



# Final Decision in Runes of Magic Case: German Federal Court of Justice Upholds Ban on In-Game Item Advertisement

The highest German civil court, the Federal Court of Justice (*Bundesgerichtshof*; "BGH"), has rendered a final decision in the "Runes of Magic" case, confirming its earlier default judgment and ordering the operator of the client-based free-to-play online fantasy game to cease using certain language to advertise additional online content available for purchase.

More specifically, the contested wording included the sentence *"Seize the advantageous opportunity and add that certain something to your armour & weapons"*. Seized by a consumer watchdog organisation, the BGH considered the language a direct exhortation to children to purchase the items, which is prohibited by unfair commercial practices legislation.

The final written reasons for the decision (docket no.: I ZR 34/12) have now been provided, ending the lengthy litigation which started in 2009. While they address and attempt to resolve many of the most widely criticized shortcomings of the default judgment, they still leave readers puzzled in places. Is this a rogue case or the end of the free-to-play business model in Germany, as some commentators have speculated? We are seeing increased enforcement action in the wake of this decision, including from youth protection authorities. How should online games providers conduct themselves now?

## What is it all about?

The games provider published the following language on an online message board associated with the game, under the heading „Die Pimp-Woche“ (Literally, "the pimping week" – the English term "to pimp" is sometimes used in contemporary German in its slang meaning as "to embellish" or "to enhance"):

*"Thousands of dangers are waiting for you and your character in the wide world of Taborea. Without the proper preparation, the next corner you round in that dungeon could be your last. This week again you have the opportunity to vamp up your character. Seize the advantageous opportunity and add that certain something to your armour & weapons. From Monday [...] through Friday [...], you have the opportunity of upgrading your character."*

The portion *"upgrading your character"* was linked to a website showing the various items that were part of the promotion, and which registered users could purchase for virtual currency within the game.

## The court's initial decision

As the defendant did not attend an initial hearing in the matter, the court rendered a default judgment in the summer of 2013, in which it saw this language as an illegal direct exhortation to children to buy the relevant items. Under § 3 para. 3 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*; "UWG") in connection with no. 28 of the appendix to the UWG (the so-called Black List). Under this no. 28 of the Black List, which is based on an EU directive on unfair commercial practices (Directive 2005/29/EC of May 11, 2005), it is an illegal commercial practice to include in an advertisement a direct exhortation to children to buy advertised products or services or persuade their parents or other adults to do so.

The BGH's position that the ad targeted children was essentially based on the following analysis:

According to the court, the language used in the advertisement made it clear that the invitation to make a purchase also targeted children. In making this finding, the court relied on the address with the German informal "you" (the German language has different words and grammatical constructions for "formal" and "informal" address, the latter being commonly used for family, close friends and children), the use of words like "pimp" and "vamp up", and the use of "anglicisms", implicitly relying on the use of the English terms "pimp" and "dungeon" in the ad, all of which it considers typical of children's speech.

The issue of accepting payment through a text message based service, which had been discussed at the hearing as an indication that children were targeted, was however conspicuously absent from the written reasons for the initial default judgment.

With its decision, the BGH took a position opposite both lower courts that have heard the case. Before the BGH, as the final appeal jurisdiction, decided in favour of the plaintiff and against the defendant, both the Regional Court of Berlin and the Higher Regional Court of Berlin had reached

# Final Decision in Runes of Magic Case: German Federal Court of Justice Upholds Ban on In-Game Item Advertisement



contrary conclusions. The Regional Court had dismissed the claim based on the argument that the advertisement did not concern a specific product. It was not clear from the advertisement which specific product offered in the online store was the subject of any exhortation to make a purchase. The Higher Regional Court had agreed with this analysis, rejecting the appeal as “obviously without merit”.

## The court’s final decision

The default judgment was widely criticized at the time on a number of legal issues (<http://spielerecht.de/wp-content/uploads/2009/08/Federal-Court-of-Justice-bans-ads-for-purchase-of-virtual-items-UPDATE1.pdf>). The game operator objected to the judgment and obtained a new hearing. With the judgment that has now become available in full, the court however confirmed its initial decision. It does address some of the criticized points, but does not convincingly resolve all of them. Both from substantive and procedural perspectives, open issues remain.

## Addressing children?

The first crucial legal problem is whether the ad in question actually directly addresses children. It appears clear that, with a game like Runes of Magic which is played mostly by adults, children cannot be the only target group of an advertisement for in-game items. The game operator had provided audience data showing that 85% of players were adults, and the average player age was 32 years. The court however brushes these figures aside as irrelevant. It does distinguish between (permitted) ads that target all audiences including children, and (prohibited) ads that target different specific audiences including children – but assumes the latter is the case here, even if the majority of the target audience are grown-ups. According to the court, the ad directly addressed children because it “consistently” used informal and allegedly child-like speech. The court further characterizes the wording of the Runes of Magic ad as “simple” and considers the term “vamp up” as typical of children’s speaking habits.

However, the court’s recent jurisprudence in the matter of what must be considered targeting minors seems highly contradictory. It has in fact decided the opposite regarding a TV advertisement by candy manufacturer Haribo. The advertisement shows a scene in a supermarket, where a family with children is encouraged by a celebrity testimoni-

al to put additional bags of gummy bears into their shopping cart. The court allowed this ad, considering that it “addresses all members of the family”.

At the same time, the judges describe the Haribo ad as using “simple speech”, depicting children in a supermarket with their parents, and showing a product that children in particular are fond of. One cannot help but think that these characteristics of the Haribo ad are extremely similar to the characteristics of the Runes of Magic advertisement that the court based its ban on.

And indeed, the line between an ad targeting all audiences and one targeting different specific audiences is extremely difficult to draw. In its Runes of Magic case, the court does refer to its Haribo decision, but its efforts at distinguishing the cases are feeble at best: It states that the decisive circumstances of the advertisement were different in the Haribo case – without even so much as hinting at what those material differences could have been.

## Direct exhortation to purchase?

A second important question was whether the ad contained a “direct” exhortation to make a specific purchase. Such can only be assumed if the ad contains sufficiently specific information on one or more specific products, but not if the ad covers a merchant’s entire range of goods: Under the EU directive (art. 2 i)), an “exhortation to buy” is “a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase”.

In the Runes of Magic case, the characteristics of the advertised items were not in fact specifically identified in the ad itself. The ad only contained a link to a separate website with a list and descriptions of these items. The court however considers that the hyperlink to the second website is sufficient, as consumers were used to the mechanism of clicking links to retrieve additional information. It therefore saw the ad and the website it linked to as one unit.

However, this analysis is hardly compelling. It should be noted that the website in question would not have been helpful to anyone not already registered for the game, and it did not allow direct purchases. In a different very recent case, the BGH allowed an advertisement that very clearly

# Final Decision in Runes of Magic Case: German Federal Court of Justice Upholds Ban on In-Game Item Advertisement



directly and exclusively targeted children: The advertiser, German consumer electronics giant MediaMarkt, had in fact told children to “bring your report card [to MediaMarkt] and receive a 2 Euro discount on any product for each “A””. The court took no issue with this wording, based on the consideration that the ad itself did not show any specific product but only attracted children to a retail store. And in a case involving ads for digital content very similar to the ones in the Runes of Magic case, the Austrian Supreme Court, applying rules resulting from the very same EU directive, did not consider an advertisement with a hyperlink to an online store a “direct” exhortation to make a purchase. It argues that clicking on the link amounts to entering a brick and mortar store, and even if products are of course on display there, this information cannot be deemed included in the advertisement.

Again the BGH refers to and attempts to distinguish the case. The judges argue that in the Austrian case, the wording of the ad “only describes the intended use of the items”. But in fact, the style of the ad was almost identical to the advertisement at issue here – among other things, it said “Take on the role of 45 different characters and brave adventures with your friends in fantastical worlds” and “Solve puzzles and get a jump-start” – in each case with a link to an online store where the necessary access credentials, items and digital content could be purchased. The court again states that “those cases are not comparable” but fails to say how it arrives at that conclusion.

## Procedural Issues

Since the material provision in the dispute is based on EU law, one should think that the ECJ should have the final say in how the rules need to be interpreted and applied – in particular if the German court did not agree with the Austrian position regarding “direct” exhortation. In addition, the term “child” as used in the provision is not defined either in the *UWG* or in the directive, and it is not entirely clear whether, under European law, this term covers all minors or only a younger sub-set of that group (e.g. persons under the age of 14). On both these questions, it would have been desirable for the court to ask the ECJ for a common interpretation of the directive. However, the court brushes this aside with one short sentence in its final decision.

A second problem lies in the court’s wording of the operative, enforceable part of the judgment: The default judgment, which is now simply confirmed, simply prohibits the sentence “*Seize the advantageous opportunity and add that certain something to your armour & weapons*” – and never mentions the hyperlink or the allegedly child-like words (“vamp up”) in the rest of the advertisement. Its reasons for judgment simply do not justify such a wide interdiction. A significant chunk of the court’s final decision is dedicated to a justification of this botched operative disposition. While the court can indeed rely on settled case law to state that the operative decision must be interpreted in light of the full reasons for judgment, it is extremely unfortunate, to say the least, that we now have an operative judgment which is incomprehensible (or plain wrong) on its own and can only be understood after careful analysis of two sets of reasons, with all the flaws they still contain.

Indeed, the court, which was presented with all the according arguments in the second hearing, should have seized the advantageous opportunity to at least clarify the extent and limits of its ban.

## Game over?

After the decision was reported, many commentators took the position that this *BGH* verdict threatened the entire “free-to-play” model in Germany. The court itself states in its new decision that it does not see such danger and expressly says that its ban only concerns a specific advertisement and is not intended to limit companies’ rights to use the F2P business model or informal speech in their advertisements. However, this short paragraph reads like a cliché and is largely contradicted by the legal analysis that precedes it. The advertisement in question, after all, is banned because of such informal and allegedly childlike speech. Unfortunately, the written reasons for judgment have therefore not significantly clarified the law with regards to the limits of permissible advertising.

## What does the decision mean for Freemium offers, children’s games and children’s apps?

In the wake of the judgment, we are already seeing a significant increase in activity from authorities and consumer watchdog groups regarding in-game advertising language, both in the classic online sector and increasingly also in mobile games. Furthermore, challenges to terms and con-

# Final Decision in Runes of Magic Case: German Federal Court of Justice Upholds Ban on In-Game Item Advertisement



ditions and privacy policies remain on consumer watchdogs' agendas.

Operators of online games, children's games and children's apps should therefore closely monitor the further legal developments in this area. As a consequence of the *BGH* decision, even greater care should be exercised in making advertising language legally compliant. Direct purchase invitations to children should be avoided at all costs. The selection of available payment methods, even though ultimately not decisive in this case, may play a certain role in the legal analysis. The way the court mentions this issue in passing also suggests that the decision concerns a very specific case and caution should be exercised not to over-generalize the statements it contains.

## Checklist:

- Informal language as such is not prohibited – the informal address can still be used in advertising.
- However, advertisements within or with regards to a game and the embedding of advertisements as such should be legally vetted and, when in doubt, worded more carefully (indirectly).
- Where it makes sense, consider using advertisements not for specific products, but for item shops in general. Such advertisements should however not contain links to the shop.



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