

8/2022 Supplement

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EDITORIAL Friendly takeover in consumer protection law

reading time: 7 minutes

The EU is getting serious about completing the Digital Single Market. In recent months, there has been a friendly takeover in consumer protection – with the New Deal for Consumers, the Digital Content Directive and the new guidance on the UGP Directive, digital consumer protection has been largely harmonised. The German legislator, who in 2011 had still lodged a subsidiarity complaint against an EU contract law, has capitulated at least for digital consumer contracts. In future, therefore, consumer protection will be interpreted and shaped even more uniformly by the ECJ.

A harmonised legal framework in the internal market is advantageous for the games industry. Games are distributed internationally and sold worldwide as digital products – on data carriers or as downloads, or as additional content such as „downloadable content“ (DLC) or in-game purchases. The EU and especially Germany are important sales markets with millions of customers. Any harmonisation is therefore a clear simplification in the drafting of contracts or in the provision of T&Cs. Therefore, from the point of view of the games industry, it is now important that the pieces of legislation mentioned are implemented and applied as uniformly as possible throughout the EU so that the same legal provisions apply in all member states. This creates legal certainty for the companies and also clarity for the consumers in Europe – usually, of course, at the highest existing regulatory level in the EU. National solo efforts are therefore counterproductive and they make centralised Europe-wide distribution more difficult and can even lead to disproportionate overbidding competition in consumer protection („goldplating“).

In this special edition on digital consumer protection in games, the importance of European consumer protection law for digital games becomes quite clear. Christian Rauda first gives an overview of the perennial issues in digital consumer protection for games. Konstantin Ewald and Leonie Schneider then present the changes in digital consumer protection resulting from the implementation of the New Deal for Consumers, which, in addition to changes in consumer protection law, also provides for changes in offences under fair trading law and introduces new sanction options. Even if a new version of Section 356 (5) of the German Civil Code (BGB) applies to the right of withdrawal as of 28 May 2022 due to the EU Directive on certain aspects of the provision of digital content and digital services under contract law, this case law should continue to apply because the conditions for the expiry of the right of withdrawal had already been harmonised under European



Professor Dr. Christian-Henner Hentsch

law and are identical except for additional information obligations (Hentsch MMR 2022, 413). A particular challenge for games is the update obligation, whereby the question arises in particular as to how long updates for the games must be kept available. Together with Philipp Sümmermann, Konstantin Ewald also writes on the new Fair Consumer Contracts Act, which goes beyond the EU package and, with this national go-it-alone, confronts games providers with the challenge of offering an isolated solution for Germany or implementing the more extensive consumer protection in Germany in other EU countries as well. Axel von Walter looks at the EU Commission's new fair trading guidance for the UCP Directive, which for the first time includes a new chapter specifically for „gaming“. Kai Bodensiek concludes with a discussion of the distinction between unlawful consumer guidance and the permissible design of consumer-friendly offers in dark patterns and game design in video games.

This special edition is the fifth supplement of MMR on games law topics since 2018. In the first special edition (MMR supplement 8/2018) on eSports, a booming phenomenon was taken into account early on and a first survey of the legal framework was made with foresight. The second special edition (MMR supplement 8/2019) on law enforcement is more topical than ever because, in addition to the rulings on cheat software, the foundations for the new instrument of website blockings of structurally copyright infringing websites created last year via the Clearing Body for Copyright on the Internet (CUII) were elaborated here. The third issue (MMR supplement 8/2020) with its focus on the protection of minors dealt with the reform of the Protection of Minors Act, which is currently being implemented and the amendment to the JMStV, which is currently underway, was also anticipated here. The fourth, last year's special edition (MMR supplement 8/2021) on data protection also dealt with current developments in tracking and AI, in addition to practical legal application examples. This year's issue on digital consumer protection is also red-hot and many provisions have just come into force or are being implemented in companies. All in all, the supplements in the August gamescom issues are always on the cutting edge, often forward-looking and, above all, sustainable because they are still current. This makes MMR the definitive leading journal for lawyers in the games industry.

Based on these many articles in MMR with numerous authors from the games industry, a handbook Games & Law is currently being written and is expected to be published this year. This makes it clear that, in addition to their economic and cultural significance, games are also playing an increasingly important legal role. With future technologies such as AI, blockchain, cryptocurrencies and also NFTs, these legal issues are also interesting for other media industries and there are many overlaps and interactions in both copyright and data protection. However, the legal departments of the big publishers as well as the sales markets are international and therefore there are still comparatively few games lawyers working in Germany.

game – Association of the German Games Industry accompanies these publications and the development of legal expertise in Germany. The mission of the association is to make Germany the best games location. In addition to know-how transfer and investments, this includes above all the legal framework condi-

tions, which is why it is important to point out the special features of the games industry in the legislative process. Unfortunately, the technical constraints in the design of games subscriptions were not taken into account in the short-term amendments to the Fair Consumer Contracts Act in the parliamentary procedure – because the parliamentarians obviously only thought of magazine subscriptions or mobile phone contracts. Due to the high consumer and youth protection standards in comparison to the rest of Europe, as well as the continental European copyright law, the German location has been difficult to communicate to international investors so far and the legal framework is not perceived as an investment advantage internationally in any case. That is why the harmonisation of many areas of law at the European level is the only right way forward from a German perspective – in this way, all other European countries will be brought into line with German standards and the competitive disadvantage in this area will be levelled out, at least in the EU, so that other competitive factors in Germany can once again come into their own.

An important factor besides the legal framework is state funding. Since the merger of the two predecessor associations BIU and G.A.M.E., the association has therefore campaigned politically with a united voice for internationally competitive funding, which should also attract major productions to Germany. In a comparatively short time, the Bundestag passed a federal funding and since the year before last, 50 million euros in subsidies can be awarded every year. In addition, at the level of the federal states, further funding models have been added to the existing ones or successively increased. The federal funding and the many Länder funding schemes are now also showing initial successes. In the past two years many companies have been founded and established developers have been able to expand significantly. Numerous companies have also been bought during this period, which proves the increasing attractiveness of Germany as a location. Upcoming industry studies will measure the effects of the funding and prove the desired growth in the core market and positive leverage effects for Germany as a digital and creative location. With the growth of German games companies, the number of games lawyers will presumably also increase soon, whether in-house or in the relevant law firms. If only to provide legal support for the many past and pending takeovers.

As Director Legal and Regulatory Affairs at game, I see these developments with great pleasure and am thrilled to see how the lawyers in the games industry are growing together here into a larger but still familiar family. MMR has played a big part in this and I would therefore like to express my sincere thanks to Ms Zimmer-Helfrich and her team for their foresight and trust in making these publications possible and encouraging them. I look forward to many more games special editions on games in MMR – we certainly won't run out of topics any time soon!

Cologne, August 2022

Professor Dr Christian-Henner Hentsch

is Director Legal & Regulatory Affairs at game – Verband der deutschen Games-Branche e.V. and Professor of Copyright and Media Law at the Kölner Forschungsstelle für Medienrecht at the TH Köln and co-editor of MMR.

Consumer protection law: „perennial issues“ in the games industry

Information duties, right of withdrawal, auto renewals and GTC control with the pioneers of digital sales

Digital business models

The article deals with the „perennial issues“ of the games industry and the German Civil Code (BGB), highlighting in particular new legislation, which is of outstanding importance for this industry due to its consideration of digital products and contracts in e-commerce. The essay provides a quick overview

of the relevant legal problems and offers suggestions for solutions. A focus is on information obligations, the right of withdrawal, dealing with continuing obligations and the invalidity of terms of use. **reading time: 16 minutes**

I. Games industry as a pioneer of digital distribution

The games industry was one of the first to successfully organise digital distribution via the internet. While the first browser-based games were released in the mid-1990s,¹ their success really took off in the early 2000s.² Browser games were mostly „free-to-play“³. In the early days, their business model was often based on selling premium accounts or playing advertisements. Later, the sale of game advantages, the so-called „items“, came to the fore. Such items could consist of visual advantages (special clothing for one’s own „avatar“, i.e. the game character), but also game advantages (digital items, such as better weapons, faster engines for cars, magical protection to defend a castle, faster football boots, but also procedural advantages such as more frequent building activities, automated attacks, etc.).

Unlike classic e-commerce, whose business model consists of the sale of physical goods via the internet, the games industry arranged the sale of digital goods via the internet early on. This led to consumer law issues arising at an early stage, for example with regard to information obligations (see under II.), the right of withdrawal (see under III.), or the question of automatic term extensions (see under IV.). Since the terms of use of digital games constitute general terms and conditions in the legal sense, many general terms and conditions clauses were litigated in legal disputes with consumer protection associations (see V.).

II. Information requirements

1. imprint obligation

Whereas at the beginning of the Internet, there were still disputes about the information obligations under Section 5 of the

German Telemedia Act (TMG) (or its predecessor Section 6 of the German Teleservices Act (TDG)), the conflict situation has eased here because practically all market participants are now aware of the imprint obligation. Digital companies have an interest in avoiding calls from consumers because such calls cost time and money. Many games companies have therefore switched to no longer stating telephone numbers in the imprint, but only electronic communication channels. This is permissible if it is guaranteed that the provider will respond to enquiries at short notice.⁴ In addition to the e-mail address, it is necessary to indicate another effective communication channel. However, the consumer has no right to a telephone hotline.

However, § 312d (1) BGB, which refers to Art. 246a of the Introductory Act to the German Civil Code EGBGB, must be observed. According to Art. 246a § 1(1)(3) EGBGB, the trader must also provide his telephone number when the contract is concluded, namely before the consumer makes the declaration (Art. 246a § 4(1) EGBGB). However, the BGH stated that „the phrase ‘where applicable’ in Art. 6 para. 1 lit. c of Directive 2011/83/EU ... must be interpreted, in the light of the context of the provision and the purpose pursued by the Directive, as covering cases where the trader has a telephone number or fax number and uses it not only for purposes other than contact with consumers“.⁵ Otherwise, that provision does not oblige him „to inform the consumer of that telephone number or even to set up a new telephone or fax connection or e-mail account so that consumers can contact him (ECJ GRUR 2019, 958, paras. 37 et seq., 51 – Bundesverband/Amazon EU)“⁶.

2. Pre-contractual information duties

In distance selling transactions with consumers, the game provider is subject to extensive information obligations. These obligations, listed in Section 312d (1) BGB and Article 246a EGBGB, contain a whole catalogue of information to be disclosed. However, the gaming operator can also disclose this information within the framework of its general terms and conditions. It should be noted, though, that Section 312j (2) BGB also contains information obligations. In the case of a consumer contract in electronic commerce that contains a payment obligation of the consumer, the entrepreneur must provide the consumer with the information in a clear and comprehensible manner in accordance with Art. 246a § 1 S. 1 No. 1, 5, 6, 7, 8, 14 EGBGB immediately before the consumer places his order. In this respect, a mere reference to the general terms and conditions containing the relevant information is not sufficient. The obligation to provide information pursuant to Section 312j (2) BGB can still be satisfied if the trader provides the information below an order button and as continuous text.⁷ In this case, however, there are

¹ The website “The Village” started in 1996, was taken over by Microsoft in the same year and then renamed “Internet Game Zone”. On the site, one could play classic card or board games, such as mill, backgammon or bridge.

² Some of the games are still in operation today, e.g. “OGame” from 2002 (Gameforge) or “Die Stämme” from 2003 (InnoGames).

³ An important exception was the game “World of Warcraft”, which was released in 2004 and which relied on a subscription model from the beginning. Although it was played over the internet, it was not a game that you played via the browser, but required an installation on the hard drive of your own computer (client).

⁴ According to OLG Cologne MMR 2017, 39 (40), no telephone or fax number has to be provided if a call-back system is set up together with the possibilities to contact by chat or e-mail (BeckOK InfoMedienR/Bornemann, 35th ed. 1.2.2022, TMG § 11 marginal no. 25 with reference to ECJ MMR 2019, 603; Möller NJW 2019, 3356 (3357)).

⁵ BGH MMR 2020, 540 (541) – Recall system II. A few months earlier, the OLG Schleswig had held that an entrepreneur must also accept any revocations via a service telephone number that it already uses to communicate with customers (MMR 2020, 420 et seq.).

⁶ BGH MMR 2020, 540 (541).

⁷ OLG Cologne MMR 2017, 552 (553).

increased requirements for the „prominence“ of the information.⁸ A text in small font size is therefore not sufficient.

The catalogue in Art. 246a § 1 EGBGB contains, for example, the obligation to provide the following information:

- the essential characteristics of the goods or services,
- the identity of the trader, including his address, telephone number and e-mail address,
- the total price of the goods or services including all taxes and duties, where applicable, the indication that the price has been personalised on the basis of automated decision-making,
- in the case of an open-ended contract or a subscription contract, the total price and the terms of payment, delivery and performance,
- the existence of a statutory right of liability for defects,
- where applicable, the existence and conditions of after-sales service, after-sales services and guarantees,
- where applicable, the duration of the contract or the conditions of termination of open-ended contracts or automatically renewing contracts,
- if applicable, the contractual minimum duration,
- where applicable, the functionality of the goods with digital elements or the digital products, including applicable technical protection measures,
- where applicable, the compatibility and interoperability of the goods with digital elements or the digital products,
- if applicable, the existence of an out-of-court complaint and redress procedure,
- the conditions, time limits and procedure for the exercise and expiry of the right of withdrawal and the model withdrawal form.

What the „essential characteristics of the goods or services“ according to Art. 246a § 1 (1) No. 1 EGBGB are for an item in a computer game, can of course be discussed. Nevertheless, it is sufficient here to describe the function of the item, highlighting whether the benefit of the item is limited in time. Some game advantages are valid for a certain period of time only and some items can only be used a few times (e.g. special football boots that can only be used five times because they are „worn out“ afterwards). With that being said, to the best of our knowledge, Art. 246a § 1 para. 1 no. 1 EGBGB has not yet been litigated in connection with items in computer games.

Typically, the games industry complies with the obligations in Sections 312d (1), 312j (2) BGB, Art. 246a EGBGB without further ado, in practice, the potential for conflict with consumer protection associations has not materialized. so that in practice, there is no potential for conflict with consumer protection associations here.

III. Right of withdrawal

1. Challenges of digital products

The statutory right of withdrawal has always posed challenges for the games industry. With the major reform of the law of obligations, which came into force on 1.1.2002, the consumer right of withdrawal was uniformly regulated in Sections 355 et seqq. BGB (previously there had been rights of withdrawal in certain areas only, e. g. under the Doorstep Selling Act or the Consumer Credit Act). Since then, the regulations have been amended several times, most recently Sections 356 et seqq. In the course of this modernisation of the BGB, the terms „digital products“, „digital contents“ and „digital services“ were introduced and legally defined in Section 327 para. 1 sentence 1, para. 2 BGB, with the term „digital products“ being the umbrella term. According to this definition, digital content is „data that is created and made available in digital form“ and digital services are services that enable the consumer to create, process or store data in

digital form and to retrieve such data as well as the shared use of such data.

An exclusion of the right of withdrawal for digital products according to Section 312g (2) No. 6 BGB („contracts for the delivery of sound or video recordings or computer software in a sealed package if the seal has been removed after delivery“) needs not be considered, as this provision only applies to the sale of sealed physical data carriers. Accordingly, the distribution of files for download or the sale of items and similar digital products are not covered. The providers of such digital items therefore faced a special challenge: When a player purchases an item, he usually wants to use it in the game immediately after purchase and not wait for the 14-day revocation period (Section 355 para. 2 BGB) to expire. Unlike a physical product, however, an item can no longer be „returned“, as it has already fulfilled its purpose for the player by being used in the game. If, however, the game operator was exposed to the risk that the player revokes the contract within the revocation period and is refunded for items already used in the game, the game operator would have to reckon with free-riding by players. While the buyer of a physical good has to pay a compensation for the use of the item until revocation if it has lost value by being used (Section 357a (1) BGB), such compensation for wear and tear is not possible for digital goods. This is because, by their very nature, digital goods do not lose value through use. Section 357a (3) of the German Civil Code (BGB) explicitly regulates this for digital content: „If the consumer revokes a contract for the provision of digital content that is not on a tangible data carrier, he or she does not have to pay compensation for loss of value“.

2. Digital services

Until 13.6.2014, there was no regulation on the expiry of the right of withdrawal for digital content.⁹ This led to a legal discussion about whether the games industry's offers in games were services.¹⁰ The regulation on the premature expiry of the right of withdrawal when a service is provided was moved from Section 312d BGB (old version) to Section 356 para. 4 BGB (new version) on 13.6.2014 and has since been supplemented repeatedly.¹¹

⁸ OLG Cologne MMR 2017, 552 (553).

⁹ § Section 312d old standardised: „The right of withdrawal also expires in the case of a service if the contract has been completely fulfilled by both parties at the express wish of the consumer before the consumer has exercised his right of withdrawal“. The consumer could therefore only revoke his declaration of intent until the time when the contract was fulfilled by both parties. The reason for the expiration of the right of withdrawal The reason for the expiry of the right of withdrawal is that services are regularly individually oriented and cannot be used otherwise, cf. Jauernig, Bürgerliches Gesetzbuch/Stadler, 14th ed. 2011, BGB § 312d marginal no. 6. The provision of online games was at least partly a service within the meaning of § 312d para. 3 BGB, cf. 3 BGB, cf. Rauda, Recht der Computerspiele, 2013 marginal no. 698. Indeed, § 312d (3) aF was applicable if, in the case of mixed contracts, the service part was equivalent to the other components, cf. Bamberger/Roth, BeckOK BGB/Schmidt-Räntsch, 26th ed. BGB § 312d marginal no. 34.

¹⁰ Diegmann/Kuntz NJW 2010, 561 (562).

¹¹ „The right of withdrawal shall also expire in the case of contracts for the provision of services under the following conditions:

1. in a contract which does not oblige the consumer to pay a price if the trader has fully performed the service,
2. in the case of a contract which obliges the consumer to pay a price, with the complete performance of the service, if the consumer, before the start of the performance
 - (a) expressly agreed to the trader starting to provide the service before the end of the withdrawal period,
 - (b) in the case of an off-premises contract, provided the consent referred to in point (a) on a durable medium; and
 - (c) has confirmed his knowledge that his right of withdrawal expires upon full performance of the contract by the trader.
3. in the case of a contract where the consumer has expressly requested the trader to visit him in order to carry out repair work, with the complete performance of the service if the consumer has fulfilled the conditions set out in points 2(a) and (b),
4. in the case of a contract for the provision of financial services, if the contract has been performed in full by both parties at the express request of the consumer before the consumer exercises his right of withdrawal.“

The new provision also applies to digital services. An important prerequisite for the expiry of the right of withdrawal is the complete provision of the service. If one looks at digital services related to games, these include, for example, the service of using a game free of advertising for a certain period of time or the provision of a premium access to the game, in the context of which the player has access to further, non-consumable functionalities for a certain period of time. However, such digital services are typically provided for a period that exceeds the duration of the existence of the right of withdrawal (14 days). This results in a situation where, as long as right of withdrawal the digital service exists, the digital service cannot be fully provided. Thus, in practice, premature expiry according to Section 356 para. 4 BGB comes into effect only in the rarest of cases. Instead, the right of withdrawal only expires after 14 days. The obligation to pay compensation for the value of a revocation in the case of services is regulated by § 357a para. 2 BGB. If the consumer revokes a contract for the provision of services, the consumer owes the trader compensation for the value of the service provided up to the time of revocation if the consumer expressly requested the trader to start providing the service before the end of the revocation period. However, the claim only exists if the trader has informed the consumer in accordance with Art. 246a § 1 para. 2 sentence 1 no. 1 EGBGB (information on the conditions, time limits and procedure for exercising the right of withdrawal as well as the model withdrawal form) and Art. 246a § 1 para. 2 sentence 1 no. 3 EGBGB (information that the consumer owes a reasonable amount for the service provided by the trader if he exercises the right of withdrawal after having expressly requested the trader to start the service before the expiry of the withdrawal period).

If the consumer revokes the contract for the digital service, which has a term of 30 days, e.g. after seven days, the consumer owes 7/30 of the price (provided that the consumer has expressly requested the early performance and the information has been given in accordance with Art. 246a § 1 para. 2 sentence 1 no. 1, no. 3 EGBGB).

3. digital content

On 13.6.2014, a special provision for digital content was introduced in Section 356 (5) BGB.¹² According to this provision, the right of withdrawal expired if the trader started to execute the

contract (unlike in the case of services) after the consumer had expressly consented to the execution of the contract before the expiry of the withdrawal period and confirmed his knowledge that by consenting, he would lose his right of withdrawal with the execution of the contract. The main area of application in the games industry is virtual currencies in games that represent digital content.¹³ Since 28.5.2022, a differentiation is made according to whether the consumer pays a price. Accordingly, the right of withdrawal expires prematurely in the case of a contract that does not oblige the consumer to pay a price if the trader has begun to fulfil the contract (Section 356 (5) no. 1 BGB). If, on the other hand, the consumer pays money, the conditions for the premature expiry of the right of withdrawal are increased: The consumer must have expressly consented to the trader commencing performance of the contract before the expiry of the withdrawal period (section 356(5)(2)(a) BGB) and the consumer must have confirmed his knowledge that his consent under subparagraph (a) will cause his right of withdrawal to lapse upon commencement of performance of the contract (section 356(5)(2)(b) BGB). According to the wording of the provision, the trader must have provided the consumer with a confirmation in accordance with section 312f BGB (section 356(5) no. 2 lit. c BGB). However, it is disputed whether this is a prerequisite for the expiry of the right of withdrawal. The argument against it being a prerequisite is that otherwise, Art. 14(4b)(iii) Consumer Rights Directive (CRD) would run empty.¹⁴ On the other hand, the fact that the language of Section 356 para. 5 no. 2 BGB does not indicate any different treatment speaks in its favor. Besides, Section 312f (2), (3) BGB clarifies that the confirmation must be made before the service is provided. Thus, the confirmation must happen prior to the performance of the contract anyway. Therefore, it seems reasonable to make the expiry of the right of withdrawal dependent on the confirmation.

So, the consumer must confirm that he is aware that he will lose his right of withdrawal if the trader begins to perform the contract. This confirmation must be given at the same time as the consumer's consent to the early performance of the contract. The confirmation must be a separate declaration, a mere reference is not sufficient.¹⁵ Yet, it is questionable when an early delivery of digital content is provided with the consumer's „express consent“. It was argued with regard to Section 312d (old version) BGB that the expression of the „express wish“ is an act similar to a business transaction.¹⁶ As a comparison with the wording of the prior Section 312d (3) no. 2 (yet older version) BGB showed, a reactive „consent“ or „instigation“ of the consumer to the service offer of the game operator was not sufficient.¹⁷ Rather, it was necessary that the initiative came from the consumer.¹⁸ Since Section 356 (5) BGB (new version) no longer speaks of the consumer's „wish“, but only of its „consent“, the initiative does not have to come from the consumer. However, the right of withdrawal does not expire if the consumer has not been informed of this legal consequence beforehand.¹⁹ It is sufficient, for example, that the consumer clicks on a separate, non-pre-filled button (subject to confirmation pursuant to § 312f BGB):²⁰ „Yes, I would like to be able to use the item immediately, i.e. before the end of the withdrawal period. Furthermore, I am aware that I lose the right of withdrawal to which I am entitled by law already upon complete fulfilment of the contract“. The point in time at which the consumer must make the declaration is also disputed. It is argued that the declaration can only be made after the conclusion of the contract, which would require a two-step procedure.²¹ But this view must be rejected because there is no evidence for it, either in the VRRG or in Section 356 (5) BGB.²² Forcing a two-step procedure would be a mere formality if the consumer was aware of the legal consequences of his consent with regard to the right of withdrawal.²³

12 The right of withdrawal expired in the case of a contract for the supply of digital content not on a tangible medium if the trader started the performance of the contract after the consumer 1. expressly consented to the trader starting the performance of the contract before the expiry of the withdrawal period and 2. confirmed his knowledge that his consent meant that he lost his right of withdrawal when the performance of the contract started.

13 LG Karlsruhe MMR 2017, 51 (52), confirmed by OLG Karlsruhe Urt. v. 11.7.2018 – 6 U 108/16.

14 Grüneberg, BGB, 81st ed. 2022, BGB § 356 marginal no. 11.

15 It is not sufficient to indicate via the „Buy“ button that the player, by clicking on this button, consents to the order being executed and that the player thereby loses his right of withdrawal (LG Köln MMR 2020, 200).

16 MüKoBGB/Wendehorst, 6th ed. 2012, BGB § 312d marginal no. 53.

17 MüKoBGB/Wendehorst, 6th ed. 2012, BGB § 312d marginal no. 53.

18 MüKoBGB/Wendehorst, 6th ed. 2012, BGB § 312d marginal no. 53.

19 The BGH MMR 2006, 453 mAnm Mankowski – collect calls with the indication that the consumer may be entitled to claims for damages under § 280 BGB in the event of a breach of the information duties by the trader.

20 LG Karlsruhe MMR 2022, 413 (417) mAnm Hentsch.

21 LG Karlsruhe MMR 2017, 51 (52): „In this case, however, the contract cannot be concluded and the right of withdrawal expire at the same time as a declaration, but a separate declaration by the consumer confirming knowledge of the loss of the right of withdrawal within the meaning of section 356(5) no. 2 BGB is required at a later date“.

22 So also LG Karlsruhe MMR 2022, 413 marginal no. 40 mAnm Hentsch, with reference to the Guide of the Directorate General Justice to Directive 2011/83/EU, June 2014, p. 66.

23 LG Karlsruhe MMR 2022, 413 marginal no. 40 mAnm Hentsch.

Instead, the literature correctly points out that a two-step procedure is detrimental to the consumer, too: „If the customer’s declaration of consent is obtained at the conclusion of the contract, the customer can consider before the purchase whether he wants to buy the digital content if he has to waive his right of withdrawal for this. In a two-step procedure, the customer must first enter into a binding contract, possibly make an advance payment and pay, and is only then informed that he will only receive his digital content after waiving his right of withdrawal.“²⁴

According to the correct opinion of the Regional Court of Karlsruhe, the loss of the right of withdrawal according to Section 356 para. 5 BGB is independent of a proper instruction according to Sec. 356 para. 3 p. 1 BGB, which sets the withdrawal period in motion.²⁵

IV. Contract duration, automatic term extension and cancellation button

The question of contract duration and the possibility of termination have always been at the core of consumer protection. The mobile phone industry in particular has developed business models that appear non-transparent to the consumer with regard to the duration and the right of termination. According to the law on general terms and conditions, continuing obligations may have a minimum term of no more than two years (Section 309 No. 9 lit. a BGB). Since 1.3.2022, an automatic renewal for a another fixed term is no longer possible (Section 309 no. 9 lit. b BGB). Instead, now a tacit renewal is only possible for an indefinite period with a notice period of no more than one month at any time (section 309 no. 9 lit. c BGB). This is unfortunate because many companies in the games industry link their pricing very closely to contract terms. A premium access for a whole year is often much cheaper than purchasing 12 individual monthly accesses. In practice, the companies in the games industry deal with the prohibition of contract extensions for a fixed period differently. A reasonable option is to offer the player an incentive to actively conclude a new contract with a fixed term before the contract term expires. In this case, Section 309 no. 9 BGB does not apply because there is no tacit, but rather an explicit extension of the contract. Another way is to grant the benefits only for the initial contract term and to let the price continue at the normal level for the contract term thereafter. This means that the consumer has the right to terminate the contract every month, but does not benefit from the favorable tariff of an annual or two-year contract.

In addition, since 1.7.2022, it has become still easier for the consumer to terminate a contract for a continuing obligation against payment in electronic commerce by providing the consumer with a so-called „termination button“²⁶ in accordance with Section 312k BGB (new version). Pursuant to Section 312k (2) BGB (new version), the trader’s website must contain a clearly legible cancellation button with the designation „Cancel contracts here“ or a similarly unambiguous wording, which must be permanently as well as directly and easily accessible. Via this button, the consumer must be led directly to a confirmation page on which only the data required for termination may be requested and on which there is a confirmation button with the same clarity as the termination button. If these criteria are not met, the consumer can terminate the contract at any time without observing a notice period (Section 312k para. 6 BGB new version).²⁷

V. Invalidity of clauses in terms of use

The clauses in terms of use of providers of games playable over the internet are attacked time and again by consumer protec-

tion associations. In view of the proliferation of case law, the principle of freedom of contract is often reduced to a dead letter. The courts are often quick – too quick – to classify clauses as unreasonably disadvantageous to the consumer.²⁸ When, for example, the terms of use of the game „World of Warcraft“²⁹ were attacked by a consumer protection association, the District Court of Berlin found nine clauses to be unreasonably disadvantageous – in part correctly so.³⁰ For instance, it is unlawful for a game provider to reserve the right „to block or terminate your access to the service at its own discretion and to deactivate or delete the account if bookings cannot be made via your credit card“. Unilateral rights to change are also rightly criticised. In the terms of use, the provider had reserved the right „to change, modify, extend, replace or delete any of the rules and conditions contained in this agreement at any time and in its sole discretion“. The unilateral change of access methods, provision times, amount of fees or costs is also unlawful and violates Section 307 BGB.

VI. conclusion

Due to the fact that computer games are a digital product which is largely distributed purely digitally (apart from games on physical data carriers), the games industry is a pioneer in the implementation of consumer protection rules in digital distribution. Since the business models in the games sector include not only a simple download of software for money, but also subscription models and the sale of items, the entire range of consumer protection framework conditions must be observed in order to successfully distribute games.

For a quick read ...

- The amendments to the German Civil Code (BGB) create at least partial legal clarity for the games industry and enable entrepreneurs to offer their services in a legally secure manner and with less risk of abuse.
- However, the regulations are partly unclear or overshoot the target.
- Case law is sometimes too expansive in its assessment of terms of use as inadmissible GTCs.



Professor Dr Christian Rauda is a specialist lawyer for IT law, a specialist lawyer for copyright and media law as well as a specialist lawyer for intellectual property law and a partner in the media law firm GRAEF Rechtsanwälte (Hamburg/Berlin) as well as an honorary professor for computer game law and entrepreneurship in the games industry at the HTW Berlin University of Applied Sciences.

The author thanks Rechtsanwalt Fabian Stöber, LL.M. (UCT), LL.M. (UoC), for his valuable advice and comments.

²⁴ Ewald/Schneider, LG Karlsruhe: Verzicht aufs Widerrufsrecht bei virtueller Währung – Ja! But how?, available at: <https://spielrecht.de/lg-karlsruhe-verzicht-auf-widerrufsrecht-bei-virtueller-waehrung-ja-aber-wie/>.

²⁵ LG Karlsruhe MMR 2022, 413 mAnm Hentsch.

²⁶ S. Güster/Booke MMR 2022, 450.

²⁷ Ewald/Sümmermann deal with the termination button in detail in this issue, see MMR 2022, 713.

²⁸ An inglorious example from the recent past is the classification of the clause „A contract is only concluded by the declaration of acceptance, which is sent with a separate e-mail (order confirmation or shipping confirmation), at the latest, however, by the dispatch of the order“ as unreasonably disadvantageous pursuant to Section 307 BGB, cf. LG München I MMR 2022, 501 marginal no. 38, because the court thus places stricter requirements on form clauses than those provided for by the statutory model in Section 151 BGB.

²⁹ Publisher: Activision Blizzard.

³⁰ LG Berlin Urt. v. 28.1.2014 – 15 O 300/12.

Update required – new digital consumer laws

New Deal or business as usual?

Harmonisation

As part of the New Deal for Consumers initiative, the European legislators introduced the Omnibus Directive and the Representative Actions Directive, which are flanked by the Digital Content Directive and the Sale of Goods Directive. This package of directives now leads to numerous changes in European consumer protection and unfair commercial practices laws. The Omnibus Directive amends four existing directives and introduces an EU-wide harmonised (though not entirely uni-

form) fines regime that, comparable to the GDPR, can lead to fines of at least up to 4% of the annual turnover. In addition, the scope of application of many consumer protection regulations is extended to contracts under which consumers do not pay a price but provide personal data which the trader does not process exclusively to fulfil its performance obligations or legal requirements (also known as „payment with data“).

reading time: 17 minutes

I. Digitalisation and cross-border commerce led to a need for action

Due to the constant developments in the area of digitalisation and increasing cross-border commerce, the European legislators felt compelled to modernise consumer protection and unfair commercial practices laws at EU level, to facilitate enforcement for consumers and to create more uniform regulations that promote the internal market. Businesses and consumers alike should find a set of rules in the EU that is as harmonised as possible. To this end, a package was put together consisting of Direc-

tive (EU) 2019/2161 (Omnibus Directive)¹ and Directive (EU) 2020/1828 (Representative Actions Directive)², flanked by Directive (EU) 2019/770 (Digital Content Directive – DCD)³ and Directive (EU) 2019/771 (Sale of Goods Directive – SGD)⁴. How the modernisation and harmonisation of European consumer laws and their enforcement is transformed is described in more detail below.

II. Omnibus Directive amends four existing directives in different areas

The Omnibus Directive, which has to be applied by the Member States since 28.5.2022, amends four Directives in the area of consumer protection and unfair commercial practices laws: Directive 2011/83/EU (Consumer Rights Directive – CRD)⁵, Directive 2005/29/EC (Unfair Commercial Practices Directive – UCPD)⁶, Directive 93/13/EEC (Unfair Contract Terms Directive – UCTD)⁷ and Directive 98/6/EC (Price Indication Directive – PID)⁸.

With the amendments, the EU intends to create consumer protection and unfair commercial practices laws which are as harmonised as possible and meet the requirements of a rapidly advancing digitalisation. At the same time, the EU does not seem to intend to restrict the individual Member States' scope for action too much. Thus, with the Omnibus Directive, it is not pursuing a purely fully harmonising approach. This becomes particularly clear in the opening clauses that the Omnibus Directive introduces into the CRD, which is in principle fully harmonising. This includes, for example, the new Article 6a of the CRD, which obliges providers of online marketplaces to inform consumers about the parameters used to determine the ranking of the offers and indicating the status as traders for third parties offering products or services on the marketplace. The opening clause of Art. 6a para. 2 CRD empowers the Member States to determine even more far-reaching information obligations, which the German legislator, for example, has made use of with Sec. 312k para. 1 BGB in conjunction with Art. 246d Sec. 1 no. 2 EGBGB and has introduced an obligation for comparison platforms to inform consumers about the providers involved in the creation of the comparison.

In addition, the Omnibus Directive broadens the scope of application of consumer protection provisions through the concept often (somewhat misleadingly) referred to as „payment with data“⁹. A large number of consumer protection standards now apply not only to contracts under which consumers pay a price, but also explicitly¹⁰ to contracts under which consumers do not pay

¹ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27.11.2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ 2019 L 328, 7).

² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25.11.2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ 2020 L 409, 1).

³ Directive (EU) 2019/770 of the European Parliament and of the Council of 20.5.2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ 2019 L 136, 1).

⁴ Directive (EU) 2019/771 of the European Parliament and of the Council of 20.5.2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC (OJ 2019 L 136, 28).

⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25.10.2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, 64).

⁶ Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”) (OJ 2005 L 149, 22).

⁷ Council Directive 93/13/EEC of 5.4.1993 on unfair terms in consumer contracts (OJ 1993 L 95, 29).

⁸ Directive 98/6/EC of the European Parliament and of the Council of 16.2.1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1009 L 80, 27).

⁹ The European and consequently also the German legislator have expressly left open whether the personal data provided is a consideration, as in the case of the payment of a price, so that there does not necessarily have to be a synallagmatic contractual relationship in order to be qualified as “payment with data”, BT-Drs. 19/27653, 35; cf. on this also Spindler MMR 2021, 451 (452).

¹⁰ In this regard, even before the changes made by the Omnibus Directive, the scope of application of the CRD and, accordingly, of Sec. 312 et seq. BGB was to be interpreted broadly in conformity with the Directive and thus might also have been applicable in the case of provision of personal data, e.g. BeckOGK BGB/Busch, 1.6.2021, BGB § 312 no. 11; Spindler MMR 2021, 451 (452).

a price (previously free of charge) but provide personal data (cf. Art. 3 para. 1a CRD, Art. 3 para. 1 subpara. 2 DCD or Sec. 312 para. 1a, 327 para. 3 BGB), with narrow exceptions (see below).

No less significant is the introduction of considerable and standardised fine options. With the specification of fines of at least (another transposition leeway for the Member States) up to 4% of the annual turnover, these are now very similar to those of the GDPR and justify an equally pressing need for action for traders in consumer protection, as was already the case in 2018 with the introduction of the GDPR.

1. Amendments to the CRD

a) „Payment with data“

Since the applicability of the DCD and the Omnibus Directive and/or the corresponding national transposition laws on 1.1.2022 and 28.5.2022, large parts of consumer law now also explicitly apply to contracts where consumers do not pay a price but provide personal data which are not strictly necessary for the performance of the contract or to fulfil legal obligations (i.e. Art. 6 para. 1 subpara. 1 lit. b, lit. c, lit. e GDPR)¹¹, cf. Sec. 312 para. 1a, 327 BGB. This means that almost all consumer contracts that were previously considered „free of charge“ and therefore did not fall within the scope of application of a large part of the consumer protection regulations, especially those concerning digital content and digital services such as free game apps, are now also heavily regulated. This is particularly relevant with regard to the consumer protection information obligations, which must now also be observed in such scenarios – including the right of withdrawal. Only a few exceptions are made to the applicable obligations. For example, in these cases it is not necessary to use a „buy now“ button (Sec. 312j para. 3 sent. 2 BGB).

b) Right of withdrawal

It remains open to what extent a right of withdrawal in cases of „payment with data“ is able to protect consumers at all. On the one hand, contracts where no price is paid can usually be terminated at any time anyway. On the other hand, handing over personal data provided after the end of the contract is already covered by the provisions of the GDPR, which Art. 16 para. 2 DCD also repeats. With regard to non-personal data, there is now a special provision; consumers also have a claim to receive such data (at least in the case of contract termination as a result of warranty for defects; the exact scope of application of the provision and its extension to other contract terminations remains unclear) (Art. 16 para. 3 DCD, Section 327p para. 3 BGB). However, the extent to which non-personal data that can be attributed to consumers for the purpose of providing it exist at all, in relation to the broad concept of personal data, also remains open.¹²

The conditions under which traders can implement a waiver for the right of withdrawal also change. Until now, the waiver of the right of withdrawal in contracts for the provision of digital content not provided on a durable medium¹³ required express consent to the performance of the contract before the expiry of the withdrawal period pursuant to Sec. 356 para. 5 BGB former version (in implementation of Art. 16 lit. m CRD former version) and an acknowledgement that the right of withdrawal expires with the commencement of the performance of the contract. Now, in the case of (digital) service contracts and contracts for the provision of digital content, where consumers are obliged to pay a price, a new condition is added: In addition, the trader has to provide that consent to the consumer on a durable medium (Sec. 356 para. 4 no. 2, para. 5 no. 2 BGB). The information on a durable medium¹⁴ was already obligatory before the

changes (Sec. 312f para. 3 BGB former version) but had not affected the waiver of the right of withdrawal in case of a violation.

In case of the newly introduced digital services, the waiver of the right of withdrawal pursuant to Sec. 356 para. 4 BGB is also linked to the requirement that the service must have been fully provided. Prior to this, the right of withdrawal does not expire even if the mechanism for consent and acknowledgement as well as the provision of the information on a durable medium is implemented (which is only required here in accordance with Sec. 356 para. 4 no. 2 lit. b BGB for off-premises contracts anyway).

This is different in the case of (digital) service contracts and contracts for the provision of digital content if the consumer does not commit to paying a price.¹⁵ In these cases, the right of withdrawal is already excluded by law if the trader has provided the service in full (Sec. 356 para. 4 no. 1 BGB) or, in the case of digital content, has begun to fulfil the contract (Sec. 356 para. 5 no. 1 BGB).

The statutory waiver of the right of withdrawal upon complete performance of a contract for (digital) services is not unproblematic. Contracts for digital services, which are now to be understood as services within the meaning of Sec. 356 para. 4 BGB, are subject to qualitatively higher requirements than contracts for the provision of digital content. The fact that the waiver of the right of withdrawal only becomes effective after full performance of the service is problematic, since contracts that were previously considered contracts on digital content must increasingly be assessed as digital service contracts. The exact classification is often not easy due to very open criteria and there is a rule that if in doubt, the provisions on the right of withdrawal for digital services should be applied, i.e. the stricter provisions.¹⁶ However, because digital service contracts, unlike contracts for digital content, are generally continuing obligations, the complete service is generally only fully performed at the end of the contractual relationship, which essentially nullifies the waiver of the right of withdrawal. Especially for subscription models, this represents an enormous economic hurdle, since in the case of withdrawal, refunds must be made pro rata temporis (at best – if the information on the right of withdrawal was provided properly, Sec. 357a para. 2 BGB). The CJEU¹⁷ dealt with this problem even before the introduction of the concept of digital services and ultimately affirmed a right of withdrawal, denying the applicability of the waiver rules for digital content. The CJEU also took up the problem of calculating compensation for lost value in digital service contracts and clarified once again that the calculation is generally to be made on a pro rata basis according to the time the service was used, even if qualitatively different partial services of an overall service were provided at different periods and the value of the initial parts could have been determined as higher in relation to the remaining parts.

In practice, the implementation of the waiver rules often poses a particular challenge and is always implemented, at any rate, by legally experienced or well-advised traders. If consumers nevertheless wish to make use of the service, they will simply have to

¹¹ The European legislator does not explicitly refer to the GDPR, but the German legislator does in the explanatory memorandum to the law implementing the Digital Content Directive, BT-Drs. 19/27653, 40.

¹² See also Spindler MMR 2021, 528 (530).

¹³ Cf. Pech MMR 2022, 348.

¹⁴ Cf. Pech MMR 2022, 262.

¹⁵ Cf. Pech MMR 2022, 516.

¹⁶ Cf. the last sentence of recital 30 of the Omnibus Directive.

¹⁷ CJEU MMR 2020, 827.

submit to the waiver of withdrawal. In practice, there is thus already a de facto quasi-statutory exclusion, which is why a statutory exclusion would have been preferable in the modernisation of consumer protection law compared to the waiver mechanisms. Clicking on a checkbox and sending the accompanying consent hardly puts consumers in a better position than if the right of withdrawal was already excluded de lege lata (especially since an exclusion would also have to be pointed out accordingly, cf. Art. 246a Sec. 1 para. 3 no. 1 EGBGB).

In implementation of the Omnibus Directive, violations of certain elements of consumer protection law are now sanctioned with a fine of up to 4% of the annual turnover under certain conditions pursuant to Art. 246e EGBGB. This includes in particular breaches of the general information obligations according to Sec. 312a para. 2 sent. 1, 312d para. 1 BGB in conjunction with Art. 246, 246a EGBGB, i.e. information about the main characteristics of the goods or services, contract periods, terms of termination, interoperability and compatibility and also the right of withdrawal. Also potentially subject to a fine is the incorrect labelling of the order button pursuant to Sec. 312j para. 3BGB.

2. Amendments to the UCPD

The requirements for transparency which were strengthened with the amendment of the CRD are supplemented by an amendment of the UCPD in Art. 3 Omnibus Directive. For example, consumers who search for products by entering a keyword, a group of words or another input must be informed about the main parameters of the ranking, i.e. the sorting of suggested products (Art. 7 para. 4a UCPD). A similarly comprehensive regulation on the transparency of ranking parameters can be found in Regulation (EU) 2019/1150 (P2B Regulation)¹⁸, which has been directly applicable since 12.7.2020. However, this regulation does not apply to B2C relationships, but only to relationships between platforms and commercial users, who in turn offer products to consumers on the platform. However, the European legislator refers to the requirements of the P2B Regulation in many places, so that this and the corresponding guidelines of the European Commission¹⁹ can also be used to a certain extent to interpret the new consumer ranking regulations.

User reviews are also to become more transparent with the help of the Omnibus Directive. If traders display reviews of products to consumers, they have to inform them since 28.5.2022 whether and, if so, how the reviews' authenticity is ensured (Art. 7 para. 6 of the UCPD, implemented by Sec. 5b para. 3 UWG in conjunction with Sec. 5a para. 1 UWG, flanked by two new offences on the blacklist in the Annex to the UWG, No. 23b and No. 23c).

Infringements of certain elements of the UWG, including the general (and far-reaching) element of misleading actions under Sec. 3 UWG, are now sanctioned under certain conditions by a fine of up to 4% of the annual turnover pursuant to Sec. 19 UWG in implementation of the Omnibus Directive, and also entail the risk of an infringement within the meaning of Sec. 9 para. 1 UWG, which means that they can trigger an obligation to

pay damages to competitors – and in the case of a violation of Sec. 3 UWG (including the offences on the blacklist) pursuant to Sec. 9 para. 2 UWG, now also to consumers.

3. Amendments to the PID

In practice, the amendment of the PID, which now contains specific requirements for the announcement of price reductions, e.g. by means of strike prices or percentage reductions in the new Art. 6a of Directive 98/6/EC, is particularly difficult to implement. In such cases, the lowest total price demanded by the trader in the last 30 days before the price reduction must now always be indicated as the reference price for the reduction.

From the point of view of the EU Commission, the amendments to the PID by the Omnibus Directive should, due to the scope of application of the minimum harmonising PID, apply in a unified manner only with regard to price reductions of movable goods, i.e. not to services and also not to digital contents or digital services.²⁰ This is also how the German legislator has implemented it in Sec. 11 PAngV. However, the Member States have a transposition leeway here, which some Member States have also made use of. Thus, the harmonisation objective is also missed at this point, with the consequence that traders must always check for all Member States (including those states of the European Economic Area which have decided to implement the Omnibus Directive as well) whether and to what extent which Member State has made use of this transposition leeway. This also applies with regard to the further opening clauses from Art. 6a PID, which allow Member States to provide for deviations from the 30-day rule, e.g. with regard to products that are new on the market or gradual price reductions. Therefore, a uniform, EU-wide approach cannot easily be taken when implementing the legal requirements of traders.

The possibilities for fines remain similarly inconsistent, although the Omnibus Directive generally pursues the approach of harmonised fine regimes. Thus, although the Omnibus Directive, by amending Art. 8 of Directive 98/6/EC, provides a catalogue of criteria for the assessment of sanctions, it does not provide for a uniform minimum level of fines. The Member States can thus impose fines that differ greatly in their type and maximum level; there are no mandatory fines at EU level.

4. Amendments to the UCTD

The Omnibus Directive did not introduce any new offences into the Unfair Contract Terms Directive (UCTD), so the laws on general terms and conditions (GTC) generally remains unaffected. However, with the introduction of Art. 8b UCTD, new fines were created and violations of the UCTD can now also be sanctioned under certain circumstances with a fine of at least up to 4% of the annual turnover. Member States may limit these fines to cases where the contract terms are expressly deemed to be unfair in any event under national law or where a trader continues to use contract terms that have been found to be unfair in a final decision pursuant to Art. 7 para. 2 UCTD.

The German legislator has done so insofar as according to Art. 246e Sec. 1 para. 2 no. 2 EGBGB only those GTC violations are potentially subject to a fine which fall under Sec. 309 BGB (prohibition of clauses without the possibility of evaluation) or concern provisions in GTC whose recommendation or use vis-à-vis consumers has been prohibited to the trader by a legally binding judgment.

In view of the German implementation with reference to Sec. 309 BGB, however, the question remains open as to whether such provisions can also potentially be subject to fines which are implemented in Sec. 309 BGB but are not based on EU law. This

¹⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20.6.2019 on promoting fairness and transparency for business users of online intermediation services (OJ 2019 L 186/57).

¹⁹ Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (OJ 2020 C 424, 1).

²⁰ Guidelines on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers (OJ 2021 C 526, 130), p. 4.

concerns e.g. Sec. 309 no. 9 BGB, which was adapted by the purely national Fair Consumer Contracts Act²¹ as of 1.3.2022 and contains special provisions on contract durations of continuing obligations and tacit contract extensions. Whether a comparable regulation of another Member State is sufficient here or what should apply, for example, to agreements with consumers from other Member States that are subject to German law, thus remains to be clarified.

III. Warranty law for digital products

The fully harmonising Digital Content Directive (DCD) covers consumer contracts on digital products, i.e. contracts about digital content or digital services. In distinction to this, the Sale of Goods Directive (SGD) deals with goods with a digital element. Goods with a digital element are goods which contain or are connected to digital content or digital services in such a way that the goods could not fulfil their functions without this digital content or digital services and which are provided with these goods according to the contract of sale, irrespective of whether this digital content or digital services are provided by the seller or by a third party (cf. Art. 2 no. 5 lit. b SGD in connection with Art. 3 para. 3 SGD).

Since the distinction can be difficult in individual cases, both the DCD and the SGD contain a rule of doubt. If there is doubt as to whether the provision of included or linked digital content or digital services is part of the contract of sale (and thus falls within the scope of the SGD), it is presumed that the digital content or digital services are covered by the contract of sale (Art. 3 para. 3 SGD, Art. 3 para. 4 DCD).

The DCD concerns both contracts on digital products for which a price is paid, which may also include virtual currencies, which are particularly relevant in the games sector,²² and contracts under which consumers provide personal data.

The DCD creates a warranty right for digital content and digital services, while the SGD contains modified regulations to the existing statutory warranty laws, which relate specifically to goods with digital elements.

Both directives introduce the obligation to provide updates, if required to maintain the products or services in conformity, i.e. free of defects. The update obligation in relation to digital content and digital services is now anchored in Sec. 327f BGB in Germany. The update obligation for goods with digital elements is found in Sec. 475b BGB.

Accordingly, traders (or in the case of goods with digital elements, sellers) must ensure that consumers are provided with updates that are required to maintain conformity with the contract (Sec. 475b para. 4 no. 2 BGB). The obligation therefore only exists with regard to so-called conformity-maintaining updates, but these generally also cover security updates.

The period of time during which the trader is obliged to provide updates depends on whether it is a good with a digital element (or the digital element) or, separately, digital content or digital services. In addition, it depends on whether a one-time or continuous supply of the digital product is owed according to the contract.

In the case of digital content and digital services, the period for the provision of updates pursuant to Sec. 327f para. 1 no. 2 BGB is determined by what consumers can reasonably expect in the case of one-time provision. In the case of permanent provision (e.g. in the case of a subscription or SaaS contract), the entire provision period is decisive. Furthermore, claims for a breach of the update obligation do not become statute-

barred before the expiry of twelve months after the end of the period relevant for the update obligation (Sec. 327j para. 3 BGB).

In the case of goods with a digital element, the entitlement to updates pursuant to Sec. 475b para. 4 no. 2 BGB exists in the case of one-time supply or if no supply period is agreed (Sec. 475c para. 2 BGB), during the period that consumers can expect on the basis of the nature and purpose of the goods and their digital elements and taking into account the circumstances and nature of the contract. In the case of continuous supply, the update obligation exists for the entire provision period, but at least for a period of two years from the delivery of the goods (Sec. 475c para. 2 BGB).

Finally, consumers should be free to install updates that are provided.²³ This also follows from Article 8 para. 3 DCD (transposed into Sec. 327f para. 2 BGB) and Article 7 para. 4 SGD (transposed into Sec. 475b para. 5 BGB), which regulate the responsibilities in the event that consumers do not install a provided update. It is questionable whether consumer protection is more endangered than protected by making automatic updates more difficult in this way. From a practical point of view, despite the existing information obligation by the traders in this respect, (also security) relevant updates could quickly be forgotten, while at the same time the trader is no longer liable for a breach of contract, provided that the trader has sufficiently informed about the availability of the update and the consequences of not installing it.

IV. Conclusion

The New Deal for Consumers mainly brings novelties for formerly free products, where consumers provide personal data (which the trader does not process exclusively to fulfil performance obligations or legal requirements), as well as in relation to digital service contracts. In this context, the requirements for traders increase significantly, which is particularly evident in the form of far-reaching and multifaceted information obligations, be it with regard to the waiver of withdrawal, user reviews or rankings. GDPR-like fines of (at least) up to 4% of the annual turnover make a legal review of the own processes indispensable – even existing ones, as the legal risk changes significantly for any violations. In order to avoid severe fines, a sovereign handling of partly very vague wording is required in many places, and despite the goal of standardising consumer protection law at the EU level, there are still numerous possibilities for deviation by the Member States in the national implementations, of which they made active use.

The New Deal for Consumers therefore creates an immense need for implementation, especially for traders who operate internationally. Whether the initiative actually promotes the internal market remains to be seen. In any case, the position of consumers is strengthened by the possibility of fines, which will be further strengthened by the applicability of the Representative Actions Directive in 2023 and thus the possibility of collective redress.

²¹ BGBl. 2021 I 3433.

²² Cf. recital 23 DCD as well as Sec. 327 para. 1 sent. 2 BGB.

²³ Cf. recital 47 DCD and recital 30 SGDL; on this also Spindler MMR 2021, 451 (456).

For a quick read ...

- The New Deal for Consumers brings numerous relevant changes to consumer protection and unfair commercial practices laws at EU level, especially for products that were previously considered free but now fall under the concept of „payment with data“.
- Potential fines at the level of the GDPR of at least up to 4% of the annual turnover increase the risk level not only with regard to new obligations, but also with regard to existing regulations, e.g. violations of the laws on general terms and conditions. As a result, consumer protection law is effectively becoming a new compliance issue.
- As the goal of harmonisation at EU level has not been achieved in many aspects by the New Deal for Consumers due to numerous opening clauses, internationally active

traders must still carry out a due diligence assessment on regulations in all relevant core markets in order to be on the safe side.



Konstantin Ewald

is a lawyer and partner at Osborne Clarke in Cologne. He is a specialist in e-commerce law with a particular focus on consumer compliance and international platform compliance projects.



Leonie Schneider

is a lawyer and associate at Osborne Clarke in Cologne. She focuses on consumer protection law, e-commerce law and platform regulation.

We would like to thank our research assistant, David Buchholz LL.M., for his active support and wise comments.

PHILIPP SÜMMERMANN / KONSTANTIN EWALD

The German Fair Consumer Contracts Act

New regulations on subscriptions – a practical overview

Cancellation button

Implementing the so-called „Fair Consumer Contracts Act“ (FCCA) currently confronts businesses operating in Germany with considerable practical challenges. The law, which passed parliament on 10.8.2021, bundles four changes to German consumer protection legislation. Most notably, it imposes restrictions on automatic contract renewals and requires businesses to provide a „cancellation button“ for users. It also introduces a prohibition to assign certain claims. In addition to these amendments of the German Civil Code (BGB), the FCCA also amends the Unfair Competition Act (UWG), introducing a documentation requirement for consumer consent to tele-

phone advertising. The article provides an overview of the new regulations and the most important questions related to its implementation within digital business models – with a special focus on games. As the regulations require considerable changes for subscription models, implementing the consumer law-related amendments of the FCCA is of particular importance for digital businesses. After a brief overview of the genesis, the article therefore takes an in-depth look at those provisions that apply to the terms of continuing obligations and the cancellation button. The article then briefly summarizes the other changes in the law. **reading time: 21 minutes**

I. Genesis

The law, called the „Fair Consumer Contracts Act“ not without bias by the legislator, was one of the last measures of the previous Federal Government. The government's draft¹ was adopted by the Bundestag in its last regular session before the end of the legislative period in a version amended by the Legal Affairs Committee² on 24.6.2021.³

While the EU Commission is trying to push forward the digital single market at the European level and is aiming for harmonised consumer protection regulations with the „New Deal for Consumers“, at least to a large extent, the German FCCA is an uncoordinated national solo run.

II. Rules on the duration of consumer contracts

In the past, clauses in general terms and conditions (T&Cs) were widespread that provided for an automatic renewal of contracts

for a further year after the initial term of one or a maximum of two years unless the consumer had terminated the contract prior to the renewal. Since 1.3.2022, such provisions in T&Cs are now generally void, Sec. 309 no. 9 BGB.

1. Content of the new regulation

After the end of the initial term, contracts that fall within the scope of the new regulation may only be tacitly renewed for an indefinite term, Sec. 309 no. 9 lit. b BGB. Renewals for a fixed term are no longer possible, regardless of their length. The new restriction affects all contracts for a regular delivery or regular provision of services or works from the trader. When making use of the possibility to renew contracts for an indefinite period, the consumer must be given the right to terminate the extended contract at any time with a notice period of no more than one month. Notice periods of more than one month before the end of the initially agreed-upon term of the contract are now also void, Sec. 309 no. 9 lit. c BGB.

This means that consumers may only be contractually bound once, for an initial term. If contracts shall continue after the expiry of this initial term, they must be converted into unlimited contracts (i.e. with an open end) and in return consumers must be

¹ BT-Drs. 19/26915.

² BT-Drs. 19/30840.

³ BT plenary protocol 19/236 v. 24.6.2021, 30732.

given the possibility to cancel at short notice with a notice period of no more than one month. The previous cap of two years remains in place for the maximum duration of the initial term, Sec. 309 no. 9 lit. a BGB.⁴

2. Application to existing contracts

The new regulations only apply to contracts concluded since 1.3.2022, Art. 229 Sec. 60 sent. 2 of the Introductory Act to the German Civil Code (EGBGB). Key date is the initial conclusion, an extension of previously concluded contracts after the effective date is irrelevant.⁵ These can continue to auto-renew without consent as set out in the T&Cs at the time until one of the parties exercises its right to cancel the agreement.

3. Restriction to tacit extensions

The newly imposed restriction only applies to tacit extensions of consumer contracts due to a provision to this effect in T&Cs. It is therefore still possible – besides concluding a new contract⁶ – for consumers to actively consent to an extension of a contract for a further binding term.⁷

The consumers motivation to agree to such an extension is irrelevant. In practice, incentives will play an important role in obtaining consent. For example, it is possible to agree on discounted rates for the duration of the initial term. The trader may then offer to extend the discount if the consumer decides to renew the contract at the end of the term.

4. Handling monthly subscriptions

Subscriptions with monthly terms that are automatically renewed at the end of each month are particularly widespread in the digital sector. Consumers may usually cancel at any time prior to the next renewal.

With the new regulations, setting out such mechanisms in T&Cs goes against the wording of Sec. 309 no. 9 lit. b BGB. According to the law, clauses that provide for a contract to renew for a fixed term shall be deemed invalid.⁸ However, in case of monthly subscriptions, there is merely a semantic difference in terms of legal consequences to the alternative expressly permitted by law, i.e. an extension for an indefinite period with a notice period of one month maximum. These two mechanisms can therefore be considered equal and there is likely no need to make changes to any such provisions.

5. Dealing with trial periods

Trial periods and similar „free test periods“ at the beginning of a contract are not considered a term within the meaning of Sec. 309 no. 9 lit. a BGB due to the lack of a commitment for a certain time on the part of the consumer⁹. The wording sometimes found in T&Cs that a contract is „automatically renewed“ after the end of the trial period therefore does not constitute an extension pursuant to Sec. 309 no. 9 lit. b BGB in absence of a binding initial term.

This is only fair, as the regulation is intended to protect consumers from cost traps. It would be misguided to extend the regulation to scenarios where consumers are granted a trial period with the right to terminate the contract at any time. Such an interpretation would ultimately lead to providers being placed in a disadvantageous position if they grant consumers longer periods to consider their contractual commitment.

6. Dealing with advance payments

Whether advance payment obligations are permissible, even beyond the relevant contract term or notice period, is not a matter

for Sec. 309 no. 9 BGB. The legality of advance payment clauses remains subject to Sec. 307 BGB, which prohibits unreasonable disadvantages.¹⁰

III. Cancellation button

The second fundamental change due to the FCCA since 1.7.2022 is the obligation for traders to implement a cancellation button¹¹ for so-called continuing obligations. The respective regulation in Sec. 312k BGB is intended to make it easier for consumers to cancel contracts concluded on websites via a legislatively predefined process.

According to Art. 229 Sec. 60 EGBGB, the regulation also applies to existing contracts. Every consumer must now be given the possibility to cancel continuing obligations that can be concluded on a website by means of this new „button solution“.

1. Scope of application

Pursuant to Sec. 312k(1) sent. 1 BGB, a cancellation button is mandatory for websites that enable consumers to conclude contracts in electronic commerce aimed at establishing a continuing obligation and oblige the trader to provide a service against a consideration.

a) Continuing obligations

In the digital realm, the regulation applies to contracts that are generally referred to as „subscriptions“. The legislator wanted the term „continuing obligation“ to be open to development and has therefore deliberately not provided for a definition.¹² A typical feature of continuing obligations are the obligations to perform and protect that arise continuously during the term, which is why neither the scope of performance ultimately owed nor the circumstances of the performance can be quantified in advance.¹³ General statements such as, for example, that contracts for digital services within the meaning of Sec. 327(2) sent. 2 BGB are always within scope but contracts for digital content within the meaning of Sec. 327(2) sent. 1 BGB are not, can generally not be made.

Within the scope are all contracts that do not set out stricter form requirements than text form for their cancellation. In addition to contract types with stricter formal cancellation modalities, websites relating to financial services and notices of cancellation for contracts for financial services are expressly excluded.

Providing a cancellation button is also mandatory if the trader exclusively offers contracts with a limited term that do not provide for any kind of auto-renewal. In these cases, an ordinary cancellation (i.e. with effect at the end of the term) would not have any additional effect. However, consumers can also notify traders of an extraordinary termination via the cancellation button.

⁴ The draft of the Federal Government, BT-Drs. 19/26915, 7, is still different; Wais NJW 2021, 2833 (2835) elaborates on this.

⁵ Wais NJW 2021, 2833 (2836); BeckOGK BGB/Weiler, 1.4.2022, BGB Sec. 309 no. 9 para. 24.

⁶ Wais NJW 2021, 2833 (2836).

⁷ BeckOGK BGB/Weiler, 1.4.2022, BGB Sec. 309 no. 9 para. 104; MüKoBGB/Wurmnest, 9th ed. 2022, BGB Sec. 309 no. 9 para. 21.

⁸ BeckOGK BGB/Weiler, 1.4.2022, BGB Sec. 309 no. 9 para. 107.

⁹ BeckOGK BGB/Weiler, 1.4.2022, BGB Sec. 309 no. 9 para. 85 with further evidence; other opinion Wolf/Lindacher/Pfeiffer, AGB-Recht/Dammann, 7th ed. 2020, BGB Sec. 309 no. 9 para. 41.

¹⁰ Wolf/Lindacher/Pfeiffer, AGB-Recht/Dammann, 7th ed. 2020, BGB Sec. 309 no. 2 para. 9 f. with further evidence.

¹¹ See also Güster/Booke MMR 2022, 450.

¹² MüKoBGB/Gaier, 9th ed. 2022, BGB Sec. 314 para. 9.

¹³ MüKoBGB/Gaier, 9th ed. 2022, BGB Sec. 314 para. 10.

b) Performance against a consideration

According to the established understanding of consideration, the term „performance against a consideration“ refers exclusively to contracts in return for monetary payments.¹⁴ This corresponds to the „payment of a price“ within the meaning of Sec. 327(1) sent. 1 BGB. Therefore, contracts against digital representations of a value as well as contracts where users provide personal data that the trader does not process exclusively for the fulfilment of the contract or due to legal requirements are not within scope.¹⁵ In cases where consumers „pay with data“, they already do not run any risk of running into a cost trap.

c) Website

Traders must provide the cancellation button on „websites“; a term for which the legislator does not provide a definition. For its interpretation, the legislator merely refers to case law on Sec. 312j(1) BGB, which uses the same term.¹⁶ However, relevant precedents have not yet been developed, so the term „website“ must be understood in the sense that it is commonly used: sites on the internet that can be accessed by means of a browser. Due to the express reference to „websites“, other graphical user interfaces including purchase options in games or apps are out of scope.¹⁷ As the legislator did not use the established terms of „electronic commerce“ or – in view of the necessity of a user interface – „telemédia“, it must be assumed that the understanding was expressly meant to be narrow. The scope is therefore more restrictive than for the legal notice („Impressum“) pursuant to Sec. 5 of the German Telemédia Act (TMG), which is also explicitly mentioned by the legislator in other contexts in the explanatory memorandum.

d) Enabling the conclusion of the contract via the website

The obligation to provide the cancellation button applies to websites that allow consumers to enter into a contract. Therefore, sites for marketing purposes only or other websites that do not allow consumers to conclude a contract via electronic commerce are out of scope.¹⁸

If a website lets consumers conclude contracts, it is irrelevant for the use of the button whether or not the specific contract to be terminated was originally concluded via the website.¹⁹ Traders must accept cancellation notices for all contracts that they sell via the website. For example, a consumer can cancel a newspaper subscription via the homepage of the respective newspaper even if he/she previously signed up for his/her subscription offline at a local branch.

With respect to the possibility to conclude contracts on third party websites, it is necessary to differentiate. According to the explanatory memorandum, traders must impose a contractual obligation on third-party platforms such as intermediary platforms to provide a cancellation button if the platforms act as agents or legal representatives and consumers do not conclude contracts with the platform but directly with the trader.²⁰ In such scenarios, it is also possible for the third-party platforms to directly link

to the confirmation page of the trader instead of designing a cancellation page of their own.

However, the provision of Sec. 312k BGB can only apply to traders to the extent that they themselves become contractual partners of the respective consumers. In principle, cancellation notices must be sent to the respective contractual partner or, if applicable, to its representatives or agents. In the case of subscriptions to computer games and similar digital offers, it is common to have constellations where users do not conclude contracts directly with the provider of the games but enter into agreements with the provider of the respective store. In such cases, the platform providers are required to provide cancellation buttons for the contracts that can be concluded via their websites as traders within the meaning of Section 309(2) sent. 1 BGB.

e) Possibility of an „opt-out“

In view of the contractual autonomy, it is permissible as an individual agreement pursuant to Sec. 305b BGB to exclude individual contracts from the possibility of using the cancellation button at the express request of the consumer or to agree that cancellation declarations submitted via this button are to be disregarded. This can be particularly useful to limit the risk of abuse of a form without authentication.

2. Content of the regulation

The regulation obliges traders to implement a three-stage process. The most visible part is the cancellation button. The button should lead consumers directly to a cancellation form – called a „confirmation page“ by the legislator – which asks for the data required to process the cancellation notice. Consumers should then be able to submit the termination declaration with only one click. The trader should also confirm sending and receipt of the cancellation notice.

Because the legal requirements are very detailed, existing termination mechanisms are unlikely to meet the expectations of the legislator. Such termination options, which are common in the digital sector (e.g. in the account settings), remain unaffected by Sec. 312k BGB and may remain untouched.²¹ Why an additional path to cancel must be provided even in cases where providers already allow for an easy cancellation remains one of the many mysteries of this regulation.

a) Cancellation button

The cancellation button must be permanently available and directly and easily accessible, Sec. 312k(2) sent. 4 BGB. According to the explanatory memorandum, the criterion of permanent availability is modelled after the provision on the obligation to provide a legal notice („Impressum“) in Sec. 5(1) TMG; the criteria of „directly and easily accessible“ are based on the provisions on information obligations for online marketplaces in Art. 246d Sec. 2(2) EGBGB.²² Despite the designation as a „button“, a special optical highlighting is not required. Same as for the access to the legal notice, a regular link is sufficient. When it comes to placement and visual design, it is usually a good idea to also use the legal notice as a guide, i.e. place the cancellation button in the footer of the website or the top level of a generally accessible menu. However, this is not mandatory.

The cancellation button must be clearly legible and labelled unambiguously, Sec. 312k(2) sent. 2 BGB. The legislator provides for a label with „Cancel contracts here“ or a similar unambiguous wording. Instead of the inscription „Cancel contracts here“, the abbreviated form „Cancel contracts“ will generally be equally unambiguous. Consumers are aware that links regularly lead to other pages and that the contents to be found there can

¹⁴ Brönneke/Föhlisch/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 32.

¹⁵ With the same result Wais NJW 2021, 2833 (2836); see also Pech MMR 2022, 516.

¹⁶ BT-Drs. 19/30840, 16.

¹⁷ Other opinion Stiegler VuR 2021, 443 (444).

¹⁸ Brönneke/Föhlisch/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 30.

¹⁹ BT-Drs. 19/30840, 17.

²⁰ Cf. BT-Drs. 19/30840, 16.

²¹ MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 31.

²² BT-Drs. 19/30840, 18.

be accessed by clicking on them.²³ Nevertheless, according to the explanatory memorandum, when choosing alternative labelling, it must be ensured that the consumer recognises that clicking on this link does not immediately submit a cancellation.²⁴

„Cancel subscriptions“ will usually be a sufficiently unambiguous label, as this accurately describes the nature of most continuing obligations within the scope of application in laymen’s terms. Whether other labels are possible depends on the design of the respective offer. In particular, the terminology used by the provider to describe his contracts is generally suitable for the labelling of the button. If, for example, a provider offers a paid „Platinum Pass“ as the only type of contract within the scope of the regulation, „Cancel Platinum Passes“ would be a valid labelling. Longer wordings are also possible.²⁵ German alternatives to the term „cancel“, on the other hand, are only conceivable to a very limited extent.²⁶

b) Confirmation page/termination form

By clicking on the button, consumers must be taken directly to a „confirmation page“, which is a specifically tailored contact form. The terminology chosen by the legislator is irritating in this respect.

The form is designed to prompt and enable the consumer to provide the following information:

- the type of termination and, in the case of an extraordinary termination, the reason for the termination;
- clear means of identification;
- a clear identification of the contract;
- the time at which the termination shall take effect; and
- contact data to confirm the termination easily by electronic means.

It is possible to make filling out fields mandatory to the extent that information is required for processing the cancellation request.²⁷ It would go against the goal to protect consumers if they could submit a form that the provider could not subsequently process – and accordingly comply with the consumer’s declaration of intent, i.e. fulfil the consumers request. However, it is not allowed to artificially inflate the termination process by requesting a large amount of information that is not required. Nevertheless, the consumer may be given the opportunity to provide further information on a voluntary basis.²⁸ It is also allowed to show the consumer alternative – e.g. simpler – cancellation options and to provide instructions on how to complete the form.

With regard to the information pursuant to Sec. 312k(2) sent. 3 no. 1 BGB, the consumer must first indicate whether he wishes to notify an ordinary or extraordinary termination. An explanation of the legal consequences is not mandatory. In most cases, consumers will not be able to understand what this means in practice.²⁹ In particular for digital subscriptions, the practical scope of application for extraordinary termination is virtually non-existent; nevertheless, both options must be offered to the consumer. According to the explanatory memorandum, cancellations under warranty law are not to be covered by the regulation.³⁰ This raises the question of how to deal with such reasons under warranty law when the consumer declares an „extraordinary termination“.³¹

According to the legislator, it should typically be possible to identify users by name and address.³² This already shows the legislator’s lack of concern with digital business models, where this information is often not available. However, providers can also request other identifiers they use, e.g. user names or email addresses.

Although this might not always be customer friendly, the trader is also allowed to ask for customer, order or contract numbers to identify the contract.³³

If a service uses e-mail addresses to identify users, it is not necessary to allow the consumer to provide further information for the „electronic transmission of the termination confirmation“. In this case, the relevant information is already available to the provider.

The website must also contain a confirmation button that allows consumers to directly submit the termination notice. This must be clearly labelled with nothing other than the words „cancel now“ or with an appropriate unambiguous wording.

The confirmation page itself as well as the button to submit the notice must also be permanently available and immediately and easily accessible.

While consumers can normally review the information to be submitted when shopping online before the final submission, this is not required for the cancellation button. An intermediary page is possible, but not mandatory.³⁴ Clicking on the cancellation button can also transmit the information directly to the trader.

c) Possibility of a login

According to the explanatory memorandum, the cancellation form must also be accessible without a login.³⁵ However, in the case of services that users use exclusively when logged in – and thus usually have their user credentials at hand – many arguments speak in favour of also being able to require a login before accessing the confirmation page. If a login is always required for the use of a contract and this is the usual way of use, the page remains „directly and easily accessible“ from the point of view of the affected users even if they can only access the cancellation form when logged in. This is the difference between digital services such as games and the usual examples for the scope of application of the cancellation button, such as gym memberships or physical newspaper subscriptions, which do not require a permanent login for use and users may not even have such a login.

In this case, it is reasonable to deviate from the explanatory memorandum to the law, not least for reasons of consumer protection. Using the form as a registered user is probably the most user-friendly option for digital services. In this case, providers can, for example, pre-fill the required information or allow the selection of the corresponding contract via a drop-down menu.³⁶

²³ Other opinion probably Stiegler VuR 2021, 443 (447), who attaches considerable importance to the “here” in order to clarify the two-stage structure.

²⁴ BT-Drs. 19/30840, 17; see also MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 15.

²⁵ MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 15; other opinion Stiegler VuR 2021, 443 (447).

²⁶ Brönneke/Föhlich/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 45.

²⁷ Stiegler VuR 2021, 443 (448); restrictively Brönneke/Föhlich/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 46.

²⁸ Stiegler VuR 2021, 443 (448).

²⁹ Also Wais NJW 2021, 2833 (2837); MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 17.

³⁰ BT-Drs. 19/30840, 17.

³¹ Wais NJW 2021, 2833 (2837).

³² BT-Drs. 19/30840, 17.

³³ BT-Drs. 19/30840, 17; Brönneke/Föhlich/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 47; Stiegler VuR 2021, 443 (448).

³⁴ Brönneke/Föhlich/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 42.

³⁵ BT-Drs. 19/30840, 18.

³⁶ Considering a selection field of the respective contracts as “ideal” MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k BGB para. 19.

Few users are likely to have order numbers for past digital purchases at hand. At the same time, a login reduces the risk of incorrect entries and thus ensures that the trader can also comply with the cancellation declaration. At the same time, a login protects the user from unauthorised changes to their data and misuse of the cancellation function (see also under III.2.e).

d) Confirmation of the declaration

After sending the notice of termination, the consumer must be given the possibility to save the submitted information with the date and time of submission on a durable medium. In practice, it is advisable to allow the customer to download a confirmation as a PDF or to print out the confirmation page displayed.³⁷ It should be visible from the confirmation that the cancellation notice was made by pressing the confirmation button. This is to be understood to mean that the „submission“ of the declaration is to be documented.³⁸ It is therefore not necessary for the summary to expressly emphasise that the declaration was made „by pressing the confirmation button“.

In addition to the possibility for the consumer to save the notice himself to document its submission, it must also be actively sent to him again – now as documentation of receipt. The trader must immediately confirm to the consumer the receipt of the cancellation notice as well as the time at which the contractual relationship is to be terminated electronically in text form. It is assumed that a termination declaration made by pressing the confirmation button was received by the trader immediately after it was made.

In the case of this confirmation of receipt to be sent immediately, the „time at which the contractual relationship is to be terminated“ is only meant as a confirmation of the expressed will, i.e. the time indicated by the consumer or otherwise „earliest possible“.³⁹ If the consumer has not indicated a time for the termination to take effect, the termination is to take effect at the earliest possible time, cf. Sec. 312k(5) BGB. In order to avoid misunderstandings, it is advisable to clarify that this does not mean a confirmation of the actual effective date of the termination.

e) Subsequent authentication

In order to avoid abuse, it may be permissible and possibly even recommended to ask consumers for a confirmation following the submission of the cancellation notice.

When the confirmation button is pressed, there is a legal presumption that the declaration of termination was received by the trader immediately after it was made, Sec. 312k (4) sent. 2 BGB. However, there is no corresponding rule of presumption for the identity of the sender on whom this declaration of intent is based.

Therefore, it cannot be concluded from the receipt of the declaration that it originates from the specified sender. However, in-

dispensable prerequisites for an effective declaration of intent are, in principle, the proof of the intention to act and the submission of the declaration of intent.⁴⁰ The burden of proof for the effectiveness of a declaration of intent lies in principle with the person who invokes it, in this case the consumer.

There is no prima facie evidence of identity. Even when statements are made via password-protected accounts, courts regularly reject prima facie evidence regarding the account holder as the sender.⁴¹ The trust to interact with the account holder and – in the case of account abuse on auction platforms – to contract is regularly not protected.⁴²

If the declarant has to provide evidence, it is not unreasonable for the provider to proactively inquire, especially in the case of openly accessible termination forms without prior authentication, also for the protection of the consumer. Depending on the individual case, there may even be a secondary contractual obligation to protect the consumer from unauthorised termination attempts by third parties.

The fact that authentication mechanisms can also be implemented without major hurdles is sufficiently known to consumers from the „double opt-in“ procedures commonly used for newsletters.⁴³ The standard of permissible authentication measures must be assessed on a case-by-case basis and, in addition to the potential for abuse – e.g. based on generally known identification features – can also take into account whether the user has independently taken measures to increase the protection of his or her account integrity, such as activating a 2-factor authentication.

If the user confirms within a reasonable period of time that the declaration originates from him/her, the original time of receipt of the original declaration by the trader shall apply with regard to the time of receipt.

f) Legal consequence

If the trader does not comply with the above requirements, consumers can terminate their contracts at any time without notice as long as the breach continues.⁴⁴ The right to extraordinary termination remains unaffected. In accordance with the usual procedural principles, the consumer is obliged to present and prove the existence of the prerequisites for the facts.⁴⁵ Apart from that, cease and desist requests can be issued for violations. Since this is a purely national regulation, a non-compliant implementation does not constitute a violation of Union law within the meaning of Art. 246e Sec. 1(1) sent. 1 EGBGB. The provisions on fines in Art. 246e Sec. 2(1) EGBGB therefore do not apply.⁴⁶

IV. Prohibition of assignment

Since 1.10.2021, clauses in T&Cs that exclude the assignment of certain claims are void. Consumers can thus more easily assign claims to third parties who will take over legal proceedings in their place.

The new provision of Sec. 308 no. 9 BGB primarily applies to the contracting party's monetary claims against the user. However, prohibitions of assignment can also be void if they refer to other rights of the contracting party; the decisive factor here is a weighing of interests – with corresponding legal uncertainty.

The prohibition applies to all contracts that were concluded after 1.10.2021, Art. 229 Sec. 60 sent. 1 EGBGB. The rule of the prohibition of assignment does not apply to contracts concluded before that date.

V. Telephone advertising

Consent from consumers to telephone advertising must be documented and retained at the time it is given, in accordance with

³⁷ Ex. Brönneke/Föhlisch/Tonner, Das neue Schuldrecht/Buchmann/Panfilii, Sec. 7 para. 52.

³⁸ Cf. BT-Drs. 19/30840, 18.

³⁹ MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 25.

⁴⁰ Hoeren/Sieber/Holzsnagel, HdB Multimedia-Recht/Kitz, 57th EL 2021, Part 13.1 para. 138.

⁴¹ Hoeren/Sieber/Holzsnagel, HdB Multimedia-Recht/Kitz, 57th EL 2021, Part 13.1 para. 139 with further evidence.

⁴² Loritz FS Geimer, 2017, 409 (415).

⁴³ Even unsubscribing from the Federal Constitutional Court newsletter requires confirmation by clicking on a link, available at: https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Newsletter/Pressemitteilungen/Newsletter_Abbestellen_Integrator.html

⁴⁴ MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 33.

⁴⁵ BT-Drs. 19/30840, 19; on the relationship to Sec. 312m(2) BGB see MüKoBGB/Wendehorst, 9th ed. 2022, BGB Sec. 312k para. 34.

⁴⁶ Stiegler misjudges this in VuR 2021, 443 (451).

the concretisation of Sec. 7a UWG. Supervision lies within the responsibility of the Federal Network Agency pursuant to Sec. 7a(2) UWG, and the regulation is subject to fines. This regulation has a greater role especially for companies outside the digital sector.

VI. Conclusion

The so-called Fair Consumer Contracts Act causes considerable headaches in its practical implementation. Paradoxically, it is a considerable problem for digital companies in particular, including the games industry, to implement the regulations in a consumer-friendly way. The practical effects of the law were unfortunately not considered by the Bundestag. It would be desirable for the legislator to provide clarity here – gladly with a law for consumer-friendly consumer contracts.



Philipp Sümmermann, LL.M. (Cologne/Paris I), is a lawyer at Osborne Clarke in Cologne.

For a quick read ...

- The Fair Consumer Contracts Act bundles four amendments to German consumer protection law.
- T&Cs on subscription contracts with consumers have to be drafted since 1.3.2022 in such a way that the contracts end automatically after the end of the initial term or are extended for an indefinite period and give the consumer a right of termination of no more than one month.
- Websites that enable consumers to conclude continuing obligations must provide a so-called cancellation button that enables the transmission of cancellation declarations.



Konstantin Ewald is a lawyer and partner at Osborne Clarke in Cologne. He is a specialist in e-commerce law with a particular focus on consumer compliance and international platform compliance projects.

AXEL VON WALTER

EU Commission Guidelines on the UCP Directive and the UWG

Digital business practices in the focus of EU consumer protection

Digital Business Models

In December 2021, the EU Commission published revised guidelines on the interpretation of the UCP Directive. The legally non-binding guidelines focus, among other things, on legal questions regarding the consumer-protective fairness of

business practices in digital business models. They contain numerous references to the games industry and can be a source for a uniform interpretation of the UCP Directive throughout Europe.

reading time: 12 minutes

I. Guidelines on the UCP Directive

Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (hereinafter the UCP Directive) harmonizes the rules on unfair business-to-consumer commercial practices in the internal market throughout Europe. It is the basis for the important consumer-related regulations in the Unfair Competition Act (UWG).

On Dec. 17, 2021, the EU Commission published the new edition of its „Guidelines on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.“¹ The 2021 Guidelines are based on the 2016 Guidelines and are intended to replace them.² With the Guidelines, the Commission aims to simplify the application of the UCP Directive and bring it closer to national courts and legal practitioners across the EU.³ In line with this goal, the 129 pages contain explanations of the UCP Directive from the perspective of the EU Commission. Thus, the scope of application of the UCP Directive and the interaction of the Directive with other EU legislation are highlighted. Chapter 2 discusses the main concepts of the UCP Directive, including the provisions of Art. 5 (professional diligence), Art. 6 (misleading

conduct) and Art. 7 (misleading omissions), in addition to Art. 8 and 9 (aggressive commercial practices). Chapter 3 is devoted to the so-called black list of unfair business practices. Chapter 4 is particularly relevant to practice, with a consideration of the application of the UCP Directive to specific sectors. The topic of sustainability (Chapter 4.1), the digital sector (Chapter 4.2), which is important for the games industry, the travel industry and the transport sector (Chapter 4.3) as well as financial services and real estate (Chapter 4.4) are discussed.

The Commission has revised the 2016 Guidelines to reflect the legal changes in light of its new consumer rights agenda („New Deal for Consumers“) and the accelerated developments in digital business models and sustainability. Therefore, the guidelines include additional legal interpretative guidance on online platforms, online marketplaces, influencer marketing, consumer ratings and data-driven personalization, and so-called „dark patterns“⁴. In addition to the guidelines on the UCP Directive, the EU Commission has also published guidelines on the inter-

¹ Official Journal of the EU v. 29.12.2021 – C 526/1.

² Cf. p. 5 of the guidelines.

³ Cf. p. 5 of the guidelines.

⁴ On dark patterns, see also Bodensiek MMR 2022, 722 – in this issue.

pretation and application of Directive 2011/83/EU (VR Directive), which also comment on consumer protection regulations in the digital environment.⁵

II. Legal character and binding nature of the guidelines

The guidelines published by the Commission are so-called „soft law“. Only the wording of EU legislation, in particular Directive 2005/20/EC⁶, has legal force and is legally binding. The Commission itself points out that any binding interpretation of the law must be derived from the wording of the Directive and directly from the decisions of the ECJ⁷. The Commission also reserves the right, as a party to proceedings before the ECJ, to adopt different legal positions than those set out in the Guidelines. Thus, the guidelines are not even intended to have a self-binding effect for the Commission. Ultimately, the guidelines are a compilation of the Commission's current abstract legal opinion on the UGP Directive.

The guidelines are neither binding for the courts of the Member States nor for the ECJ. As far as can be seen, national courts have not yet dealt in depth with the guidelines on the UCP Directive or used them as grounds for judgments on unfair competition. The guidelines could be a useful aid to interpretation for a uniform understanding of the provisions of the UCP Directive throughout the EU. At present, the guidelines do not yet have this practical significance.

III. Guidelines and Games

The updated guidelines aim in particular to make the application of EU consumer law easier to understand against the backdrop of the accelerated digital and green transformation. With this focus of the Commission on digital business models in its consumer policy, there are naturally numerous old and new points of contact in the guidelines that may be of relevance to the games industry. With chapter 4.2 of the guidelines, the Commission dedicates a separate section of the guidelines to the „digital sector“. This chapter addresses various aspects of business practices towards consumers in the digital environment.

1. guidelines on computer games

Section 4.2.9 of the guidelines contains a subsection on aspects of „computer games“. It is striking that the Commission repeatedly emphasizes the protection of children and young people in the guidelines in connection with computer games and stresses the special need for protection.⁸ For example, the Commission refers to paragraph 28 of the blacklist, which prohibits direct solicitation of children to buy products. It says studies have shown that children are less likely to recognize and understand the commercial intent of advertising in games compared to more direct advertising on television.⁹ The commission also calls for computer game providers to use parental control platform measures.¹⁰

The Commission emphasizes the importance of transparency requirements under fair trading law with regard to computer games. The essential features of the product must be clearly described and the prices for virtual items must also be clearly indicated in real currency.¹¹ The transparency requirement also applies when offering „early access“ to games. This refers to games that are still in development. Here, too, the traders would have to make transparent to the users what the user can expect at this early stage of the game's maturity and, if applicable, what not.

The guidelines also devote a separate paragraph to the topic of loot boxes (referred to there as „loot boxes“). It describes game content with „gambling elements“ as questionable. The guidelines include an example that online games would use algorithms to determine „risk scores“ based on the user's gaming habits to personalize the timing of in-game offerings of loot boxes, the odds of obtaining a valuable item in a loot box, and the strength of in-game opponents – all with the goal of retaining users and increasing their in-game spending. The algorithms are particularly used in addictive games, which may constitute an aggressive commercial practice (Art. 8, 9 UCP Directive), the Commission said.¹² In the Commission's view, the sale of loot boxes in games must comply with the information requirements of the Consumer Directive and the UCP Directive with regard to the price and the essential characteristics of the product. The Commission's transparency expectation for loot boxes includes clear references to the existence of paid content and an explanation of the probability parameters of receiving a random item. Since lootboxes can often be purchased by in-game points or currency, the price in real currency should always be indicated alongside this.

The Commission's interpretive guidance, which is specifically tailored to computer games, also includes specific discussion of online intermediaries, social media, online marketplaces, app stores, search engines, and comparison platforms, including topics such as algorithms, automated decision making, and artificial intelligence (AI) that may be relevant to the games sector.

2. guidelines on platforms, rankings, ratings and social media.

The Commission understands an online platform to be an infrastructure that enables electronic communication between providers and users in connection with the provision of goods, the provision of services and the online transmission of digital content and information. In the Commission's view, platforms are subject in particular to the transparency requirements of Articles 6, 7 of the UCP Directive, which prohibit misleading conduct and misleading omissions.¹³ The „professional due diligence“ requirement under Art. 5(2) UCP Directive includes, in the case of platform operators, the obligation for platforms to design their user interfaces in such a way as to enable commercial third parties to provide information to users of the platform in accordance with Union legislation on advertising and consumer protection. In the Commission's view, there is not only an obligation for platform operators to be transparent themselves with regard to their own services (Art. 6, 7 UCP Directive), but also a second-order transparency obligation as a professional duty of care, according to which platform users must be provided with the technical means to meet the transparency requirements on their part.¹⁴

With RL (EU) 2019/2161 („Omnibus Directive“), a new paragraph 4a was added to Art. 7 of the UCP Directive. This contains a specific information requirement on the main parameters for determining the ranking of online platforms. According to the Commission's guidelines, this provision only applies to providers

⁵ Guidelines on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, OJ C 525/1 of 29.12.2021.

⁶ Cf. p. 5 of the guidelines.

⁷ Cf. p. 5 of the guidelines.

⁸ Cf. p. 103 of the guidelines.

⁹ Cf. p. 104 of the Guidelines with reference to the studies “Study on the impact of marketing through social media, online games and mobile applications on children's behavior“ (EACH/FWC/2013 85 08).

¹⁰ Cf. p. 104 of the guidelines.

¹¹ Cf. p. 104 of the guidelines.

¹² P. 104 of the Guidelines.

¹³ Cf. p. 87 of the guidelines.

¹⁴ cf. p. 88 f. of the guidelines.

of online marketplaces that allow consumers to search for products offered by „other“ traders or consumers, i.e. online marketplaces and comparison platforms. It does not apply to traders who allow their consumers to search for different products only in their own offers. Thus, insofar as platform providers in the games environment only make „their own“ digital content searchable, this provision of Art. 7(4a) UCP Directive does not apply. The description of the standard parameters for determining the ranking can be kept general and does not have to be individually adapted for each search query. The information must be provided in a clear and comprehensible manner and in a manner adapted to the means of distance communication by making it available in a specific area of the user interface that is directly and easily accessible from the page on which the offers are displayed.¹⁵ According to the Commission, the information requirement also applies when a trader enables searches on an online user interface by voice commands (via „digital assistants“) rather than by typing. In this case, too, the information must be made available on the trader’s website/application „in a designated area of the online user interface.“

The comments on user ratings are also relevant for the games industry. In the guidelines, the Commission takes up the new legal requirements regarding the transparency of ratings, which can be relevant for consumers’ purchasing decisions. The Commission sees – based on unspecified studies – a particular relevance of user ratings for the purchase decisions of consumers in the digital business environment. Therefore, it is important that companies that make user reviews available and thus potentially influence purchasing decisions take proportionate steps to ensure that such reviews actually come from genuine users who have also purchased the product. For this reason, the Commission explains in the guidelines its view of the new information obligations that have been in force in Germany since May 28, 2022 with Section 5b (3) of the German Unfair Competition Act (UWG) as well as the two new facts in the black list (Items 23b and 23c in the Annex to Section 3 (3) of the UWG).

With regard to social media, the Commission is particularly concerned with platforms such as Facebook, Twitter, YouTube, Instagram and TikTok, on which, in the Commission’s view, hidden advertising, unfair contractual terms or manipulative algorithmic advertising in particular should be problematic. Ultimately, the issue here is the transparency of advertising measures, as is already being discussed in this country for the area of influencer advertising.

3. data-driven methods and dark patterns

A separate subchapter deals with data-driven practices and so-called dark patterns¹⁶. In this context, the Commission refers to the ePrivacy Directive, the GDPR or the sector-specific legislation applicable to online platforms. In the Commission’s view, the provisions of the UCP Directive apply in a complementary manner, whereby existing decisions by data protection authorities on compliance or non-compliance with data protection rules by traders are to be taken into account when examining the general fairness of business practices under the rules of the UCP Directive.¹⁷

The term „dark patterns“, which is still unfamiliar to German fair trading law, is now also found in the Commission’s guidelines. In summary, it is intended to designate a mechanism that is generally built into digital user interfaces and serves to induce consumers to act in a malicious manner¹⁸. This paraphrase of the term „dark pattern“ is not defined in the UGP-RL and thus only represents a definition of the Commission, which has no legal binding force. Of course, all provisions of the UCP Directive apply to „dark patterns“, such as professional duties of care of

the trader (Art. 5), misleading practices (Art. 6, 7) or aggressive practices (Art. 8, 9). I do not discuss „dark patterns“ in detail in this article, as this area is the subject of a separate article in this issue.¹⁹ The Commission devotes remarkably detailed attention to the topic of „dark patterns“ and describes a number of practices in the context of digital business models that it considers harmful to consumers, as can be seen, for example, in the example of „confirmshaming“²⁰, which the Commission classifies as a violation of Art. 7 (Misleading by omission) and Art. 9 (Aggressive commercial practice).²¹ This leads to the assumption that the Commission and thus the European legislator will continue to deal with individual practices and „dark patterns“ in the future and, if necessary, take legislative action.

IV. Summary

The EU Commission’s new guidelines on the interpretation of the UCP Directive consistently follow the focus of the Commission’s consumer policy on digital business models. The business practices of the games industry are thus moving further into the center of fair trading law from a consumer protection perspective. Even though the guidelines are legally non-binding, courts will increasingly deal with the guidelines and the uniform interpretations they seek throughout Europe as a result of the European discourse. In other areas of law (energy law, air passenger law), German courts have incorporated the relevant EU Commission guidelines into their case law to guide their interpretation. Even if the EU Commission’s guidelines on the UCP Directive have so far received little attention alongside the traditionally strong and influential commentaries on the UWG, this will change as a result of the ongoing Europeanization of consumer protection law.

For a quick read ...

- The EU Commission published recast guidance on the interpretation of the UGP Directive in December 2021.
- Guidelines focus on digital business models, among other things.
- For game publishers, the guidance on lootboxes and transparency requirements in games is of interest.
- This includes explanations from the areas of platforms, social media, online marketplaces, app stores, comparison platforms including topics such as algorithms, automated decision making and artificial intelligence (AI) that may be relevant to the games sector.
- The guidelines are not legally binding, but can become a source for a uniform interpretation of the UGP Directive throughout Europe.



Dr Axel von Walter

is a lawyer and partner at GvW Graf von Westphalen, a specialist in copyright and media law, a specialist in IT law and a lecturer in media and information law at the law faculty of the University of Munich (LMU).

¹⁵ Cf. p. 91 of the guidelines.

¹⁶ See Section 4.2.7 of the Guidelines; see also Bodensiek MMR 2022, 722 – in this issue.

¹⁷ Cf. p. 99 of the guidelines.

¹⁸ Cf. p. 101 of the guidelines.

¹⁹ Cf. Bodensiek MMR 2022, 722 – in this issue.

²⁰ „Confirmshaming“ is the Commission’s term for a practice in which consumers, when attempting to opt out of a service, are required to click through numerous non-intuitive steps while being discouraged from actually terminating the service by emotional messages such as „We’re sorry you’re leaving“ or „Here are the benefits you’re losing.“

²¹ Cf. p. 102 of the guidelines.

Dark Patterns or Game Design

The distinction between unlawful consumer steering and the permissible design of consumer-oriented offers in computer games

Game influence

„Dark Pattern“ is a term that was unknown in German law until some time ago. The article takes up the term and explains the current references to ongoing legislative processes, supervision by the state media authorities and current discussions on consumer and youth protection law. It focuses on a selection of (alleged) dark patterns under current law and shows that not every sales-oriented design of a product can be directly subsumed under the term dark patterns. Rather, an additional element should be required causes such behaviour to be considered

unfair. This is to be examined on the basis of the known criteria from the Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – „UWG“) and the law for the protection of minors (Jugendschutzgesetz – „JuSchG“), taking into account the amendments to the law already announced at the European level. The distinction between permissible game design and unlawful steering of the customer against his interests in computer games is likely to become an issue even more frequently in the future. **reading time: 12 minutes**

I. Dark Patterns – what is it?

„Dark Patterns“¹ is a term from the field of design and a sub-term of Design Patterns from the field of architecture/software development. Design patterns describe a typified design solution for certain, frequently recurring problems. „Dark Patterns“ was shaped as a term by designer Harry Brignull, who first used the term in an article to describe such design actions that lead users to make decisions that they would not otherwise have made and that are disadvantageous to them².

Dark patterns occur in many forms, e.g., through the uneven placement or colour highlighting of individual buttons on a web page to direct a consumer to an option, countdowns that suggest to the customer that an offer is limited, recurring requests or offers to the customer, hiding cancellation options, etc. A detailed description of the manifestations can now be found in the legal literature³.

II. Dark Patterns in the Games Industry?

Today, a significant proportion of games are offered as online and mobile games. Most recently, the market for game apps and their in-app purchases in Germany grew by 22% to around EUR 2.7 billion in 2021⁴. This is probably one of the reasons why

youth and consumer protection agencies have also been concerned with dark patterns in games over the past year⁵. The latest documents trying to define Dark Patterns include a large number of classic design mechanics that are initially aimed at encouraging customers to consume the products, such as high scores or leaderboards, playing in clans/groups, rewards for daily visits to an online game, time-limited offers to players, the use of virtual currencies that are purchased with real money, or even the already much-discussed loot boxes⁶. However, this discussion lacks a distinction between classic (and legally irrelevant) game design and (legally possibly objectionable) dark patterns. If, for example, it is argued that high score lists or playing in teams could be a dark pattern that is intended to create social pressure to play every day and not to fall behind in the rankings or to be sorted out of a group because one has not played enough⁷, then also the team rankings or training plans in sports clubs where training is paid for would be considered a Dark Pattern. It becomes clear that the consumer protectors apparently want to consider every behaviour as a Dark Pattern that wants to induce the customer to consume goods. However, this is a basic principle of advertising and product design, namely that advertising should persuade customers to buy products or services, and that products should be designed to encourage customers to continue consuming them. It has been known for years that supermarkets are designed in accordance with psychological methodologies to encourage customers to consume goods they did not originally intend to buy as often as possible, and weekly markets are also known for their sales tricks, but no one has yet come up with the idea that this is illegal under competition law⁸.

The question therefore arises as to what is a permissible design of a game mechanic or a permissible mechanism for monetizing otherwise free products, such as free-to-play games, and what should constitute a dark pattern.

III. Legal Definition

The perceptual-psychological effect of dark patterns has already been the topic of the Fall Academy of the German Foundation for Law and Informatics, where the legal aspects have also been touched upon⁹. A legal definition is currently still pending.

1. European law

The draft of the Digital Services Act, as amended by the EU Parliament in January 2022, defines dark patterns in recital 39a as

1 i.a. Hentsch/von Petersdorff MMR-Beil. 8/2020, 3 (5).

2 Harry Brignull, Dark Patterns – dirty tricks designer use to make people do stuff, available under: <https://90percentofeverything.com/2010/07/08/dark-patterns-dirty-tricks-designers-use-to-make-people-do-stuff/>.

3 Loy/Baumgartner ZD 2021, 404; Martini/Drews/Seeliger/Weinzierl ZfDR 2021, 47 (52); Janicki/Schultz DSRITB 2021, 15

4 Press release of the game – Verband der deutschen Games-Branche e.V., abrufbar unter: <http://game.de/markt-fuer-spiele-apps-in-deutschland-waechst-um-22-prozent/>.

5 Report der Jugendschutz.net „Dark Patterns“, abrufbar unter: https://www.jugendschutz.net/fileadmin/daten/publikationen/praxisinfos_reports/report_dark_patterns.pdf.

6 i.a. Maties NJW 2020, 3685; Hoeren/Sieber/Holznapel, HdB Multimedia-Recht/Hentsch, 57. EL September 2021, Teil 22, Rn. 60–63; Nickel/Feuerhake/Schelinski MMR 2018, 586

7 Thus, quite astonishingly, the report of Jugendschutz.net „Dark Patterns“ on p. 7 f.

8 Verbraucherzentrale Bayern: „Psychotricks im Supermarkt“, available under: https://www.verbraucherzentrale-bayern.de/sites/default/files/2019-05/2%20Planung%20-%20LMV%20Arbeitsbl%C3%A4tter%20gut%20planen%20und%20einkaufen_10-03.pdf; ZDFzeit: „Die Tricks des Einzelhandels“, available under: <https://www.zdf.de/dokumentation/zdfzeit/zdfzeit-die-tricks-des-einzelhandels-mit-eva-brenner-100.html>.

9 Stoll DSRITB 2021, 1; Janicki/Schultz, DSRITB 2021, 13

follows: It is prohibited to „deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof.“¹⁰

Although this is only found in the recitals and this is only a draft, it is important to note that this does not mean to influence decision making, which any form of advertising or product design attempts to do, but rather to „distort“ or „impair“.

2. Law against Unfair Competition

According to the general clause of the Law against Unfair Competition, § 3 para. 2 UWG, is a business act unfair if it does not comply with the entrepreneurial diligence and is capable of significantly influencing the economic behavior of the consumer. Therefore, influencing the decision making alone is not sufficient. Rather, a breach of entrepreneurial diligence and a substantial influence are required. Since entrepreneurial diligence according to Section 2 (1) No. 9 UWG is primarily based on good faith and market practices, the assessment of new market practices and distribution systems depends on the ability to transfer findings from traditional market systems.

However, the current European consumer conception of the informed consumer means that, beyond the already expressly regulated behavior such as pressure (Section 4a UWG), misleading (Section 5 UWG) and harassment (Section 7 UWG), there is hardly any room for any other unfair action¹¹.

3. Special laws

The GDPR contains special provisions that explicitly protect freedom of choice, such as the criterion of voluntary consent under Art. 6(1)(a) GDPR and the principle of „privacy by design“ under Art. 25(1) GDPR. With regard to these regulations the ECJ has also ruled – without explicitly stating so – that dark patterns are inadmissible, if they influence the voluntariness of consent¹².

Furthermore, Section 6 (4) JMStV („Jugendmedienschutzstaatsvertrag“ – Media Youth Protection State Treaty) prohibits the exploitation of the inexperience of children and young people as well as advertising measures that directly harm the interests of children and young people¹³.

4. Assessment under current law

A definition based on whether the influence is contrary to the interests of the person concerned¹⁴ is unlikely to be helpful, because interests and motivations vary from person to person¹⁵. To claim in general that regular consumption of an online game or playing together in groups with other players would be against the interests of the persons concerned would be a general condemnation of an entire entertainment industry and would testify to an ascetic attitude to life. Even if for individual users such use may be against their interests, however, the very nature of such measures is to influence a large number of users, which is why they should not be based on individual cases. Even the special legal regulation in the JMStV requires damage to the interests of children and young people, i.e. a direct negative influence, e.g. through an inappropriate depiction of children in sexualized poses or the depiction of children in advertising with products that are neither intended nor suitable for them¹⁶. Mere influencing is not sufficient.

It is therefore now rightly argued that the influencing of the person concerned must take place in an abusive manner, e.g. in the form of restricting or impeding decision possibilities, and that it must have a corresponding effect on a large number of users¹⁷, insofar as one of the existing statutory regulations is not already being violated. As long as the consumer concept of Section 3(4)

UWG remains unchanged, however, the assumption of a dark pattern outside of the special statutory regulations must be applied with caution, since the informed consumer is naturally less susceptible to manipulation than a volatile consumer¹⁸.

IV. Dark Pattern or Game Design?

If we look at some of the design decisions in today's games under these standards, it quickly becomes clear that there are, of course, also prohibited dark patterns in the games industry, but that they are mostly permissible forms of game design.

1. Play time related design

Design measures that are intended to encourage a player to spend more time with a game are, in principle, completely legitimate to begin with. Every entrepreneur is entitled to design his offer in such a way that consumers make use of it as often as possible. This is the core of any customer loyalty program that rewards the customer for frequent use. If, for example, a player receives a reward for daily use of an app without this being linked to a particular playing time, this is not likely to be a dark pattern. Something else could apply if the player would otherwise be threatened with considerable disadvantages, but as far as only the game progress is slower, this is a normal effect, like in sports: If you train little, your skill increases more slowly. The same applies to mechanisms that incentivize more frequent visits, such as the possibility to cultivate and harvest fields more frequently as a farmer in a farming simulation. Especially when a game design is only an image of reality, it cannot represent a dark pattern.

In this respect, it is possible to speak of a design that attempts to influence the decisions of consumers, but its abusiveness cannot be recognized.

Only in the area of children and adolescents something different can apply here, if the advantages are so substantial that children and adolescents, due to their inexperience, can no longer put the value of the time involved into perspective. However, this is also likely to be a rare case.

2. Social Design

If a game allows players to play together with other players, this is not negative as a social component. This is true even if the interaction is designed competitively, i.e. players compete against each other individually or in groups. This is initially the nature of any competition. In this respect, leader boards or player successes are nothing different from a league table in soccer or a sports badge in athletics. Both also have in common that frequent training usually leads to greater success. This, or the fact that if you play infrequently you may be removed from a team and replaced by other players, is not a dark pattern, but typical of actually all competitive group activities.

¹⁰ Draft of the recital 39a of the Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_DE.html.

¹¹ Harte-Bavendamm/Henning-Bodewig, 5. Aufl. 2021, UWG/Podszun, UWG § 3 Rn. 82, 83

¹² E.g. in case Planet49 in the form of the GDPR, even if this was not explicitly designated as a dark pattern: EuGH MMR 2019, 732 mAnm Moos/Rothkegel = ZD 2019, 556 mAnm Hanloser – Planet49.

¹³ Auer-Reinsdorff/Conrad, HdB IT- und Datenschutzrecht, 3. Aufl. 2019, § 29 Rn. 48; Hopf ZUM 2019, 8 (13).

¹⁴ Bogenstahl, Dark Patterns, 2019, S. 1; jugendschutz.net, Dark Patterns, S. 1; Ettig/Herbrich K&R 2020, 719 (721).

¹⁵ Martini/Drews/Seeliger/Weinzierl ZfDR 2021, 47 (52 f.).

¹⁶ Binder/Vestin-Ladeur, Beck'scher Kommentar zum Rundfunkrecht, 4. Aufl. 2018, Rn. 26–27.

¹⁷ Martini/Drews/Seeliger/Weinzierl ZfDR 2021, 47 (50) (53).

¹⁸ Martini/Drews/Seeliger/Weinzierl ZfDR 2021, 47 (71); Weinzierl NVwZ 2020, 1087 (1088); Janicki/Schultz DSRIITB 2021, 13 (17).

Once again, there is a design decision in the competitive design that aims to induce consumers to use the game frequently, i.e., to influence a decision, but no element of abuse is evident.

Here, too, exceptions are conceivable, e.g., if consumers are humiliated or belittled in the game, if the necessary training participation does not take place, or if the game excludes player from the group activities. However, such negative mechanisms are unlikely to prevail, since most providers have an interest in a broad customer base and not in a small elite clientele.

3. Store design

Many modern games provide for the possibility to purchase additional content, functions or items for a fee. In most cases, this is based on the „free-to-play“ business model, whereby the game itself can be played for free and only a small portion of consumers spend money on additional services. This business model has been around for a long time and as such is not objectionable even if players who spend money on the game have clear advantages¹⁹.

A common model is that players can purchase game currency in such games, which can then be exchanged for content or virtual items in the game. It is often criticized that such in-game currencies create a lack of transparency, since the player no longer has an overview of the conversion rate in the game²⁰.

This may indeed be true in individual cases, but players can often obtain the in-game currency both in exchange for money and through player achievements. However, there is no clear conversion rate for play time into money. In addition, the in-game store is usually accessible with just a few clicks, so a player is easily able to do the conversion themselves. Granting quantity discounts can also hardly be called an abusive market instrument.

4. Real Dark Patterns in Games

Not pure design decisions, but real dark patterns can be found regularly in games, especially in the mobile gaming sector. This includes, for example, the dark pattern, which is also referred to as „nudging“, i.e. the constant asking of users whether they

would like to buy something or whether they would like to give consent that has already been refused. Here, Section 7 (1) UWG applies at least if these requests reach a level that significantly interrupts the ongoing flow of the game.

Likewise, the artificial shortage of digital offers, e.g., through expiring timers or individually limited offers, is likely to be unfair at least if the offers are available even after a timer has expired, an alleged special offer is actually no different from the normal offer, or a „one-time“ offer is regularly repeated²¹. These cases can be dealt with consistently under Section 5 (2) UWG.

The much-discussed loot boxes can also constitute a dark pattern, at least if particularly high-value game items are advertised while concealing the probabilities, but which are actually included in only a vanishingly small number of cases. In this case, too, consumers are misled within the meaning of Section 5 (2) UWG.

III. Conclusion

Dark patterns are also a topic in the area of games that will play a relevant role in the protection of minors and in fair trading law in the coming years. Contrary to some approaches, however, a business model and a game design must be considered permissible at least as long as no special abuse criteria are met. If the legislator wanted to change this, new statutory regulations would have to be created.

For a quick read ...

- There is no clear statutory definition of „dark patterns“.
- A statutory definition must not be based solely on influencing an acquisition decision, but must provide for a requirement of excessive influencing or abuse.
- The European consumer concept of the informed consumer does not permit an excessive extension of the general clause of the Law against Unfair Competition (*UWG*) to „dark patterns“ outside of the special statutory regulations.
- Even the draft of the Digital Service Act by the EU Parliament does not yet provide a legally secure treatment of dark patterns.

¹⁹ Fezer/Büscher/Obergfell, *Lauterkeitsrecht/Mankowski*, 3. Aufl. 2016, Rn. 293c-293j; Nickel/Feuerhake/Schelinski MMR 2018, 586 (591).

²⁰ E.g.: Verbraucherzentrale Bundesverband, available under: <https://www.verbraucherzentrale.de/wissen/digitale-welt/apps-und-software/ingame-und-inappkaufe-wenn-virtueller-spielspass-teuer-wird-12941>

²¹ Martini/Kramme/Seeliger VuR 2022, 123.



Kai Bodensiek

is a Attorney at Law and partner of Brehm & v. Moers Rechtsanwälte Partnerschaftsgesellschaft mbB in Berlin.

Redaktion: Anke Zimmer-Helfrich, Chefredakteurin (verantwortlich für den Textteil); Katharina Klausner, Redakteurin; Ruth Schrödl, Redakteurin; Eva Wanderer, Redaktionsassistentin; Wilhelmstr. 9, 80801 München, Postanschrift: Postfach 40 03 40, 80703 München, Telefon: 089/381 89-427, Telefax: 089/38189-197, E-Mail: mmr@beck.de

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Verlag: Verlag C.H.BECK oHG, Wilhelmstraße 9, 80801 München, Postanschrift: Postfach 40 03 40, 80703 München, Tel.: 089/381 89-0, Telefax: 089/38 18 93 98, Postbank München IBAN: DE82 7001 0080 0006 2298 02, BIC: PBNKDEFFXXX. Der Verlag ist oHG. Gesellschafter sind Dr. Hans Dieter Beck und Dr. h.c. Wolfgang Beck, beide Verleger in München.

Erscheinungsweise: Monatlich.

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Druck: Druckerei C.H.BECK, Bergerstraße 3-5, 86720 Nördlingen. ISSN 2698-7988

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