to other companies? No, this is not quite what the law says.

Even where the initial collection of data was based on a valid legal ground and occurred for one or several legitimate purposes, it is essential that the data are not further processed in a manner that is incompatible with those purposes. Whether processing for another purpose is **compatible** with the purpose for which the personal data were initially collected is to be ascertained by considering, inter alia, any link between the purposes, the context in which the personal data were collected, the nature of the personal data, and the possible consequences of the intended further processing for data subjects, considering the existence of appropriate safeguards (e.g. encryption or pseudonymisation). Further processing for, e.g., scientific or historical research purposes is normally considered to be compatible with the initial purposes.

4.2.3. Data subjects' rights

Sebastian remembers from the company he ran together with his father that they were once confronted with a customer's request to transmit any data they had about this customer to another company. His father and he were quite at a loss at the time, but then the company went insolvent and they never followed up on this. Now that Sebastian remembers that incident he is wondering whether this could happen again in the new business ...

Another important cornerstone of the GDPR are the data subjects' rights. Where the data subject exercises any of those rights the controller must react without undue delay and normally within one month of receipt of the request. Any actions taken must be provided free of charge, but where requests from a data subject are manifestly unfounded or excessive, the controller may either charge a reasonable fee or refuse to act on the request.

Under the **right of access** afforded by Article 15 GDPR, the data subject has the right to obtain from the controller confirmation as to whether or not their personal data are processed, and, where that is the case, access to the personal data and to a broad range of items of information.

These include, by and large, the same or similar items as must already be provided under Articles 13 and 14 (see below p. 43). The controller must provide a copy of the personal data undergoing processing. Where the data subject makes the request by electronic means the information must be provided in a commonly used electronic form, but the data might be provided, e.g., in one huge text file.

Under the **right of data portability** enshrined in Article 20 GDPR, a data subject has the right to receive personal data which they have provided to a controller in a structured, commonly used and machine-readable format and have the right to transmit such data to another controller, or to have the data transmitted directly from one controller to another, where technically feasible.

This concerns all data collected by the controller on the basis of either consent or contract and where the processing is carried out by automated means. It is important to note that, as the right currently stands, it only includes raw data, i.e. data in the state as initially collected, not derived or inferred data (such as data analytics).

The main difference between the right of data portability and the right of access is the format and mode in which the data must be provided. While the purpose of the right of access is that the data subject gets to know which data is held by the controller (e.g. in order to exercise other rights) the primary purpose of the right of data portability is to avoid 'lock-in' effects and to facilitate the switching of suppliers. For instance, switching of provider with regard to a fitness app is much easier if the new provider receives all the data collected by the previous provider in order to provide personalised analytics or recommendations. Data portability also has a competition law aspect, as it might potentially serve as a vehicle to make data held by big private actors available to newcomers in the market.

The data subject has the right under Article 16 GDPR to obtain from the controller the **rectification** of inaccurate personal data. Taking into account the purposes of the processing, the data subject may also have the right to have incomplete personal data completed.

Under the famous **right to erasure ('right to be forgotten')** as described in Article 17 GDPR, the data subject has the right to obtain from the controller the erasure of personal data where the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed. There is also a similar right under Article 18 to obtain restriction of processing (e.g. for periods during which the lawfulness of processing is contested).

In any case, data must be erased where the data subject withdraws consent on which the processing was based (and where there is no other legal ground for the processing), or where the data subject exercises their right to object to the processing (and there are no overriding legitimate grounds for the processing).

The GDPR lists some other cases where erasure may be obtained, but also a number of exceptions, so as to make sure that a range of legitimate purposes, such as scientific or historical research purposes or the exercise or defence of legal claims, are still possible.

4.3. What to bear in mind when setting up a trading website

Selma and Sebastian are quite shocked to learn how difficult all this really is. But since the next step is finishing their trading website, they are mainly concerned about what all this means for the website design ...

4.3.1. Information duties (data protection notice)

When setting up a trading website, one of the most important duties to bear in mind is the duty to inform. There are two sets of information duties, in Article 13 and in Article 14 GDPR, depending on whether personal data are collected from the data subject or from other sources. Where data are collected from the data subject, as is often the case with online shops, the controller must provide the data subject with the items of information listed in Article 13.

These include, inter alia, the identity and contact details of the controller and any data protection officer; the purposes of the processing and the legal basis for the processing (including, where the processing is based on legitimate interests, the concrete legitimate interests pursued); the recipients or categories of recipients of the personal data, if any; the period for which the personal data will be stored; the data subject's rights and remedies; and the existence of automated decision-making and meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

4.3.2. Cookies

After having spent a whole day getting that data protection notice right (at least they hope they have), Selma and Sebastian are wondering whether there are any specific requirements concerning cookies. Since they always have to tick some boxes on cookies when they use the Internet, they suspect that there may be such requirements.

As they have received some cool offers from companies that would provide services (e.g. analytics) or even pay money to them if Selma and Sebastian let them track their customers, they are inclined to use cookies to the maximum extent possible ...

A cookie is a small piece of data or text file that a website asks a user's browser to store on the local hard disk drive of the user's device. A cookie allows the website to 'remember' the user's actions or preferences over a period of time. Most web browsers support cookies, but users can set their browsers to decline them.

Some cookies used by trading websites are necessary for the website's proper functioning, e.g. session cookies avoid the customer having to re-enter information when jumping from the shopping cart to the product description and back again, and for being able to complete the ordering process. Other cookies may save the customer, when entering the access credentials for their customer account, from having to type in the full name and password for each purchase. However, there are also cookies such as third-party cookies used by other companies to **track user behaviour** and create personal profiles for purposes of targeted advertising.

According to **§ 96(3) TKG**, the storing of information, or the gaining of access to information already stored, in the terminal equipment of a user is only allowed on condition that the user has given their **consent** in accordance with the GDPR. This does not prevent any technical storage or access for the sole purpose of carrying out the transmission or as strictly necessary in order for the provider of a service explicitly requested by the user to provide the service. So the session cookie necessary for completing the ordering process is admissible without consent, while storing the access credentials requires consent, and all the more the setting of third-party cookies for targeted advertising.

Since the CJEU has ruled that merely continuing to browse on a site does not amount to valid consent, and that having the option of unticking a pre-ticked box is not sufficient for other than functional cookies either, the vast majority of websites requires visitors to **tick a consent box**. It has become an extremely widespread habit to design this box in a way that the button for accepting all cookies is very well visible and placed in a manner that most users intuitively click on it, while the button for other settings is hidden and making a choice is burdensome. Such manipulative designs are called '**dark patterns**'. It is very doubtful whether this practice is compliant with both data protection law and unfair commercial practices law.

4.3.3. Privacy by design and by default

As a general requirement for designing a trading website, an online shop will have to take into account the principles of privacy by design and by default as enshrined in Article 25 GDPR. 'Privacy **by design**' means that, taking into account the state of the art, the cost of implementation and the type of processing and the risks involved, the controller must implement appropriate technical and organisational measures to implement data-protection principles already in the technical design of equipment and other arrangements. 'Privacy **by default**' means that default settings are such as to allow only for processing of the minimum amount of data necessary for a particular purpose.

4.4. Contracting with other businesses

Meanwhile, Selma is negotiating contracts with other companies, because they cannot run their business without the support of other service providers. Definitely, they need a contract with at least one provider of parcel delivery services, and with several providers of payment services (such as the big credit card companies or PayPal). They will also need software solutions provided by other businesses, e.g. for bookkeeping purposes, and they need arrangements with social media to run their ads. Selma has spent days analysing the terms and conditions provided by a dozen different companies and has difficulties figuring out how this relates to what she has just learnt about data protection law.

Data protection has a massive impact not only on any dealings with customers, but also on any dealings with other businesses that involve in any way the processing of personal data, such as the

providers of parcel delivery services, bookkeeping services, but also with social media operators (e.g. a commercial page on Facebook) or providers of targeted advertising services. This also includes relationships with the providers of any software solutions that include the exchange of personal data, or storage space in a cloud.

4.4.1. Contracts with other controllers and processors

In dealings with such other businesses the first question is whether the other business is an independent controller or a processor. This depends on who decides about the purposes and means of the processing, i.e. who is 'in the driver seat' as far as data processing is concerned (see above p. 39). There is also the possibility of joint controllership, i.e. two or more controllers jointly determine the purposes and means of processing and disclose to the data subject who is responsible for what.

If the other business is an **independent controller**, onward supply of the data to that party must, as such, generally be based on a legal ground (e.g. consent). However, once the data has been passed on that other business has to rely on its own legal ground for any processing and has to comply directly with all requirements set out for controllers in the GDPR. There is only a limited notification obligation, i.e. the initial controller must communicate any rectification or erasure of personal data to each data recipient unless this proves impossible or involves disproportionate effort.

This is one of the major weaknesses of the GDPR, since once data have been lawfully passed on to a third party who is an independent controller (e.g. where that was included in the smallprint to which the data subject had given consent) the initial controller has hardly any further responsibilities. There is not even a clear duty of the initial controller to exercise due diligence and check what the recipient will likely be doing with the data.

If the other business is a **processor** no separate legal ground is required for engaging that party and entrusting it with the data, but the controller must use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of the GDPR. In addition, the GDPR lists, in its Article 28, a range of mandatory contractual terms any contract with a processor must include.

Selma is really at a loss. She has figured out that the provider of cloud space is clearly a processor and that she must make sure their contract contains all the requirements under Article 28 GDPR. In most of the other cases she rather believes that the relevant companies would be independent controllers, but is not entirely sure. Given that some offers are astonishingly cheap, and much cheaper than others, she is of course wondering whether maybe those companies make part of their money with data ...

4.4.2. Data transfers to third countries

... in any case, Selma is glad she does business in Austria and some neighbouring countries and does not have to worry about those data transfers to third countries you often read about in the media...

But is this really true?

Things get significantly more complicated when data is to be transferred to a third country, i.e. a country that is not a Member State of the EU/EEA. This is very often the case, e.g. when making use of software solutions provided by U.S. companies and where such software solutions involve the sending of feedback data to the U.S., remote maintenance by the developer, or even storage of data on U.S. based servers.

Any transfer of personal data to a third country must rely on one of the transfer tools listed under Chapter V GDPR. The most reliable transfer tool is that of an **adequacy decision** taken by the European Commission under Article 45 GDPR, i.e. a declaration that the third country ensures an

adequate level of protection. Such a transfer does not require any specific further authorization. Adequacy decisions exist, for instance, for Canada, Japan or Switzerland.

There used to be adequacy decisions also for U.S. companies as far as these companies committed to a particular data privacy regime created specifically for that purpose by way of an international agreement, the Privacy Shield Agreement. However, the CJEU declared the Privacy Shield Agreement to be incompatible with EU law in the recent *Schrems II* decision (after having already declared the predecessor of Privacy Shield, the Safe Harbor Agreement, void in *Schrems I*).

In the absence of an adequacy decision, a trader needs to rely on one of the transfer tools listed under Articles 46 to 48 GDPR for transfers that are regular and repetitive. In essence, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided **appropriate safeguards**, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

Such appropriate safeguards include, in particular, **standard contractual clauses** (SCC) issued by way of an EU Commission Decision. However, the CJEU has also clarified in *Schrems II* that it may not be enough to base a contract with a data recipient in a third country on SCC, but that a data exporter must assess whether there is anything in the law or practice of the third country that may impinge on the effectiveness of the appropriate safeguards of the transfer tool relied on, such as far-reaching data access rights by U.S. authorities for the purpose of surveillance. If this is the case, supplementary measures such as strong encryption may need to be taken ([EDPB Recommendations 01/2020](#)).

One of the most controversial issues is the question to what extent a controller may resort to the transfer tools under Article 49 GDPR, including, in particular, the data subject's free and **explicit consent**. According to the EDPB, Article 49 GDPR may be relied on only in some cases of occasional and non-repetitive transfers.

4.5. Requirements for bigger players

Where processing is likely to result in a high risk to data subjects, the controller must carry out a **data protection impact assessment** first. This is required, in particular, in the case of a systematic and extensive evaluation of personal aspects of individuals (e.g. profiling) on which decisions are based that significantly affect the individuals, or of processing on a large scale of particularly sensitive data. The Austrian data protection authority has published a list of the kind of processing operations which are subject to the requirement for a data protection impact assessment.

A controller or processor must furthermore designate a **data protection officer**, inter alia, where the core activities consist of processing which requires regular and systematic monitoring of data subjects on a large scale, or of processing on a large scale of especially sensitive data. The data protection officer may be a staff member or fulfil the tasks on the basis of a service contract.

Big controllers employing at least 250 persons, and controllers engaging other than just occasionally in processing activities that are likely to result in a risk to the rights and freedoms of data subjects, face enhanced **documentation** duties under the GDPR. Such controllers must maintain a record of processing activities under its responsibility. That record must contain a long list of items of information that is similar to the information provided to data subjects under Article 13.

5. Concluding contracts online

Having implemented all the general requirements for commercial websites, including data protection law, Selma and Sebastian are eager to set up what they consider to be the most important part of their online shop: the features that allow customers to conclude online contracts with them.

After all the experience they have gained so far they suspect that a host of further intricate legal requirements is awaiting them, and they are, indeed, right...

5.1. Contract law


5.1.1. Formation of contracts

A contract is made through the agreement between two (or more) parties who mutually declare that they will be bound by particular rules, e.g. by particular obligations owed to one another. The two declarations of will (*Willenserklärungen*) are called ‘**offer**’ (*Angebot, Antrag*) and ‘**acceptance**’ (*Annahme*). Contracts made between an online shop and its customers are mostly contracts for the sale of goods or for the provision of services.

As a general rule, contracts do not have to be made in a particular form, but can be made orally, or even by implied conduct, and only exceptionally does the law require particular formalities (such as a deed made in writing or even a notarial deed). Many declarations are nowadays made by electronic means and over the Internet (e.g. by clicking on a button).

Parties are normally more or less free, within the confines set by the law and public policy considerations, to decide on the content of contractual agreements. This is an important aspect of party autonomy (*Privatautonomie*). However, where one party (such as an online trader) imposes its **general terms and conditions** (GTC) (*Allgemeine Geschäftsbedingungen, AGB*) on the other party (such as a customer), these general terms and conditions are subject to additional unfairness control. This unfairness control is particularly strict in dealings with a consumer.

Since unfairness control is very strict and there is very little leeway in dealings with consumers anyway, Selma and Sebastian decide not to use GTC for the time being and simply rely on the law.



You will study the origins of modern contract law in BA CM 4 (Roman Law and the Civilian Tradition).

You will study contract law as it is in force today in BA CM 9 and CM 10 (Civil Law and Private International Law).

5.1.2. Consumer, general, and commercial contracts

Contract law rules are very different depending on whether the contract is one between two businesses (B2B), a business and a consumer (B2C), or two consumers (C2C). For the purpose of contract formation the main difference is between consumer contract law (B2C contracts) and general contract law.

A ‘**consumer contract**’ that is subject to specific consumer protection rules is any transaction in which one party is acting as a business and the other as a consumer (B2C). There is a host of legal provisions on consumer contract law that apply exclusively to B2C transactions, a major part of which is based on EU Directives. More or less all consumer law is **mandatory law** in the sense that it cannot be derogated from by agreement to the detriment of the consumer.

In European law, a ‘business’ means any natural or legal person that is acting for purposes relating to that person's trade, business, craft or profession. A ‘consumer’ means any natural person who,

conversely, is acting for purposes which are outside that person's trade, business, craft or profession. These definitions are relevant for the application of all directly applicable EU law (Regulations).

In Austrian domestic law, notably § 1 of the Consumer Protection Law (*Konsumentenschutzgesetz*, KSchG), definitions are slightly different. A consumer is defined as any natural or legal person that is not acting as a business. Even legal entities (e.g. associations) may thus qualify as consumers provided they are not pursuing an economic activity. The KSchG further provides that whoever sets up a business for the first time is not considered to be acting as a business for any preparatory transactions entered into before the business starts its operations.

As far as contract formation is not governed by specific provisions of consumer contract law the provisions of **general contract law** apply. The most important provisions are to be found in the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB). Every contract is, at least to some extent, governed by provisions of general contract law because consumer contract law never covers all the issues that might arise.

While contracts between businesses are largely subject to the general provisions under the ABGB there are also some legal provisions that are explicitly restricted to dealings between businesses, i.e. to B2B transactions. Most of the latter can be found in the Austrian Commercial Code (*Unternehmensgesetzbuch*, UGB), notably in §§ 343 et seq. UGB.

5.1.3. Cross-border trading

In cases with a foreign element, the applicable contract law does not have to be Austrian law, it may equally be foreign domestic law. As far as an issue is not governed by uniform law such as the CISG (on which [see below p. 51](#)), the applicable contract law is determined by the rules of private international law (**conflict-of-laws**).

Every court seised with a matter applies the conflict rules of its own country (the so-called ‘forum’), which may be rules of domestic, EU or international law, in order to find out (a) whether the court has international jurisdiction, and, if that is answered in the affirmative, (b) the law of which state applies to the issue at hand.


Naturally, if every court applies its own rules of jurisdiction and its own conflict rules, the results achieved may diverge. This is why there is an incentive for claimants to search for the most favourable forum, i.e. the forum that will apply the substantive rules most favourable to the claimant (‘forum shopping’), and also why there may be conflicting decisions. This is undesirable, and a reason for making efforts to harmonise jurisdiction and conflict rules at European or even at international level.

Jurisdiction

Selma and Sebastian are a bit concerned when they hear this. Does this mean that someone could sue them in a court abroad, maybe in a country whose language they do not speak, even though they have their business in Austria? Unfortunately yes, in particular when dealing with consumers.

Where a court is seised with a matter arising from a contract a court within the EU has to base its own international jurisdiction on the **Brussels I Regulation** (but there are exceptions where the defendant is not domiciled in a Member State of the EU).

Special provisions on consumer contracts apply to some contracts with a credit element and, more generally, to contracts made with a business that pursues commercial activities in the Member State of the consumer’s domicile or that, by any means, directs such activities (also) to that Member State, and the contract falls within the scope of such activities.



You will study international jurisdiction in MA CM 4 (Law of Civil Procedure)

Whether an online shop ‘directs’ its activities to the consumer’s country is to be determined by a variety of factors, such as any explicit statements made, delivery options, the language chosen for the website, domain names, or currencies.

According to Article 18, the consumer may bring proceedings against the business either in the courts of the Member State in which the business is domiciled or in the courts of the place where the consumer is domiciled (the latter even where the business is domiciled outside the EU). The business may bring proceedings against a consumer only in the courts of the Member State in which the **consumer is domiciled**. So these rules of jurisdiction are extremely favourable to the consumer.

In contracts other than such B2C contracts international jurisdiction for contractual claims follows from an agreement between the parties, or the claimant can sue before the courts of the defendant’s domicile or at the place where the contractual obligations were to be fulfilled.

Applicable law

Selma and Sebastian are now truly shocked. Is it even possible that they will have to comply with foreign contract law, just because they are marketing their stuff cross-border? Unfortunately (for them), the answer is again: yes.

The law applicable to issues arising from a contract is determined, from the point of view of a court in the EU/EEA, by the **Rome I Regulation**. This holds true even where elements of the situation are located outside the EU/EEA, or when the law applicable to the contract is not that of a Member State (‘principle of universal application’). The most important principle underlying the Rome I Regulation is that of party autonomy, i.e. a contract is, in the first place, governed by the **law chosen** by the parties.

You will study conflict of laws in BA CM 10 (Civil Law and Private International Law).

The choice can be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. There are only very few limits to this general principle, e.g. the parties cannot escape the mandatory provisions of the law of a country where all other elements relevant to the situation at the time of the choice are located in that country, or mandatory provisions of EU law where all other elements are located in the EU.

In the absence of choice by the parties, a contract for the sale of goods is normally governed by the law of the country where the seller has their habitual residence. For other than sales contracts, there are similar rules, referring normally to the law of the supplier.

‘Habitual residence’ of a company is the principal place of business or central administration. Where the contract is concluded or to be fulfilled by a branch, agency or any other establishment, the location of that branch etc. counts.

Things are, however, different for B2C contracts where the business pursues their commercial activities in the country where the consumer has their habitual residence, or by any means, directs such activities (also) to that country, and the contract falls within the scope of such activities. In the absence of a choice by the parties, such a consumer contract is wholly governed by the law of the state of the **consumer’s habitual residence**. Even where the applicable law has been chosen (such as in standard terms provided by the business) choice by the parties may not deprive the consumer of the mandatory protection afforded by the law of that consumer’s habitual residence.

CISG

A cross-border contract for the sale of goods between businesses may primarily be governed by the [United Nations Convention on Contracts for the International Sale of Goods](#) (CISG). The CISG is international **uniform law**, applicable in 94 countries worldwide. It applies to contracts for the sale of goods between parties whose places of business are in different States when these States are Contracting States; or when the rules of private international law lead to the application of the law of a Contracting State.

You will study the CISG in BA CM 9 and CM 10 (Civil Law and Private International Law).

The CISG is not really restricted to parties who are acting as businesses, but it does not apply to the sale of goods bought for personal, family or household use, which means it will ordinarily apply only to commercial sales contracts.

However, the parties may **opt out** of the CISG (note that choice of 'Austrian law' as the law governing the contract does, as such, not suffice for opt out, as the CISG is part of Austrian law). Also, the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract, but not, e.g., the validity of the contract or liability of the seller for death or personal injury caused by the goods to any person.

5.2. Duties under e-commerce law

Selma and Sebastian know from their own shopping experience that there is a number of duties for online retailers, including the duty to acknowledge very quickly receipt of an order. They are not sure, however, what the source of these duties is, and which kind of duties exist ...

Where an information society service consists in making contracts with others, or offering to do so (as is typically the case with an online shop), additional information and related duties must be fulfilled on top of the ones already discussed ([see above p. 32](#)). Their purpose is to make sure **contract formation is fair for the customer**. These duties apply irrespective of whether the contract is B2B or B2C, but where the customer is not a consumer the parties may derogate from the duties by way of mutual agreement (which hardly ever happens in practice).

You will study e-commerce law in BA CM 7 (Digital Law).

Without prejudice to more far-reaching information duties resulting from consumer contract law or other bodies of the law, at least the following information must be given by the online shop clearly, comprehensibly and unambiguously and prior to the order being placed by the customer:

- the different technical steps to follow to conclude the contract;
- whether or not the concluded contract will be filed and whether it will be accessible;
- the technical means for identifying and correcting input errors prior to placing of the order;
- the languages offered for the conclusion of the contract; and
- any relevant codes of conduct to which the business subscribes (such as trust labels) and information on how those codes can be consulted electronically.

In addition, the business must

- make all contract terms and general conditions available in a way that allows the customer to store and reproduce them;
- acknowledge the receipt of the customer's order without undue delay; and

- make available to the customer appropriate, effective and accessible technical means allowing the customer to identify and correct input errors, prior to the placing of the order.

5.3. Duties under distance sales law (*Fernabsatzrecht*)

Requirements under the ECG look pretty straightforward to Selma and Sebastian. However, when shopping online in the past, they were usually confronted with a lot more information, and with something called ‘right of withdrawal’. If this does not follow from the ECG, does it follow from another law? Or do online traders offer this voluntarily?

While the duties under the ECG apply to all online shops irrespective of whether an online shop sells to other businesses or to consumers, there is a host of further duties that apply specifically to **B2C contracts**. They follow from the Distance and Off-Premises Contracts Act (*Fern- und Auswärtsgeschäftegesetz*, FAGG) and apply to consumer contracts that are concluded under an organised distance sales or service-provision scheme without the simultaneous physical presence of the parties, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded (**distance contracts**). Contracts concluded in an online shop are typical distance contracts.



You will study consumer contract law in BA CM 9 and CM 10 (Civil Law and Private International Law).

5.3.1. Steps towards online contract conclusion

Step 1: Pre-contractual information duties

Before the consumer is bound by a distance contract the business must provide the consumer with a very long list of items of information, as listed in § 4 FAGG, in a clear and comprehensible manner and in a way appropriate to the means of distance communication used. The information includes specific information, inter alia, about the business, the characteristics of the goods etc., the total price, delivery and any other costs, details about delivery and payment, details about the consumer’s right of withdrawal, and a reminder of the existence of warranty rights and, where applicable, of commercial guarantees and complaint mechanisms.

As will be explained in more detail below (p. 54), the consumer may, within a period of 14 days, withdraw from the contract without having to give any reason. Among the long and detailed list of items, the **information regarding the right of withdrawal** is of particular importance because any – even very minor – mistake may lead to quite drastic consequences (on which further below p. 55). In the course of providing this information, the business also has to provide to the consumer a model withdrawal form set out in an Annex to the FAGG. Because it is so difficult and yet so crucial to get the information right, the legislator provides a set of model instructions on withdrawal in another Annex. The business is not strictly required, but well advised to use them.

Step 2: Order process

If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the business must make the consumer aware of particular key items of information, which are listed in § 8(1) FAGG, in a clear and prominent manner directly before the consumer places their order. This normally occurs in the electronic ‘**shopping cart**’.



Trading websites must indicate clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply and which means of payment are accepted.

Before the order is placed, the business must then comply with the additional duty under the ECG (see above p. 51) to make available to the customer appropriate, effective and accessible technical means allowing the customer to identify and correct input errors prior to the placing of the order. Normally this occurs by showing to the consumer, on one page, all the core information they have provided and asking the consumer to check and either correct or confirm.



The business must then ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a **button** or a similar function, the button or similar function must be labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation.

Formulations such as ‘Buy now’ are generally assumed to comply with this requirement, but not formulations such as ‘Download’ or ‘Continue’. If the trader has not complied with these requirements, the consumer is not legally bound by the contract or order.

Step 3: Requests to start performance before the lapse of withdrawal period

As has been mentioned above, the right to withdraw from the contract without having to give any reason is a core consumer right. For many contracts, such as contracts for services, digital content or grid-based supply of water or electricity, it would be impossible to unwind the contract in kind if the consumer exercises their right of withdrawal after performance has started. In order to minimise complications caused by the reversal of such contracts, the FAGG provides for further safeguards. Where a consumer wants the performance to begin right away or otherwise already before the lapse of the 14-day period the business must require that the consumer ‘makes an express request’ or ‘gives consent’ and acknowledges that they will lose the right of withdrawal under certain circumstances.

Details are very complex, including on who has to require or confirm what in which order. However, it is particularly important for businesses not to forget this step because forgetting can have drastic consequences (on which further below p. 55).

Step 4: Confirmations

In consumer contract law, the provision of information on a ‘durable medium’ plays an important role. A **‘durable medium’** means any instrument which enables the consumer to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

This includes paper, email or text message, but normally not the mere display on a website because a website can be changed by the business at any time. There may be exceptions for very sophisticated websites with a password-protected customer area which the business cannot just access to change the information therein stored.

If the information has already been given to the consumer on a durable medium before the contract was concluded the business does not have to provide it again. Otherwise – e.g. if it was displayed only on the website – the business must provide the consumer with the confirmation of the whole contract and all the information on a durable medium within a reasonable time, and at the latest at the time of the delivery of the goods or before the performance of the service begins.

5.3.2. Consumer's right of withdrawal

Selma and Sebastian are now particularly worried about this right of withdrawal, which seems to involve quite a lot of risks for businesses. They are keen to learn more...

When marketing goods, services and digital products to consumers online, businesses must bear in mind that contracts are usually subject to the consumer's right of withdrawal under distance sales law (see already above p. 52).

Existence of a right of withdrawal

As a general rule, consumers who buy online have the right to withdraw from the contract, without giving any reasons, within a **withdrawal period** of 14 days calculated from the day the goods were delivered or, for contracts other than for the sale of goods, when the contract was concluded. However, where the trader has not one hundred percent complied with all information duties concerning the right of withdrawal, the withdrawal period is extended by up to one year.

This applies irrespective of whether the mistake was only minor (e.g. the model withdrawal form was missing, but the consumer would not have used that anyway, or there was just one little ambiguity in the formulation). Generally speaking, consumer protection regulation such as the FAGG is very **formalistic and strict**, i.e. there is hardly any room for argumentation whether something is equitable and just in the individual case. Even abusive behaviour by consumers is tolerated to a very large degree, as the idea is that traders who fail to comply with the requirements are not deserving protection. This applies irrespective of the size of the business.

§ 18 FAGG lists a limited number of contracts where no right of withdrawal exists. These contracts include, inter alia:

- the supply of goods made to the consumer's specifications or clearly personalised;
- the supply of goods which are liable to deteriorate or expire rapidly; and
- the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery.

There is also a limited number of situations where a right of withdrawal initially exists but later expires for reasons other than lapse of the withdrawal period. The most important situations are:

- full performance of a service under a service contract, but only if the performance has begun with the consumer's prior express consent, and with the acknowledgement that they will lose their right of withdrawal once the contract has been fully performed by the trader; and
- start of online supply of digital content or digital services, but only if the performance has begun with the consumer's prior express consent and with the acknowledgment that they will lose the right of withdrawal with the beginning of performance.

Conditions

The consumer can exercise their right of withdrawal by way of informing the trader in any form, with or without using the model withdrawal form provided by the trader, and including by way of implied conduct such as by sending back the goods received. Exercise of the right of withdrawal immediately terminates all obligations to make performance under the contract, and insofar as performance has already been made, anything received under the contract needs to be returned.

This means that the trader will **reimburse all payments** received from the consumer without undue delay and in any event within 14 days. The obligation to reimburse payments includes the costs of standard delivery (if paid by the consumer), but not any supplementary costs if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered

by the trader. The trader may normally withhold the reimbursement of payments until the trader has received the goods back or the consumer has supplied evidence of having sent back the goods. The direct **cost of returning the goods** is normally borne by the consumer, but a trader may, of course, voluntarily agree to bear these costs (in order to encourage consumers to buy).

When consumers exercise their right of withdrawal this may be burdensome for the trader who, in the case of sale of goods, receives the goods back and has to examine and re-package the goods, sometimes also to replace price-tags etc. The situation is worse where the consumer has used the goods so that they need cleaning and may only qualify for re-sale as second-hand goods, if at all.

Under distance sales law, the consumer is liable for any **diminished value** of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods, such as where garments have already been worn and not just tried on. However, the burden of proof is on the seller, and the consumer is not liable for any diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with all the requirements that the law sets out for this notice. As, in the latter case, the withdrawal period is extended by up to one year, this means in effect that the consumer can theoretically use the goods for one year, send back what is left of them, and claim back the full purchase price plus initial delivery costs.

In the case of services or grid-bound supply of water, energy etc. the situation is even more difficult for the trader because the consumer does not have to pay anything for the service or supply received where the trader has made particular, albeit very small, mistakes.

5.4. Warranty law (*Gewährleistungsrecht*)

Warranty law comes into play when performance made under a contract, e.g. goods delivered under a sales contract, is not in conformity with the contract. The legal consequences differ, depending on whether the contract is a B2C, B2B or C2C contract and on the contract type.

5.4.1. Consumer Warranty Act 2021

For B2C contracts, a new Consumer Warranty Act (*Verbrauchergewährleistungsgesetz, VGG*) is expected to be passed in summer 2021 and to apply from January 2022. The VGG relies on two EU Directives, one on the sale of goods and the other on the supply of digital content (such as apps) and digital services (such as social network services) to consumers.

Lack of conformity with the contract

As to the requirements that must be met for goods to be in conformity with the contract, a distinction is made between two types of requirements. The **'subjective requirements'** are rather straightforward – the trader simply has to comply with everything they have promised under the contract, ranging from product features to software updates. The **'objective requirements'** are generally implied by the law, but the parties may derogate from them by way of qualified agreement.

For such derogation to be qualified the consumer must have been specifically informed that a particular characteristic of the goods deviated from the objective requirements for conformity when the sales contract was made, and must have expressly and separately accepted that deviation.



You will study the origins of warranty law in BA CM 4 (Roman Law and the Civilian Tradition).

Contract law, including consumer contract law, will be taught in BA CM 9 and CM 10 (Civil Law and Private International Law).

‘Objective requirements’ include, inter alia, that goods

- are fit for the purposes for which goods of the same type would normally be used;
- are delivered along with such accessories (e.g. packaging and instructions) and with updates (e.g. security updates) as the consumer may reasonably expect to receive; and
- possess the features normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement by persons in the supply chain, particularly in advertising or on labelling.

The seller is liable for any lack of conformity that existed at the time of delivery, albeit possibly in ‘embryonic’ form, and that becomes apparent within the **warranty period**, which is at least two years from delivery. Where the lack of conformity becomes apparent within the **presumption period**, the burden of proof that the lack of conformity already existed at the time of delivery is on the seller. This presumption period is at least one year. Whether Austria will eventually provide for periods that are longer than the minimum periods is not yet clear.

What is important to note is that the right to receive **updates** is not limited to the warranty period, but is for the period of time ‘that the consumer may reasonably expect’ or, in cases of continuous supply, for the duration of the contract. This means that, in particular for expensive and durable consumer goods, the seller may become liable for a lack of conformity that is due to absence of an update, or to a faulty update, even many years after delivery. Needless to say, this is not the case where it was the consumer who failed to install the update that was properly provided.

Remedies for lack of conformity

In the event of a lack of conformity, the consumer is, in the first place, entitled to have the goods, digital content or services brought into conformity. For goods, this means that the consumer may choose between the ‘primary remedies’ of **repair** or **replacement**. The consumer is not entitled to repair or replacement where the remedy chosen would be impossible or would impose costs on the seller that would be disproportionate.

The consumer cannot freely choose to have the price reduced or claim their money back right away. Rather, these ‘secondary remedies’ are available only under particular circumstances.

This is the case where the business has failed to comply with the primary remedies, or has refused to do so, or it is otherwise clear that the business will not comply within a reasonable time and without significant inconvenience for the consumer, or an attempt to comply with them has been unsuccessful, or the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination because the consumer has lost trust in the business.

The consumer may, under such circumstances, choose between proportionate **price reduction** and **termination**, but termination is not available as a remedy if the lack of conformity is only minor. In the event of termination, the contract needs reversing, i.e. the consumer must return goods to the seller, at the seller's expense, and the seller must reimburse the consumer for all sums paid under the contract.

Mandatory nature and redress

Traders cannot, in B2C transactions, escape the strict warranty rules – like more or less all consumer contract law, the rules are mandatory. Since the immediate sellers are usually not the parties who have caused the non-conformity it is important to make sure they can seek redress against previous links of the supply chain. Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission, including omitting to provide updates, by a person in previous links of the supply chain, the seller is entitled to pursue remedies against that person.

5.4.2. General warranty regime

All sales contracts that are not B2C contracts, and more or less all B2C or other contracts that are not contracts for the sale of goods or the supply of digital content or services, are subject to the **general warranty regime** under the ABGB.

This general warranty regime is not too different from the VGG, as the types of remedies, and their hierarchy, are very similar. However, it is clearly less favourable for the buyer (e.g. the presumption period is shorter; remedies are less far-reaching where goods have been installed; there are no explicit rules for goods with digital elements). In particular, parties may freely derogate from warranty provisions under the general regime, but full waiver of all warranty rights by the buyer may be considered to be contrary to public policy in the case of a sale of newly manufactured goods.

Even for B2C contracts that are normally covered by the VGG, some **concurring remedies** are to be found in the ABGB, including:

- damages in lieu of warranty (*Schadenersatz statt Gewährleistung*), which is similar to warranty rights, but requires fault, and is subject to a more favourable prescription regime;
- damages for consequential harm (*Schadenersatz für Mangelfolgeschäden*), which equally requires fault and may be afforded for instance where the buyer suffered personal injury or property damage; and
- avoidance of the sales contract for mistake (*Irrtumsanfechtung*).

Note that, independently from any liability of the seller, the producer of defective products that have caused death, personal injury or property damage may be liable in tort or under the **Product Liability Act** (*Produkthaftungsgesetz*, PHG). This has nothing to do with warranty law.

Warranty for goods or digital products that are not in conformity with a **commercial sales contract** is mostly governed by the ABGB, with some specific provisions in the UGB. Under §§ 377, 378 UGB, there is a requirement for commercial buyers to notify the seller within a reasonable period of defects in the goods which they have discovered or should have discovered by examination in the ordinary course of business after delivery. Normally, failure to do so means the buyer can no longer enforce any rights under warranty law, but there are some exceptions, e.g. where the seller acted intentionally or grossly negligent in causing or concealing the defect.

5.5. Trading via a platform

Given how difficult it is to get everything right, Selma and Sebastian are beginning to wonder whether it is really a good idea to set up an entire webshop by themselves, or buy a ready-to-use webshop package, or whether they should maybe rather trade their stuff via one of the big trading platforms. Maybe these platform providers would assist them in setting up their business and take over much of the difficult tasks.

Online intermediary platforms play an ever bigger role for e-commerce. There is a very broad range of different types of platforms, ranging from mere search engines (e.g. Google), to price comparison tools (e.g. Geizhals.at), to direct marketing tools (e.g. Facebook), to online marketplaces (e.g. Amazon) to full-service intermediary platforms that take over most of the steps required for negotiating, concluding and fulfilling a contract (e.g. Airbnb). Accordingly, the types of services provided to platform users (suppliers as well as their customers) vary, as do the contractual arrangements. It is in particular in the case of full-service intermediary



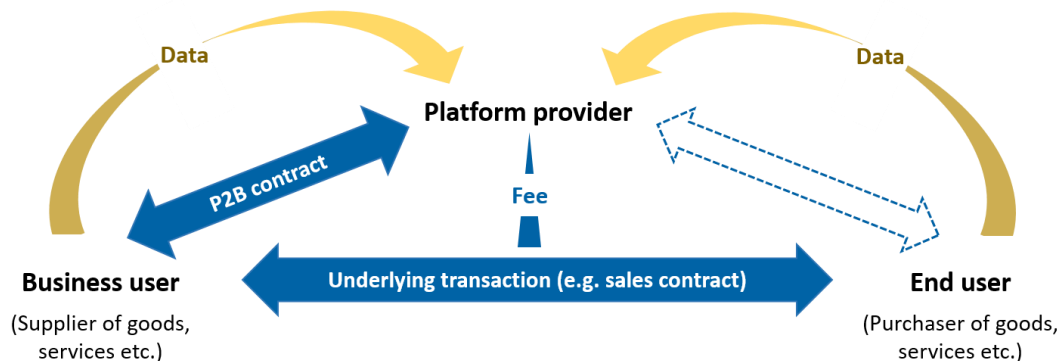
You will study platform regulation in
BA CM 7 (Digital Law).

platforms that operators may even become the customer's only contracting partner if the whole appearance of the arrangement was such as to make the customer believe they were contracting with the platform operator itself.

5.5.1. General duties of platform operators

Platform operators are essential for a free and vibrant online society and economy. There is thus a general desire to shield them from overreaching duties and liability risks with regard to their users' activities. On the other hand, there is often a mismatch between the actual power of platforms as well as the profits they make and the responsibilities they take.

For instance, a platform engaging in the matchmaking between transport services providers and passengers might harvest a significant share of the profit derived from transport services without having to worry about specific requirements for transport as a regulated trade (see above p. 13), about wages and social security (see above p. 24), about taxes in the country where the service is provided (see above p. 21), or about many mandatory consumer rights. In addition, such a platform can collect and accumulate valuable data from all individual transactions, giving it unparalleled insights into the behaviour of market participants and enabling it to create additional value, ranging from the development of new 'smart' services to AI training. This is why there is a general trend to shift more legal duties and requirements to the platform providers themselves, e.g. by qualifying the operator of a platform such as 'Uber' directly as a provider of transport services, by involving online marketplaces in market surveillance measures (see above p. 11), by making them liable for import VAT as 'deemed suppliers' (see above p. 24), and by further measures.



Information duties for B2C contracts

There are as yet only few rules concerning the general duties of platform operators. From May 2022, online marketplaces facilitating B2C contracts must provide particular **information to the consumer**. This information includes the main parameters determining ranking of offers presented to the consumer as a result of a search query and the relative importance of those parameters as opposed to other parameters. It also includes the information whether the supplier offering the goods etc. is a trader or not (on the basis of the declaration of that supplier to the provider of the online marketplace) and, if not, a warning that mandatory consumer rights do not apply to the contract. The online marketplace must also disclose how the obligations related to the contract are shared between the supplier and the online marketplace.

Notice-and-take-down principle for illegal content

One of the aspects Selma and Sebastian find worrying is that, on some of the platforms they are considering, there seem to be a lot of rather dodgy suppliers, in particular from outside the EU/EEA, overtly offering, for instance, counterfeit products or iPhones at the astonishing price of 5 euros. They are wondering how this can be possible.

One of the most controversial issues is the extent to which platform operators may be held liable for their users' activities where these activities are 'illegal' in the broadest sense, ranging from hate speech to copyright infringement to fraud to the marketing of counterfeit or unsafe products.

According to the ECG, platform operators that are mere **host providers** (as contrasted with content providers), i.e. that limit themselves to the storage of information provided by a supplier, are not liable for the information stored on condition that the provider (a) does not have **actual knowledge** of illegal content and is not aware of facts or circumstances from which the illegality is apparent; and (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the content ('notice-and-take-down' principle). There is, in particular, no general obligation to monitor content which they store, nor a general obligation to actively seek facts or circumstances indicating illegal activity. Only where illegal activities become known, the service provider may be required to terminate or prevent an infringement.

For 'video sharing platforms' (which may include social media), the Audiovisual Media Services Act (*Audiovisuelle Mediendienste-Gesetz*, AMD-G) provides for a range of additional requirements and safeguards, which also affects the activities of influencers, professional YouTubers, etc. For other 'communication platforms' (which excludes, e.g., mere online marketplaces for goods or services), the new Communication Platforms Act (*Kommunikationsplattformen-Gesetz*, KoPl-G) provides for a range of additional mechanisms intended to create a fair balance between the conflicting interests. There is also a proposal for a **Digital Services Act** at EU level on the table, which has a much broader scope and would also capture online marketplaces for goods or services.

It is only with regard to copyright infringements that the famous Article 17 of the **DSM Directive** makes an exception from the limitation of liability, i.e. 'online content-sharing service providers' may become liable where uploaded content infringes copyright unless they demonstrate that they have (a) made best efforts to obtain an authorization from the rightholders, and (b) made best efforts to ensure the unavailability of protected works where no authorization is provided, and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to infringing works and prevent their future uploads. Points (b) and (c) have given rise to the interpretation that '**upload filters**' need to be generally employed, which is a heavily contested point. In order to avoid over-blocking (i.e. the phenomenon that providers, for fear of liability, delete too much content) providers must offer an effective and expeditious complaint and redress mechanism for users.

5.5.2. P2B Regulation

Selma and Sebastian are also worried at hearing about the experience of Xu's parents, and of Matteo and John, all of whom have had difficult encounters with some big and powerful platform providers. For example, they suddenly found their offers removed from one day to the next ('de-listing'), or ranked so far down that customers would never find them ('dimming'). They are wondering whether there is any protection against such practices.

The **P2B Regulation** lays down rules to ensure that business users of online intermediation services (platforms) as well as corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities.

In territorial terms it applies where the business users or corporate website users are established in the EU/EEA and offer goods or services to consumers located in the EU/EEA, irrespective of the place of establishment of the platform or search engine provider and of the law applicable to the platform contract.

A focus of the P2B Regulation is the requirement of full transparency of all **terms and conditions** applied by a platform provider vis-à-vis business users. Proposed changes of terms and conditions must be communicated on a durable medium and must not be implemented before the expiry of a

reasonable notice period of at least 15 days, allowing the business user to adapt to the new situation or to terminate the contract with the platform. Non-transparent terms and conditions, or changes of terms of conditions that do not meet the requirements, are null and void.

Specific requirements apply where the platform provider decides to **restrict or suspend** the provision of its services to a given business user. Further provisions address the **ranking** of business users or of the goods and services they offer, or any differentiated treatment, or other relevant issues such as access to data. They concern mainly the transparency of parameters with the aim of enabling the users to obtain an adequate understanding of whether decisions take account of legitimate concerns. Last but not least, the P2B Regulation focusses on **redress mechanisms**, introducing mandatory internal complaint-handling system, mediation, and judicial proceedings by representative organisations or associations and by public bodies.

5.5.3. Competition law (*Wettbewerbsrecht*)

When they hear this, Selma and Sebastian are not totally convinced. Transparency and procedural fairness requirements are nice, but what they would find essential is that these very powerful platforms simply refrain from unfair practices against much smaller businesses ...


Competition law, and more specifically a part of competition law that is often referred to as antitrust law or cartel law (*Kartellrecht*), serves to protect the market against restrictions of competition and the undue exercise of market power. It is partly derived directly from Articles 101, 102 TFEU, partly from EU secondary law, and partly from domestic law (e.g. *Kartellgesetz 2005* KartG 2005, *Wettbewerbsgesetz* WettbG). Competition law comprises the prohibition of cartels (e.g. price cartels) and the prohibition of abuse of a dominant market position. Furthermore, it includes merger control and state aid law.

Amongst other things, competition law prohibits **abuse of a dominant market position** (*Missbrauch einer marktbeherrschenden Stellung*). What constitutes a dominant position depends on the relevant product and geographic market. In general, the lower the market share, the more likely it is that special circumstances of the market structure or similar factors must be present in order to assume a dominant position.

Abuse of a dominant position may, e.g., consist in charging unreasonably high prices, depriving smaller competitors of customers by selling at artificially low prices they can't compete with, obstructing competitors by forcing consumers to buy a product which is artificially related to a popular product, refusing to deal with certain customers or offering special discounts to customers who buy all or most of their supplies from the dominant company.

However, traditional competition law enforcement inevitably intervenes after the restrictive or abusive conduct has occurred and involves investigative procedures that are difficult and take time. A proposal for a new piece of EU legislation, the **Digital Markets Act**, deals specifically with practices of so-called 'gatekeepers' among the platforms that limit contestability or are unfair. The proposal complements existing competition rules by minimising unfair practices already *ex ante*.

For instance, a gatekeeper must allow businesses to offer the same products or services to end users through other platforms at prices or conditions that are different from those offered through the gatekeeper platform, and to conclude contracts with end users acquired via the gatekeeper platform regardless of whether for that purpose they use the core platform services of the gatekeeper or not.



You will study
competition law in
BA CM 11
(Business Law).

6. Enforcement of the law

After having studied all the many legal requirements and restrictions someone setting up an online shop has to consider and to comply with, Selma and Sebastian are rather desperate. Many of the requirements and restrictions they understand and endorse, but others (including some of the information and similar duties as well as some restrictions following from data protection and copyright law) they find rather unnecessary and overreaching. Shouldn't the State be grateful if young people accept the challenge and start a business, rather than make things difficult for them?

OK, they want to become lawyers and should therefore obey the law in any case, but ... they are still wondering what would happen if they simply ignored some of the rules.

In contrast to social, moral or religious standards, law is characterised by the fact that it will be **enforced by the State's institutions**. While in reality, the law will never be enforced in full, the gap between law and its enforcement (the 'enforcement gap') should never grow too big, for otherwise the rule of law—as a foundational principle our society and legal system is built upon—would be undermined. However, there are different mechanisms of enforcement, notably public enforcement, private enforcement, and other forms of enforcement. Typically, an area of the law is dominated by one or the other type of enforcement.

6.1. Public enforcement

Public enforcement means the law is enforced as such and on the initiative of the State in the exercise of sovereign power. **Criminal law** is the paradigm case for an area that is dominated by public enforcement. State authorities will normally initiate criminal investigations by themselves (i.e. even where the victim does not complain) for the majority of judicial crimes as well as administrative offences (*Offizialdelikte*). This is without prejudice to the fact that, in practice, authorities will often learn about a crime only upon a complaint.



You will study criminal law in BA CM 8 (Criminal Law and Procedure).

For some crimes, such as unlawful access to a computer system ('hacking'), the victims need to give their authorisation (*Ermächtigungsdelikte*). However, in a number of cases, the legislator felt that the decision should be entirely in the hands of the victim and that, in the absence of the victim's initiative, the crime will not be prosecuted. These so-called private prosecution offences (*Privatanklagedelikte*) include, e.g., most infringements of IP rights or competition offences. Proceedings are, however, still criminal proceedings, e.g. a fine will normally be paid to the Treasury and not to the victim. If the victim wants damages, they have to resort to remedies under private law.

Also most **other public law** is dominated by public enforcement. This includes, e.g., public security law (including product safety law), tax law or social security law. While any violation of such laws may indirectly give rise to, or facilitate the substantiation of, private claims (e.g. for damages) under private law, authorities will normally enforce those laws in their own right. Details are complex and differ from area to area of the law.

6.2. Representative and competitor enforcement

When they hear this, Selma and Sebastian are not too concerned. After all, while infringement of many of the standards would constitute an administrative offence, they have never heard of authorities enforcing consumer protection law or similar law on a broad scale. Plus, since 2019, administrative authorities in Austria have started a new initiative 'Advising instead of Punishing' ('Beraten statt Strafen'), so when an offence is not really serious, and in particular with microenterprises, authorities

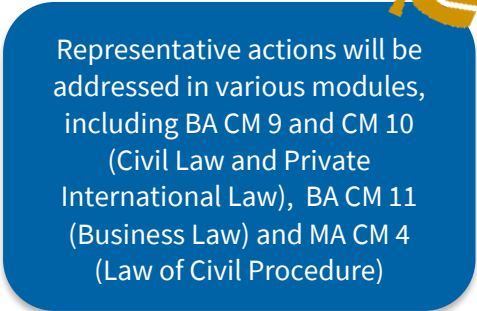
would normally support traders in being compliant rather than impose a fine (or worse) when non-compliance occurs for the first time.

Selma and Sebastian remain a little confused, though, because they remember friends telling them about very minor mistakes these friends had made on their trading websites, and that this turned out to be really expensive ...

Also economic administrative law is subject to public enforcement. This includes the majority of requirements and restrictions addressed in these preparatory materials, such as following from trade regulation law, e-commerce law, telecommunications law, media law, but also—at least as far as violations may be prosecuted as administrative offences—much of consumer contract law, such as information and related duties under distance sales law. There are **supervisory authorities** for each of these areas whose role it is to take action whenever there is a violation of the law. While this is established practice in some areas (e.g. telecommunications law), enforcement in other areas has largely been delegated to other players and other enforcement mechanisms.

Representative action under the KSchG

A long list of statutes or statutory provisions (see §§ 28, 28a KSchG) has been qualified as serving **consumer protection**. This includes, inter alia, e-commerce law, distance sales law, information duties under the services act, information duties on ADR and ODR, rules on unfair contract terms and consumer warranty law. Any infringement of such law that is contrary to the collective interests of consumers (e.g. because it might occur repetitively) is subject to an **action for injunctive relief** (*Unterlassungsklage*). The injunction may be sought by qualified entities representing the interests of affected stakeholders, such as recognised consumer representative bodies (e.g. the *Verein für Konsumenteninformation*, VKI) or trader representative bodies (e.g. the Austrian Chamber of Commerce, WKÖ).



Representative actions will be addressed in various modules, including BA CM 9 and CM 10 (Civil Law and Private International Law), BA CM 11 (Business Law) and MA CM 4 (Law of Civil Procedure)

An injunction may result in enjoining the cessation and prohibition of an infringement (where appropriate by way of summary procedure), publication of the decision, and possibly sentencing defendants to pay a fine in case of future infringements. A qualified entity will often not go to court right away but approach the infringing business first with a warning notice (*Abmahnung*), requesting the business to sign a **declaration to cease and desist** (*Unterlassungserklärung*) under a contractual penalty.

Representative and competitors' action under the UWG

Similar rules apply where a business has engaged in a defined range of **unfair commercial practices** within the meaning of the UWG, such as misleading or aggressive practices. According to § 14 UWG largely similar qualified entities as mentioned in the KSchG have the right to file an action for injunctive relief under the UWG. This goes beyond consumer protection as action may be taken also against business practices that harm primarily the interests of competitors, or the public at large.

Under § 14 UWG, also **competitors** of the infringing business can request an injunction under largely the same conditions as qualified entities. As competitors are not able to rely on §§ 28, 28a KSchG, it is particularly important to note that the infringement of a broad range of laws may amount to unfair competition under § 1 UWG (*Rechtsbruchtatbestand*) not least because, by saving on compliance costs, the infringing business might obtain a competitive advantage. Therefore, also competitors

can enforce largely the same provisions, ranging from e-commerce law to unfair contract terms law, by way of injunctions, and they will often do so.

For relying on § 14 UWG a competitor will normally not go directly to court but first send a warning notice and request the infringing business to sign a **declaration to cease and desist** (see above p. 63), combined with a request to pay for the lawyer's fees accrued. Even in rather simple cases and for rather minor infringements, fees of around EUR 1,500 are not unusual. Often, the initiative will not be taken by the competitors themselves, but by specialized law firms (notably from Germany) that systematically browse the Internet watching out for online shops that do not fully abide by the rules. While such practices may be controversial from the perspective of professional ethics they are rather effective in terms of law enforcement.


Collective redress

Injunctive relief does not mean that those whose rights have been infringed in the past are compensated. Therefore, businesses often do not have sufficient incentives for complying with the law, as they can usually trust that only a small part of those whose rights have been infringed will enforce their claims. In order to improve both compliance with consumer law and protection of consumer rights, a new [Directive on representative actions](#) for the protection of the collective interests of consumers has been passed, under which not only injunctive measures, but also **redress** measures (e.g. payment of damages) can be claimed by way of **representative action**. Currently, similar effects are being achieved by consumers assigning their claims to a consumer organisation that will then sue in its own name or by granting powers of attorney to such organisation ('*Österreichische Sammelklage*').

6.1. Private enforcement

Selma and Sebastian are wondering where private law claims by individual customers would fit in that equation

Private enforcement means that parties other than the State (but including public bodies where they are acting as market participants, e.g. buy goods from a trader) have certain **rights** (*subjektive Rechte*) under the law, together with **remedies** (*Rechtsbehelfe*), such as termination of a contract or a claim for damages, to enforce these rights where they are infringed. However, it is a fundamental principle of the law that no one may normally use any kind of force or duress to actually enforce the remedies against the infringing party by way of self-help (*Selbsthilfeverbot*, cf. § 19 ABGB), but has to rely on the State's institutions instead.



Private enforcement will be addressed in various modules, including BA CM 9 and CM 10 (Civil Law and Private International Law), BA CM 11 (Business Law) and MA CM 4 (Law of Civil Procedure)

This means, at least typically, that the party whose rights have been infringed must file a claim in a **civil law court** if the infringing party fails to comply with their obligations. Litigation in civil and commercial matters might sometimes be expensive and time-consuming.

Each party must, in the first place, bear its own costs. These include costs for the court (e.g. court fees, witness fees, fees for experts and interpreters), and, if applicable, lawyer's fees and pre-litigation costs such as for preserving evidence. If a party cannot afford this, the court may, upon application, grant legal aid (*Verfahrenshilfe*) to enable also poorer persons to conduct legal proceedings. The party that loses the case in its entirety must reimburse the winning party for all costs incurred for the litigation as far as these were necessary ('loser-pays-principle'), e.g. the lawyer's fees according to the statutory fee schedule. Details are decided by the court.

It is in particular for low-value cases that persons whose rights have been infringed will often refrain from taking action, which is one of the reasons why the legislator promotes ODR for consumer disputes arising from e-commerce (see above p. 36).

Recently, there has been a shift from putting the focus on direct enforcement of the law to ensuring compliance with the law by way of a variety of different 'soft' mechanisms, many of which can be described as 'nudging'. Already today, online shops may be more afraid of negative customer ratings in **online reputation systems** than of law enforcement in the proper sense. Such mechanisms may therefore be more effective than traditional enforcement mechanisms. However, each of these mechanisms creates new legal problems (such as fake or abusive customer ratings), and additional costs created must be carefully weighed against the prospective gain.

Selma and Sebastian are now convinced that compliance from the outset is much cheaper than having to worry about all sorts of things later. They also believe it is really important for them to understand more thoroughly how the legal system has developed into what it is today, and how to interpret and apply the law. At the end of the day, they might also have a suggestion or two for how to improve the law ...

... but for the time being they are mainly determined to make enough money with their newly established e-commerce business, and to really enjoy the five years of student life in Vienna that are lying ahead of them!

MaSwyS



2,468,489 customer ratings

average rating 4.99

Appendix: Curricula BA and MA International Legal Studies

BA International Legal Studies

1st Semester

CM 1: Introduction to Law and its International Aspects	Combined exam 1 written + 3 case analysis exercises	EN DE	10 ECTS	= StEOP
CM 2: Introduction to International Law	Written exam	DE	6 ECTS	
CM 3: European and Global Legal History	Written exam	EN	10 ECTS	

2nd Semester

CM 4: Roman Law and the Civilian Tradition	Written exam	EN	10 ECTS	Do not require completion of StEOP
CM 5: European Law	Oral exam	EN DE	11 ECTS	
CM 6: International Law	Oral exam	EN	9 ECTS	

3rd Semester

CM 7: Digital Law	Written exam	EN	8 ECTS	CM 14: Electives 21 ECTS
CM 8: Criminal Law and Procedure	Written exam	DE	16 ECTS	

4th Semester

CM 9: Civil Law	Oral exam	DE	14 ECTS	Exams as applicable in each course chosen
CM 10: Civil Law and Private International Law	Written exam	DE	11 ECTS	

5th Semester

CM 11: Business Law	Oral exam	DE	14 ECTS	EN/DE or other Min. one seminar or moot court for BA thesis
CM 12: Constitutional Law	Oral exam	DE	14 ECTS	

6th Semester

CM 13: Public Law	Written exam	DE	18 ECTS	
CM 15: Bachelor's Module	Written BA thesis	EN DE	8 ECTS	

MA International Legal Studies

1st Semester

CM 1: Comparative Law	Written exam	EN	8 ECTS	CM 7: Electives with international elements
CM 2: Legal and Political Philosophy	Written exam	EN	6 ECTS	
CM 3: Labour Law and Law of Social Security	Oral exam	DE	14 ECTS	

2nd Semester

CM 4: Law of Civil Procedure	Oral exam	DE	14 ECTS	30 ECTS
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3rd Semester

CM 5: Tax Law	Written exam	DE	11 ECTS	Exams as applicable in each course chosen
CM 6: Economic Competence in Law	Written exam	DE	6 ECTS	

4th Semester

Master Thesis	Written MA thesis	EN DE	25 ECTS	EN/DE or other
Master Examination	Defensio	EN DE	6 ECTS	

