

Games Law Briefing

July 2023

**Meet us
@Gamescom**



Dear Reader,

In our July issue, we once again present decisions and regulatory news that we think are of particular interest to the games industry.

Again, we have a colourful mix of consumer protection topics that we also find in our everyday counselling.

At EU level, there is also a lot of news to report on the Digital Services Act, the Data Act and the Artificial Intelligence Act.

We hope you enjoy reading!

More importantly: If you are at Gamescom, we'd love to see you there. Please send us an [e-mail](#) so that we can set up a meeting!

Games Law Briefing:

I. CASE LAW

+++ ECJ: Consumers do not have to pay for **revocation after contract fulfilment +++**

Question: Can a consumer claim back his money if he exercises the right of withdrawal only once the service has been fully provided?

The European Court of Justice (ECJ) has ruled in favour of a consumer that he is exempt from the obligation to pay remuneration after exercising his right of withdrawal even though the services were performed by the other contracting party. In the case which was decided by the ECJ, a craftsman had not informed the consumer about his right of withdrawal. The consumer exercised his right of withdrawal only after the services had been performed. Even though the consumer had received a service without paying for it, the Court argued that the Consumer Rights Directive (2011/83/EU) intended to ensure a high level of consumer protection, which should not be undermined.

In our view, this decision is hardly surprising – but it shows (again) how strict courts are when it comes to the right of withdrawal. For games companies, getting it all right is essential if they want to avoid having to repay monies already collected. But that’s easier said than done, especially in the light of the Digital Content and Services Directive, and the Omnibus Directive. Plus, German courts are very strict when it comes to the language which must be used if a company wants the right of withdrawal to end once the consumers wants the service to commence (also see previous issues of the Games Law Briefing).

[\(To the ECJ ruling dated 17 May 2023\)](#)

+++ Frankfurt Higher Regional Court: Start-up entrepreneur must **check copyright situation itself before placing an order for production of merchandise +++**

Question: Does an internet company have to inform its clients that material infringing copyright must not be uploaded?

The Higher Regional Court of Frankfurt am Main had to deal with the question of whether a company allowing to upload images to be printed

on textiles should have informed its customers that they must own these rights to the images. In the case which was decided, images of a famous boyband were uploaded to be printed on cushion covers. The internet company stopped the production of the cushions, but insisted on (partial) payment for work already performed. The customer argued that she had not been properly informed by the internet company that no infringing material must be used.

The Court ruled in favour of the internet company, holding that it did not violate any information requirements, as it was part of the knowledge of the general public that one may not simply download/upload images from the internet without any consideration of third-party copyrights and then exploit them commercially oneself.

[\(To the decision of the Frankfurt Higher Regional Court dated 6 June 2023, in German\)](#)

+++ Munich Regional Court I: Several **clauses in terms and conditions of streaming service **inadmissible** +++**

Question: Are price adjustment clauses and "changes to the services" clauses valid?

The Regional Court of Munich I has declared several clauses in the terms and conditions of a sports streaming service invalid, including a price adjustment clause, which the Court found was lacking clarity. In addition, the clause did not state that prices would also be reduced again in the event of cost reductions. Another clause by which the provider had reserved the right to change the programme content according to its availability was considered to be too one-sided by the court, as this clause would have led to the provider being able to change its service (i.e. programme) to such an extent that no more sporting events would be broadcasted at all. This was not acceptable for the customers. The ruling is now to be reviewed by the next instance.

This decision is highly relevant for all subscription-based business models in the games industry, but – at least as far as it covers changes to the service – also for live games.

[\(To the press release of the consumer organisation with judgement of 30 June 2023, in German\)](#)

+++ Hamburg Regional Court: Inadmissible **advertising of an **energy drink** for gamers +++**

Question: Can energy drinks be advertised with the promise that they help concentration which is crucial in gaming?

The Regional Court of Hamburg has prohibited a beverage manufacturer from advertising a caffeinated powder for the preparation of energy drinks by claiming that it was developed for "better focus and proper concentration, which are crucial in gaming". Following the reasoning of the plaintiff (a consumer protection organisation), the court found this to be a violation of the Health Claims Regulation (1924/2006/EC). The suggestion the consumption of the product would lead to a better reactivity and concentration were inadmissible. In principle, health claims under the Health Claims Regulation may only ever refer to the nutrient for which they are authorised, not to the product in general.

[\(To the press release of the consumer organisation with judgement of 25 April 2023, in German\)](#)

+++ Koblenz Regional Court: Additional **cancellation assistant not unlawful +++**

Question: Is it legal to offer a "cancellation assistant" on top of the cancellation button?

Since July 2022, companies have to provide a cancellation button for continuing obligations (i.e. subscriptions) that consumers can conclude via their website. The Regional Court of Koblenz dealt with the question of whether a cancellation assistant, which was provided as an additional alternative to the cancellation button on a company's website, was unlawful, as argued by the consumer protection organisation. The Regional Court denied this in case the legally mandatory cancellation button continued to be directly and easily accessible.

(Koblenz Regional Court, decision of 7 March 2023 – 11 O 21/22)

+++ Hildesheim Regional Court: **Order button must be clearly labelled +++**

Question: How does my "order button" comply with consumer protection law?

The Regional Court of Hildesheim ruled that the wording "Pay by credit card" on an "order button" was ambiguous and thus inadmissible because

it could also be understood as a mere choice of a payment method instead of the final step in the purchase process. The court held that this was a violation of the stipulation which implements Article 8 (2) of the EU Consumer Rights Directive into national law. Such a button shall be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. The Court further found fault with the fact that mandatory pre-contractual information in relation to an offered subscription had also not been fulfilled. This should have been provided to the consumer immediately before the conclusion of the contract.

(Koblenz Regional Court, decision of 7 March 2023 – 6 O 156/22)

II. PREVIEW

+++ Zalando and Amazon contest their designations as a "Very Large Online Platform" under the [Digital Services Act](#) +++

On 27 June 2023, the online fashion retailer Zalando filed an action before the European Court of Justice against its designation as a "very large online platform" within the meaning of Article 33 Digital Services Act (DSA). A few days later, Amazon also filed an action against the designation of its store as a "very large online platform".

A designation as a "very large online platform" is accompanied by particularly strict due diligence obligations.

Zalando mainly argues that the Commission miscalculated the number of monthly active users in the European Union. In addition, the online platform says it does not pose a "systemic risk" of harmful or illegal content being disseminated by third parties.

Likewise, Amazon is of the opinion that the designation of online retailers is based on a discriminatory criterion and disproportionately violates the principle of equal treatment.

The DSA is also applicable on some games and related services. Companies are well-advised to prepare for compliance.

[\(To Zalando's press release dated 27 June 2023\)](#)

[\(To the news article regarding Amazon's action dated 11 July 2023, in German\)](#)

III. LEGISLATIVE PROJECTS AND NEWS

+++ New EU Regulation will require **replaceable batteries in future portable consoles** by 2027 +++

On 10 July 2023, the European Council adopted a new regulation that strengthens sustainability rules for batteries and waste batteries. The Regulation applies, inter alia, to phones, tablets, and gaming handhelds.

[\(To the press release dated 10 July 2023\)](#)

+++ EU reaches political agreement on **Data Act** +++

The European Parliament and the European Council reached a political agreement on the European Data Act on 27 June. The Data Act will apply to all data and is not limited to personal data.

The Data Act entails far-reaching changes especially for connected products and related services as well as for cloud services. Connected products may include PCs, smartphones, tablets, but also game consoles and gaming devices. The Data Act aims to make data collected by such devices available to the user and, under certain conditions, to third parties.

We have published a blog post on the version leaked at the beginning of July, which we encourage you to read.

[\(To our Blog post dated 5 July 2023\)](#)

[\(To the press release dated 28 June 2023\)](#)

+++ European Parliament adopts position on **AI Regulation** +++

On 14 June 2023, the European Parliament adopted a draft AI Regulation, which will now be discussed in trilogue negotiations between Parliament, Council and Commission. The regulations are intended to give the development and use of AI a legal framework that is in line with the values and rights of the European Union. There will likely be categories of services, which determine the obligations which depend on the risk potentially posed by artificial intelligence.

[\(To the press release dated 14 June 2023\)](#)

+++ EU rules on **collective remedies entered into force; national implementation passed in Germany +++**

Since 25 June 2023, the rules of the Directive on Collective Actions for the Protection of Collective Interests (2020/1828/EU) are applicable in the European Union. Consumers can register their claims in a register of collective actions. The claims are asserted collectively by consumer associations. Consumers do not have to bring an action themselves and can still benefit directly from the proceedings. The German implementation of the Directive was passed on 7 July 2023.

[\(To the press notice by the German Parliament dated 7 July 2023, in German\)](#)

[\(To our Blog post dated 10 July 2023\)](#)

+++ E-Sports organisation Astralis fined for breach of **Louvre Agreement +++**

The professional e-sports organisation Astralis must pay a fine of USD 100,000 for a breach of the Louvre Agreement for maintaining and failing to declare an existing conflict of interest. Allegedly, Astralis contracted an employee of another team while the employee still held a crucial position with a competitor. The Louvre Agreement is a contract between the Electronic Sports League (ESL) and leading international teams in e-sports for Counter Strike Global Offensive (CS:GO).

[\(To the press release\)](#)

Reminder: If you are at Gamescom, please send us an e-mail so that we can set up a meeting!

Your Contacts:

Dr Andreas Lober

[vCard](#)



Susanne Klein, LL.M.

[vCard](#)



Wojtek Ropel

[vCard](#)



Dr Peggy Müller

[vCard](#)



Lennart Kriebel

[vCard](#)



Fabian Eckstein, LL.M.

[vCard](#)



Jason Komninos, LL.M.

[vCard](#)



Daniel Trunk

[vCard](#)



EDITOR IN CHARGE:

Dr Andreas Lober | Rechtsanwalt
©Beiten Burkhardt
Rechtsanwalts-gesellschaft mbH



Update Preferences | Forward

Please note

This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive information, you can [unsubscribe](#) at any time.

© Beiten Burkhardt

Rechtsanwaltsgesellschaft mbH

All rights reserved 2023

Imprint

This publication is issued by Beiten Burkhardt Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33, 80339 Munich, Germany

Registered under HR B 155350 at the Regional Court Munich / VAT Reg. No.: DE811218811

For more information see:

www.advant-beiten.com/en/imprint

Beiten Burkhardt Rechtsanwaltsgesellschaft mbH is a member of ADVANT, an association of independent law firms. Each Member Firm is a separate and legally distinct entity, and is liable only for its own acts or omissions.