

# Federal Court of Justice bans ads for purchase of virtual items in "free-to-play" online game



In a recent ruling relevant for the entire games industry, the highest German civil court, the Federal Court of Justice (*Bundesgerichtshof*; "BGH"), has created a considerable stir – and some degree of confusion – in the industry: In its decision of July 17, 2013 (docket no.: I ZR 34/12), the BGH ordered the operator of the online fantasy game "Runes of Magic" to cease using certain language to advertise additional online content available for purchase. More specifically, the contested wordings included the sentence "Seize the advantageous opportunity and add that certain something to your armour & weapons". The plaintiff was a consumer watchdog organisation, the *Bundesverband der Verbraucherzentralen* (vzbv).

The BGH considered the language a direct exhortation to children to purchase the items, which is prohibited by unfair commercial practices legislation.

Is this the end of the free-to-play business model in Germany, as some commentators have speculated? How should online games providers conduct themselves in the future? The written reasons for the decision are not yet available. Nevertheless, we want to attempt a first legal analysis of the ruling in this article.

## 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 the item shop in which registered users could purchase virtual items for the game.

## The court’s decision

The BGH saw this language as an illegal direct exhortation to children to buy the relevant items. According to what was said at the oral court hearing, the BGH’s position that the ad targeted children is 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 relies 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) and the use of words like “pimp” and “vamp up”, which it considers typical for children’s speech.

Furthermore, the *BGH* relies on the fact that the game provider accepted payment through a text message based service. The court apparently considers this a typical mode of payment for children.

Just like in a brick and mortar store, the advertisement and the opportunity to make the purchase were in close proximity of one another; in the case at hand they were connected by the hyperlink to the online store.

With its decision, the *BGH* takes 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 contrary conclusions. The Regional Court 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 agreed with this analysis and rejected the appeal as “obviously without merit”.

## Legal background

The *BGH* found the advertisement to be illegal commercial practice 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, 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. This provision is based on an EU directive on unfair commercial practices (Directive 2005/29/EC of May 11, 2005), which also contains such a Black List with almost identical provisions.

The term “Child” is not defined either in the *UWG* or in the aforementioned EU directive. However, it appears that the majority of legal scholars and practitioners assume, based on other EU legislation, that the relevant cut-off age is 14 years.

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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". Interestingly, the German language version of the directive uses the same term, which can be translated as "invitation" or "request" ("*Aufforderung*"), both in art. 2 i) and in no. 28 of the Black List, while other language versions, such as the English and French, differentiate between the "invitation" of art. 2 i) and the much stronger "exhortation" (or "*inciter*" in French) in no. 28 of the Black List. In the case decided by the *BGH*, the characteristics of the advertised item were not in fact specifically identified. However, the *BGH* seems to consider that the hyperlink to the online store is sufficient.

Finally, under the applicable statutory rules, the exhortation must be "direct". Such is the case when the exhortation to purchase the virtual item is intended to induce the purchase decision. There cannot be an additional step between exhortation and the arising of the purchase decision. This direct or immediate character lacks in particular when children have to deduce from other elements that they should make a purchase. Therefore, while the invitation "Get this sword for only 2.99 Euros!" is a direct exhortation, a wording like "Wouldn't it be great to enhance your weapons?" should not be problematic.

## Game over for Freemium offers?

After the decision was reported, many commentators took the position that this *BGH* verdict threatened the entire "free-to-play" model in Germany. We are not there yet. Firstly, the complete reasons for the decision have not yet been published, so that it cannot be determined yet which elements were really decisive for the court. Secondly, the decision is only a default judgment.

Once the game provider is served with the decision, they will have two weeks to object to the decision before it becomes final. This right of objection enables the game provider to make further legal submissions. It is by no means excluded that the *BGH* changes its position after an objection or that the *BGH* asks the ECJ for a common interpretation of the directive.

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

Firstly, it can be expected that consumer watchdog groups and potentially also competitors will take an even closer look at advertising language in or with regards to online games. Furthermore, challenges to terms and conditions and privacy policies have been on consumer watchdogs' agendas for quite some time now. This does not only apply to browser and client based games, but also to mobile

apps. The *vzbv* has recently reviewed 32 apps specifically targeted at children and harshly criticized the wording of their terms and conditions and privacy policies as well as the design of their freemium offerings and the advertisements contained in them. According to press reports, some game providers, including the operator of the "Smurfs' Village" app, have already received cease and desist letters from *vzbv*.

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 seems to play a certain role in the legal analysis.

## Checklist:

- Terms and conditions need to be adapted to German law. Merely translating "universal" terms is not a solution.
- In most cases, privacy policies must be adapted to the specific offer and to German law. Generally worded privacy policies that do not take into account the specific characteristics of mobile and online games can no longer be considered sufficient.
- 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).



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