

Games Law Briefing

October 2023



Dear Reader,

In our October issue, we have once again put together rulings and regulatory news that we think are of particular interest to the games industry.

In less than six months, the Digital Services Act (DSA) will fully apply to all providers of intermediary services. Amazon was able to obtain a provisional judgement in its favour before the European Court with regard to individual obligations as a Very Large Online Platform. Please find more details in this newsletter.

We hope you enjoy reading!

Games Law Briefing:

I. CASE LAW

+++ ECJ: No renewed right of withdrawal after the expiry of the trial period +++

The European Court of Justice (ECJ) has recently clarified that consumers have a right of withdrawal only once for a subscription concluded by means of telecommunication. In case a free trial period is offered, the right of withdrawal and the relevant deadlines start with the free trial. In principle, there is no additional right of withdrawal after the trial period has expired.

[To the judgment of the ECJ \(dated 5 October 2023\)](#)

+++ EGC: Million Euro fine against Valve for geoblocking confirmed +++

The General Court of the European Union (EGC) confirmed a fine of EUR 1.6 million imposed by the European Commission against Valve, the operator of the gaming platform Steam. The EGC confirmed the Commission's view that Valve, together with other providers, had bilaterally agreed on geo-blocking and, by geographically restricting game activation keys, prevented consumers from choosing the best offer in the various EU member states. Valve can still lodge an appeal against the decision before the European Court of Justice (ECJ).

[To the judgment of the EU General Court \(dated 27 September 2023\)](#)

+++ FCJ submits questions on the concept of Pastiche to the ECJ +++

In a copyright dispute that has kept the German courts busy for more than 20 years, the German Federal Court of Justice (FCJ) has referred questions on the interpretation of the term "pastiche" to the ECJ. According to Section 51a German Copyright Act, which goes back to Article 5(3)(k) of the Infosoc Directive, the purpose of "pastiche" allows the use of works protected by copyright. To date, however, there is no clarity as to what is covered by the term pastiche. The judges now want to know whether the exception for use for the purpose of pastiche is a

catch-all provision for artistic expression and also covers sampling. In addition, the ECJ has to rule on the question of whether use "for the purpose of" a pastiche within the meaning of the Directive requires a specific intention of use for this particular purpose. The question of what is to be understood by a pastiche is also red-hot for the use of copyrighted elements in video games, as it can provide a framework for the extent to which one can make use of the works of others without infringing their rights.

[To the decision of the FCJ \(dated 14 September 2023, in German\)](#)

+++ Wildeshausen Local Court: Ineffective contractual penalty against e-sports player +++

The Wildeshausen Local Court ruled that a clause regarding contractual penalties in the player contract of a Rocket League player was invalid, irrespective of whether the player was to be classified as an entrepreneur or consumer. Through the clause, the e-Sports organisation reserved claims for damages in the amount of at least EUR 5,000 due to any reputational damages caused by acts or statements of the player. The organisation held a tweet by the player as image tarnishing and demanded the penalty from the player. The Court considered the clause to be too vague, resulting in an unjustified margin of discretion for the organisation. Furthermore, it was an unreasonable disadvantage to the player, as the lump sum sanction did not differentiate according to the type and duration of the breach of contract as well as its consequences.

(Wildeshausen Local Court, judgement of 6 July 2023 – 4 C 31/23)

II. DIGITAL SERVICES ACT NEWS

+++ Amazon temporarily exempted from certain DSA obligations +++

Before the General Court of the European Union (EGC), the online retailer Amazon has achieved a preliminary partial success against some obligations stemming its designation as a very large online platform. According to the decision, Amazon is temporarily not required to create a detailed archive on the transparency of online advertising, from which the content, client and time period of the advertising can be seen, as well as

whether the advertising should be displayed specifically to one or more particular user groups and the main parameters used for this purpose, even though Very Large Online Platforms do have such an obligation under the Digital Services Act (DSA). Amazon argues that until a final decision is made, it would be facing irreversible damage if this information were to be published to competitors at this stage. This view was also taken by the Court. The decision on the merits is still pending.

[To the decision of the General Court \(dated 27 September 2023\)](#)

+++ European Commission publishes **transparency database +++**

At the end of September, the European Commission published a database for more transparency regarding the implementation of the DSA. Hosting service providers and online platforms are required under the DSA to provide users affected by content moderation with an explanation. The Commission collects the decisions of online platform providers in a database which is now accessible, so that their decisions can be verified and transparency in content moderation and monitoring is ensured. Today (10 October 2023), the database already contains more than 57 million statements of reasons.

[The DSA Transparency Database](#)

+++ Verbraucherzentrale considers **consumer protection at very large online platforms to be **inadequate** +++**

The Federation of German Consumer Organisations (*Verbraucherzentrale, vzbv*) holds that very large online platforms (VLOPs) do not comply with their obligations under the DSA. According to the vzbv, the VLOPs under examination do not sufficiently explain their recommender systems. In addition, the points of contact for online services are not always easily accessible. The vzbv has announced that it will continue to monitor compliance with the due diligence requirements and consider the possibility of issuing warnings if compliance is insufficient.

[To the press release of the vzbv \(dated 30 August 2023, in German\)](#)

+++ German implementation act for the DSA published +++

While the DSA will apply directly in all EU member states, it requires national implementation laws e.g. on competences. The Federal Ministry of Digital Affairs and Transport has now published a draft bill and asked

the federal states and associations to comment. The Act is scheduled to take effect on 17 February 2024, when the DSA comes into full effect. The Federal Network Agency is to become the coordinating body for the enforcement of the DSA in Germany. The Act will also replace the Telemedia Act, which previously transposed the E-Commerce Directive (Directive 2000/31/EC) into national law.

[To the draft bill \(dated 1 August 2023, in German\)](#)

III. LEGISLATIVE PROJECTS AND GAMES NEWS

+++ Westlotto presents regulatory proposal for **lootboxes** +++

Westlotto, a German lottery provider, has published a legislative proposal to regulate lootboxes in video games. The association is calling for an amendment to the German Youth Protection Act, according to which similar rules should apply to games with lootboxes as apply to classic gambling. For example, players would then have to set a monthly deposit and would have to be informed about addiction risks. In addition, the amounts "wagered" would have to be stated precisely in euros and cents which currently is not always the case due when in-game currencies are used. In addition, the random generators used to "fill" the loot boxes would have to be checked by the authorities.

[To the press release by Westlotto \(dated 2 October 2023, in German\)](#)

+++ Riot Games announces **new financial regulations for LEC** +++

Riot Games has announced that new "Sporting Financial Regulations" (SFR) will apply to future seasons of the LEC, the European top division in the game "League of Legends". The regulations are intended to create a "financially sustainable environment" for all parties and ensure exciting competition between all teams. Among other things, the SFR provides for a salary cap based on the salaries of the five highest-paid players on the roster. Teams that exceed the maximum threshold shall pay a luxury tax, part of which would be distributed to teams that comply with the salary cap.

[To the announcement by Riot Games \(dated 28 September 2023\)](#)

+++ Landessportbund NRW sees funding potential for e-sports clubs and calls for clear regulations on non-profit status +++

In a recent position paper, the State Sports Association of North-Rhine Westphalia (Landessportbund NRW) is in favour of the non-profit status of club-based e-sports. The Association stands firm in its position that "e-sports is not a sport". However, it is particularly close to sports and is increasingly being included in the portfolio of sports clubs. In addition, the Sports Association still has moral concerns about shooter games. Nevertheless, it says e-sports can reach juvenile cultural scenes that would rarely be reached through traditional club sports. In addition, e-sports offer opportunities for inclusion. However, the Association also stresses that funding for e-sports should not reduce funding for regular sports. Among other things, non-profit associations enjoy tax relief and are allowed to issue donation receipts. The federal government also has the non-profit status of e-sports on its agenda. However, nothing has happened so far.

[To the statement of the Landessportbund NRW \(dated 20 September 2023, in German\)](#)

+++ Major tech firms designated as gatekeepers +++

The European Commission has designated six major tech companies, including Alphabet, Amazon, Apple, ByteDance (TikTok), Meta and Microsoft as so-called gatekeepers under the Digital Markets Act (DMA). The designation addressed, in total, 22 core platform services by the companies. These included, among other services, app stores, messengers, operating systems and social networks. They now have six months to implement the DMA's full list of bids and bans for their core platform services. The DMA obliges gatekeepers to open their central services to third party online offerings. It is aimed at ensuring fair competition. In case of non-compliance, the Commission may impose fines up to a maximum of 10 % of the company's total worldwide turnover; in case of repeated infringement, even up to 20 %.

[To the press release by the European Commission \(dated 6 September 2023\)](#)

+++ USK is content with **enhanced age rating criteria** +++

In a press release from July, the Entertainment Software Self-Regulation Body (*Unterhaltungssoftware Selbstkontrolle, USK*) drew a positive conclusion after the introduction of the extended age rating criteria. These follow an amendment to the German Youth Protection Act from 2021 and are taken into account in the review process since January 2023. According to the new criteria, not only the effects of the games' content (e.g. depictions of violence, sexuality or swearing) have to be taken into account, but also so-called usage risks such as chats, in-game purchases or in-game purchases with elements similar to gambling (such as "loot boxes"). This led, among other things, to the Fifa successor EC FC24 having an age rating of "12+". Previous Fifa games were rated 0+ by the USK.

[To the press release of USK \(dated 4 July 2023, in German\)](#)

IV. LAST BUT NOT LEAST

Thanks for connecting with us at Gamescom. As always, it was a blast!



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
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