

Games Law Briefing

February 2023



Dear Reader,

For our first Games Law Briefing in 2023, we have selected exciting case law and regulatory news that we found of interest for the games industry.

This month we place a special focus on case law and legal developments regarding content moderation, which - considering the Digital Services Act and increasing discussions on hate speech - will be of particular importance. (If you want to know what other topics we consider highly relevant this year, please read our feature on [GamesIndustry.biz](https://www.gamesindustry.biz).)

Finally, we would like to take this opportunity and inform you that our games law team has grown again: Dr Peggy Müller joined us in January and has very relevant experience: Formerly, she was head of IP at Nintendo of Europe.

Games Law Briefing:

I. CASE LAW

+++ Federal Court of Justice submits question about the admissibility of **cheat software** to the European Court of Justice +++

In the latest hearing on the admissibility of cheat software, the Federal Court of Justice submitted a question to the European Court of Justice whether a software that enables users to manipulate the program on a game console without interfering with the source code and the software itself is a restricted act in the sense of the EU Directive on the legal protection of computer programs (Directive 2009/24/EC – also known as the Software Directive). It is now expected that the European Court of Justice will issue a landmark decision. In the past, the Federal Court of Justice has already confirmed that offering cheating software for massively multiplayer games can be an infringement of the Act Against Unfair Competition, and copyright infringement. These decisions remain unaffected by the ongoing proceedings.

[To the press release \(dated 23 February 2023, in German\)](#)

+++ Higher Administrative Court of Rhineland-Palatinate: No legal basis for **blocking order** against access provider +++

The Gambling Authority of the German Federal States had ordered a telecommunication service provider to block access to certain allegedly illegal Malta-based gambling sites, so that access via Internet provided for users of the telecommunication services was no longer possible. The telecommunications provider appealed against the order and has now been granted a preliminary ruling in its favour. The court considered the order unlawful and holds that the telecommunications provider is not liable under the German Telemedia Act.

[To the press release \(dated 1 February 2023, in German\)](#)

II. DEEP DIVE: CONTENT MODERATION AND HATE SPEECH

+++ Frankfurt Regional Court: Removal of **defamatory statements** with substantially the same content +++

In a dispute over defamatory false statements on Twitter, the Frankfurt Regional Court ruled that the platform provider has to remove an illegal statement as soon as it becomes aware of the infringement (take down). The court also clarified that the same statement must not be disseminated again – neither in identical wording, nor in other words with the same essence (stay down).

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

+++ Pending lawsuit against provider of an **online platform** for allegedly **insufficient moderation**+++

In January, HateAid and the European Union of Jewish Students (EUJS) have jointly filed a legal complaint against Twitter, criticizing its allegedly insufficient content moderation regarding incitement to hatred, which is a criminal offence. According to the complaint, Twitter failed to take down several antisemitic and illegal comments even though these had been reported in accordance with the platform's own policy. Both organizations seek clarification on whether users have a legal claim to enforce user policies as part of their contract with social networks without being personally affected by violations of their rights.

[To the press release of the EUJS \(dated 25 January 2023\)](#)

This lawsuit can be very relevant for providers of online games as they typically have codes of conduct for their online services. According to the latest study published by the Anti-Defamation League (ADL), adults' exposure to white-supremacist ideologies more than doubled compared to 2021.

[To the recent study of ADL \(dated 6 December 2022\)](#)

The Digital Services Act (DSA), which is fully applicable as of 17 February 2024, provides obligatory notification and action mechanisms in case a user considers content to be illegal. According to Article 14 of the DSA, providers shall include information on their content moderation practices in their terms and conditions. Hence, the question whether a user can require the provider to actually enforce these practices can be very relevant.

III. LEGISLATIVE PROJECTS AND NEWS

+++ **New transparency obligations for online platforms and search engines as of 17 February** +++

The Digital Services Act (DSA) contains several new obligations for providers of intermediary services. Most of them have to be complied with as of 17 February 2024. However, providers of online platforms and online search engines must publish their average monthly users since 17 February 2023 already. Given the fact that there is no clear guidance by the European Commission how to identify unique active users and that even the individual assessment of the categories of intermediary services providers harbours legal ambiguities, online service operators should monitor these legal developments closely and act accordingly.

[To our blog post \(dated 1 February 2023\)](#)

+++ **Investigations reveal massive consumer protection violations** +++

According to the results of the latest coordinated investigations of retail websites to check compliance with EU laws, almost 40% of the inspected online stores and shopping apps used practices which were held to be manipulative to exploit the consumers' weaknesses (so-called dark patterns). The screening focused on three specific types of manipulative practices, namely fake countdowns, hiding relevant information and other practices to put pressure on consumers.

Every year consumer protection authorities organize so-called sweeps in different consumer market sectors under the guidance of the European Commission. A sweep can be the first step to enforce consumer law compliance. Non-compliance can result in a fine of up to 4% of a company's worldwide annual turnover.

[To our blog post \(dated 7 February 2023\)](#)

+++ **European Parliament demands stricter consumer protection in online games** +++

The European Parliament has adopted a report calling for the European Commission to address several consumer protection topics. The report calls on the European Commission, among other things, to consider

consumer protection issues in online video games as part of its ongoing fitness check on EU consumer law and to enforce Union law accordingly. Online games addressing minors and young children must account for their rights and vulnerabilities with the highest possible standards of security, and privacy. It is worth noting that the European Parliament welcomed the recent adoption of the DSA to better tackle illegal online content, “including for video games”. It is thus to be expected that the legislators already have video games on their radar in terms of DSA compliance.

[To the adopted text of the European Parliament](#)

**+++ Enforcement of the Fair Consumer Contracts Act:
Cancellation Button +++**

The Federation of German Consumer Organizations (Verbraucherzentrale Bundesverband – vzbv) criticized the fact that 72% of more than 3,000 websites reviewed still had not properly implemented the required cancellation button for subscriptions. With the results of this review, vzbv wants to initiate targeted measures to solve problems in the interests of consumers.

[To the press release of vzbv \(dated 16 January 2023, in German\)](#)

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