

# Games Law Briefing

December 2022



Dear Reader,

In the same way that video games combine different art forms, games law is an interdisciplinary topic that raises a multitude of very different legal questions - therefore, we have a broad team of experienced lawyers specialized in this industry. The pictures below show our core team (which will further grow in January).

**"Games Law Briefing"** is our new newsletter format - this is volume II. We have again selected case law and regulatory news that we found to be of particular interest for the games industry. We found developments in intellectual property, consumer law and youth protection of particular interest, but we have also important news on e-sports, gambling, and games subsidies.

As the year comes to an end, we wish you a relaxing holiday season, some time to collect trophies in your favorite game, and all the very best for 2023.

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## I. CASE LAW

**+++ Federal Court of Justice: Obligation for internet providers to block the access to a website in case of copyright infringements only as a last measure +++**

In a hearing held in mid-October, the Federal Court of Justice confirmed its previous case law that an access provider can have an obligation to DNS block the access to copyright infringing material. Before making a claim to the access provider, the claimant must use all reasonable

measures to take action against the operator of the infringing website and, if necessary, the host provider. However, it is not necessary to take measures which lack any prospect of success. In this case, it would have been possible to file an action for disclosure against the Swedish host provider in Germany.

[To the decision of the Federal Court of Justice \(dated 13 October 2022, in German\)](#)

**+++ Higher Administrative Court North-Rhine Westphalia: Indexing of the game "Heimat Defender" due to youth endangerment rightful +++**

The Higher Administrative Court of North Rhine-Westphalia has confirmed in preliminary proceedings that the "indexing" (i.e. de facto banning) of the jump'n'run game "Heimat Defender" in 2020 was lawful. In the game, the player fights specifically against certain groups of people such as supporters of the LGBTQ+ movement. In the game, the fight against people with a different sexual orientation was presented as a kind of self-defence. The 2020 indexing decision (by the BPjM, now BzKJ) also stated that the game's content is generally directed against the values of the German Constitution, which is largely based on tolerance and equality of the genders (cf. Article 3 of the German Constitution).

A further investigation that may be necessary to weigh up artistic freedom and the protection of minors is reserved for the main proceedings.

[To the decision of the Higher Administrative Court North Rhine Westphalia \(dated 27 July 2022, in German\)](#)

**+++ Cologne Higher Regional Court: Repayment of gambling stakes due to void contract +++**

A player who participated in poker and blackjack games on an illegal gambling site was able to successfully claim a refund of his stakes. The Higher Regional Court of Cologne based this decision on a violation of the rules which apply to the organisation of gambling, which require a license in Germany. The court also took into account aspects of youth protection and the fight against gambling addiction. The court said it was not enough to briefly display the message "the offer is only directed at players in Schleswig-Holstein" in the advertisements.

[To the news \(dated 15 November 2022, in German\)](#)

### **+++ Cologne Regional Court: Strict requirements for **cancellation button** +++**

The Regional Court of Cologne has ruled on a case in which the "cancellation button" for a subscription was only available for users which were logged in. Unsurprisingly, and following the wording of the law as well as the reasoning, a cancellation button which requires the user to be logged in does not meet the requirements of the German Fair Consumer Contracts Act. Notwithstanding the risk of being sued for claims from competitors and consumer protection organisations (e.g., for cease and desist and, theoretically, damages), non-compliance entitles consumers to immediate termination of the contract.

[To the court order \(dated 30 July 2022, in German\)](#)

### **+++ Hanover Regional Court: Continued use of an account does not constitute consent to **amended terms and conditions** +++**

The German Federation of Consumer Associations and Consumer Organizations (vzbv) filed a lawsuit against a bank that wanted to interpret the continued use of the bank account by its users as implied consent to the change in terms and conditions. The Hanover Regional Court ruled that the bank's actions constituted a breach of competition law. It violated fundamental principles of contract law and placed consumers at an unreasonable disadvantage.

[To the decision \(dated 28 November 2022, in German\)](#)

### **+++ European General Court: No **trademark protection** due to **lack of distinctiveness** for EU figurative mark "GAME TOURNAMENTS" +++**

The European General Court had to decide on an application for registration of an EU figurative mark for classes 9, 35, 38, 41, and 42 that included "game tournaments". The EGC dismissed the applicants appeal because, among other things, it considered that the mark applied for conveyed a purely descriptive and informative message. Thus, it was incapable of performing the essential function of a trademark which is to identify the commercial origin of the goods and services concerned.

[To the trademark information including the timeline and court decision](#)

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## II. PREVIEW

### +++ Federal Court of Justice's hearing on the admissibility of **cheat software** goes into next round on 23 February 2023 +++

As we have highlighted in our last briefing, the Federal Court of Justice held its first hearing with the parties in a case about a software that enables users to manipulate the program on a game console without interfering with the source code and the software itself. During the hearing, it was also considered to submit the question at issue to the European Court of Justice.

[To the news \(dated 28 October 2022, in German\)](#)

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## III. LEGISLATIVE PROJECTS AND NEWS

### +++ Youth Protection: New rules for **age rating procedures** +++

The German Entertainment Software Self-Regulation Body (USK) has issued new guidelines for age rating procedures in coordination with the responsible youth protection state authorities. The requirements introduced by the German Youth Protection Act 2021 will thereby be put into practice. As a consequence, interaction risks (usage risks) will have to be taken into account in the assessment procedure if they are a permanent component of a game. Publishers will be required to provide detailed information on communication functions, purchase functions, gambling-like mechanisms, and location transfer if such features exist. The new rules shall apply as of 1 January 2023.

[To the press release \(dated 14 December 2022, in German\)](#)

### +++ **E-sports visa: Call for applications** +++

The German Esports Federation (ESBD) has opened the application for tournaments to be listed as qualified competitions for the e-sports visa. With the respective tournament being listed, application for a long-term visa to participate in (paid) e-sports activities in Germany is clearly facilitated. The deadline for applications is 31 December 2022.

[To the application for inclusion](#)

### +++ **Computer games subsidy: "The funding must go on"** +++

After the budget for games funding was used up, the Federal Ministry of Economics announced at the end of October that it would not accept any further applications for computer game funding. At the beginning of November, the Federal Parliament's Budget Committee decided to increase the amount by more than twenty million euros. This budget must now be approved by the Federal Council which is expected to happen in mid-December. A special feature of the federal subsidy is that the state covers up to 50 percent of the development costs incurred; it is not necessary to pay the subsidy back.

[To the news \(dated 30 November 2022, in German\)](#)

### +++ **No non-profit status for e-sports for now** +++

After the non-profit status of e-sports was promised in the previous legislative period but never implemented, the project seemed to be off the table again. Even though the governing parties explicitly stated this goal in their coalition agreement, they failed to agree on the recognition of the non-profit status of e-sports in the German Annual Tax Act. Non-profit associations that are exempt from corporate and trade tax may issue donation receipts and apply for government grants. In response to a small question from the CDU/CSU parliamentary group, the German government recently stated that the content and timetable for the implementation of a non-profit status in e-sports had not yet been determined.

[To the news \(dated 29 November 2022, in German\)](#)

### +++ **European Parliament passes resolution on e-sports and video games** +++

With an overwhelming majority, the European Parliament has approved the motion for a resolution on the acknowledgement and promotion of the video game industry and e-sports. The resolution was passed on 10 November 2022.

A few important key aspects:

- Call for a long-term European video game strategy that also includes and promotes e-sports

- Support for video game development, also by means of government grants
- Creation of a European Video Games Observatory
- Emphasise importance of intellectual property for video games, recognise need for international law enforcement
- Recognition of the significant social and cultural potential of video games and e-sports
- Demand for protection of the integrity of e-sports
- Call on industry, youth protection organisations and consumer watchdogs to continue to promote effective youth protection, among other things via age ratings
- Sports and e-sports are (according to the resolution) different sectors due to the strong legal position of publishers, but they complement each other and represent similar positive values.

The resolution itself is not binding. It is now up to the European Commission to come up with proposals.

[To the press release \(dated 10 November 2022\).](#)

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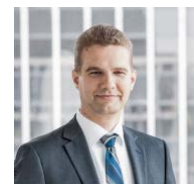
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