

## Loot Box Regulation - Germany's KJM issues its decision

On March 23, 2018 the German Commission for the Protection of Youth in the Media ("KJM") released its long awaited official position on loot boxes. The KJM is the head regulator for youth protection in online media in Germany (including video games, apps, social casino, etc.). The KJM's statement is non-committal. However, the KJM outlines that loot boxes can under certain circumstances violate youth protection laws. The KJM is not responsible for regulating gambling. Thus, potential issues from a gambling law perspective are not addressed in its decision.

### 1. Developments on loot boxes in Germany so far

The still ongoing 2017/2018 global loot box controversy caused several reactions by German regulators, politicians and other stakeholders.

- German Age Rating Board ("USK"): After receiving a great number of complaints, the USK released an official statement on October 13, 2017 which also found global attention. While the USK pointed out that it is concerned about loot boxes it made clear that it has no competence to regulate them (including higher age-ratings or rating refusals). Despite not being competent for gambling regulation, the USK nevertheless gave an opinion on loot boxes stating that it does not consider loot boxes to constitute gambling under applicable gambling laws.
- Federal Review Board for Media Harmful to Minors ("BPjM"): After receiving several complaints the BPjM released an official statement on October 17, 2017. Media considered as harmful to minors by the BPjM is added to a blacklist and is from then on subject to strict distribution restrictions (amongst others prohibition of public advertisement and sale). The BPjM statement was rather non-committal and did not include any specific announcements. However, the BPjM mentioned that it has the power to develop new decision practices, implying that these practices could also cover loot boxes. Furthermore, the BPjM stated that it recently entered into dialogue with lawmakers to address recent developments such as loot boxes.
- Reactions by Lawmakers: In November 2017, a small Bavarian political party (*Freie Wähler*) with few seats in the Bavarian Parliament announced that it would lodge an emergency appeal on loot boxes in the Bavarian Parliament to ask the Bavarian government to take measures on loot boxes. Amongst others, the appeal proposed that games including loot boxes should generally be considered harmful to minors. On 29 November 2017 the Bavarian Parliament discussed the matter. At this



point, the two major German political parties had already prepared their own emergency appeals. The Social Democrats' (SPD) appeal asked the Bavarian government to outline its position on "obvious gambling elements" implemented in video games and what legislative and regulatory measures should be taken. The Christian Democrats' (CSU) appeal asked the Bavarian government to continue its efforts in contemporary youth protection in online games and to address the "issue of loot boxes" under the current measures of building up media competence amongst youths. The appeal also suggested engaging the KJM with the matter of loot boxes. The emergency appeals of the SPD and CSU passed the Bavarian Parliament on the same day. The Appeal from the *Freien Wähler* was rejected. Following the emergency appeals of the SPD and CSU the Bavarian State Ministry for Labor and Social Matters, Family and Integration ("**the Ministry**") asked the KJM to look into the matter of youth protection in online-games in light of the new phenomenon of loot boxes.

- Early reactions by the KJM: Following the request of the Ministry, the KJM started investigating loot boxes in January 2018. During its ongoing investigation, on 2 February 2018, the KJM chairman gave an interview to a major German newspaper, stating that loot boxes might violate the prohibition on direct appeals to buy products directed towards minors. The interview caused massive global attention and was often falsely reported as "Germany is about to ban loot boxes". In a later interview, the KJM corrected its statement and made clear that it neither intends nor is competent to ban loot boxes entirely. The KJM's final decision on loot boxes was about to be released in March.

## 2. The KJM's statement

In response to the Ministry's request, the KJM published its official statement on Friday 23, 2018. In its five page long statement, the KJM first summarizes its tasks and competences. Subsequently, it describes the phenomenon of loot boxes and the related ongoing controversy. The KJM makes clear that a number of potential issues related to loot boxes do not fall under its competence, including consumer protection, gambling regulation and prevention of addiction.

In terms of substance, the KJM outlines that loot boxes can play a role under the prohibition of direct advertisement appeals to buy products directed towards minors (Sec. 6 (2) No. 1 JMStV) and the prohibition that advertisements directed towards minors may not harm the interests of minors or exploit their inexperience (Sec. 6 (4) JMStV): *"Whether in-game advertisement for loot boxes crosses the line of legality and thereby violates Sec. 6 (2) No. 1 JMStV is consequently a case-by-case decision. Depending on the kind and method of the presented and advertised loot boxes as well as the targeted age group, a violation against Sec. 6 (2) No. 1 JMStV is possible."*

However, the KJM also explicitly stated that it did not find any issue with loot boxes in general and that none of the games which were reported to it by the Ministry pose an issue: *"Here it must be considered that the relevant games which included loot boxes [...] were all targeting an older age group. This can be derived, amongst others, by the age-rating of 16+ which must be considered within the standard of assessment. Nevertheless, providers of online games appealing to children and adolescents must be sensitized in relation to legal in-game advertisement already during the development."*

The KJM also addresses Sec. 6 (4) JMStV which prohibits advertisements directed towards minors which harm their interests or exploits their inexperience: *"This would in particular need to be evaluated in the context of time pressure in relation to purchasing decisions as well as unclear and difficult to comprehend terms and conditions. The visual and auditive presentation in the foreground (e.g. the loot box is presented in mysterious fashion or looks like a treasure chest) and the communication information relevant for the purchase are other indications for the exploitation of the inexperience of children and/or adolescents. The use of such advertisement means can also be unlawful where they have the potential to mislead minors (e.g. making an unrealistic connection between additional purchases and an increased chance of winning under false pretences), by attracting them through disproportionate advantages which are exploiting their passion for gaming or which can otherwise harm their interests."*

Other than that, the KJM does not go into much detail. It concludes with stating that although some of the investigated gaming apps directed towards children included loot boxes, none of them advertised the loot boxes with unlawful direct appeals. Furthermore, the KJM makes clear that until now no specific complaints about a potential unlawful loot box presentation have reached it.

### 3. Analysis

The KJM's statement is rather non-committal. The fact that the KJM points out that no complaints on concrete loot box mechanisms have reached it so far, indicates that it does not intend to investigate the matter itself any further without reason (e.g. a complaint). However, due to the ongoing heated loot box debate such complaints are not unlikely (in particular after the KJM has released its statement). This gives rise to the question under which circumstances the KJM could prohibit a specific loot box mechanisms.

#### **3.1 Sec. 6 (2) No. 1 JMStV: Advertising shall not contain direct appeals to buy or rent goods or services directed at children or adolescents exploiting their inexperience and credulity**

The KJM's statement primarily focuses on Sec. 6 (2) No. 1 JMStV. However, the provision does not concern loot boxes in particular but only advertisements. Loot boxes could therefore only be prohibited by this provision where offering them would already constitute an advertisement which contains a direct appeal to buy the loot box directed at children or adolescents exploiting their inexperience and credulity.

##### **a) Advertisement**

For broadcasting, the term "advertising" is defined in Sec. 2 (2) No. 7 of the Interstate Broadcasting Treaty. The definition applies to online media accordingly: Advertising is any statement made in the cause of exercising a trade, business, craft or another free profession, which is transmitted via telemedia either in exchange for payment or a similar return or as self-advertisement with the purpose of promoting the distribution of goods or the provision of services, including immovable assets, rights, or obligations against payment. The term "advertising" must generally be interpreted very broadly. In any case, it includes visualizations of offers to purchase a certain product. Thus, an offer to purchase a loot box, be it within or outside the game, constitutes advertisement.

### b) Direct appeals to buy or rent goods or services directed at children or adolescents

A "direct appeal" is any slogan such as "You should try it as well!" or "Get the new edition!". The same goes for slogans such as "Get 20 loot boxes for EUR 5". However, to meet the requirement, the appeal must also be directed at children or adolescents. Not sufficient in this regard are appeals which are directed to everyone and consequently also at children and adolescents. Whether an advertisement is specifically directed at children or adolescents must be assessed on a case-by-case basis. Guidance can be drawn from two recent court decisions:

#### i) Federal Supreme Court on *Runes of Magic*:

In 2013, the German *Federal Supreme Court* issued a landmark decision on direct appeals towards minors in video games. The case settled litigation on an advertisement included in the free-to-play game *Runes of Magic* which was challenged by a German consumer association. The consumer association claimed that the game violated the restrictions for advertising vis-à-vis minors and, more specifically, that it contained an unlawful direct exhortation to minors to buy products or services. The advertisement used the following slogan:

*"Pimp your character week.  
Is your character ready and set up for the coming adventures?  
Thousands of dangers are waiting for you and your character in  
the world of Tabora. Without appropriate preparation any edge of  
the dungeon could be the last step.  
This week you have another chance to pimp up your character!  
Seize the good opportunity and give your armor and weapons that  
certain 'something'".*

The *Federal Supreme Court* held that this sentence, by its context and language, was a direct appeal targeted at minors and therefore violated the prohibition of direct exhortations to minors. Arguments by the court:

- The advertised product: The court implied that a fantasy RPG is mainly a product directed towards minors. Related advertisement would therefore be automatically directed towards minors as well. However, the court did not go into any detail in this regard. Instead it only claimed that "[f]rom the relevant perspective of the addressed persons, the appeal at hand is from the beginning on not directed only to a limited circle of addresses of minors over 14 years of age [...] but instead to underage players in general based on the advertised product." This argument was heavily criticized as there is significant research available which proves that the majority of gamers are indeed adults and not minors.
- The language used: A central argument for the *Federal Supreme Court* was the language used for the advertisement slogan. The German language contains two different words to address another person, one being informal and used in particular vis-à-vis minors and close friends ("Du"), while the other is more formal and used in particular vis-à-vis other adults ("Sie"). The advertisement used the

informal language. Though the *Federal Supreme Court* explicitly stated that using the informal language does not automatically mean that an advertisement is directed towards minors, it held that the overall presentation of the advertisement in conjunction with the used informal language was directed vis-à-vis minors. This argument was also heavily criticized as internet communication is traditionally less formal. However, the *Federal Supreme Court* also held that the remaining language of the slogan was primarily directed at children as it would use "*terms typically used by children, including common anglicisms*" (note that the only two anglicisms used in the original German advertisement were "pimp" and "dungeon").

### ii) High District Court Berlin on World of Warcraft:

Shortly after the above mentioned decision by the *Federal Supreme Court*, the High District Court Berlin (*Kammergericht*) ruled on a similar matter quite differently.<sup>1</sup> The case concerned a marketing slogan for *World of Warcraft*:

*"Buy at the pet shop  
New exclusive riding animal: Armored Blood Swing – GET IT  
NOW  
This monstrous, flesh eating bat is the perfect companion for a  
detour to the next battlefield in order to bring death and  
destruction."*

While the court agreed that the slogan constitutes a direct appeal, it did not find that the slogan was also directed towards children and adolescents. The court argued that its decision would not contradict the land mark decision of the *Federal Supreme Court* (which is Germany's highest civil law court). Instead, the ruling would specify the requirements set out by the FSC and would simply apply them to another case. Nevertheless, the decision is considered as easing the requirements on advertisement which may be considered as directed towards children. Arguments by the court:

- The advertised product: The mere fact that the advertisement relates to a video game which includes a colorful fantasy world with typical fantasy creatures is not sufficient to assume a direct appeal vis-à-vis minors as this characteristic applies to the majority of video games, no matter whether they are played on console or smartphone. It is not apparent that these types of games are directed only towards minors. Based on the court's experience quite the contrary is the case. The *Runes of Magic* decision by the *Federal Supreme Court* does not say that any fantasy game explicitly targets minors. Instead this question must be assessed on a case-by-case basis.
- Age-rating, terms of use, privacy policy and parental consent features: According to the court, the fact that (i) the game was rated 12+, (ii) the game operator allows minors under 16 years of age to register for the game with parental consent, (iii) the terms of

<sup>1</sup> High District Court Berlin, December 1, 2015, case no. 5 U 74/15.

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use include regulations concerning the use of the service by minors, (iv) the game includes a feature for "parental consent" and (v) the privacy policy includes specific recommendations for children under twelve years and children between 13 and 17 years would not mean that the game is specifically directed at children but only that the game operator enables children to play the game as well.

- Payment methods: The fact that the game operator also enables persons who do not own a credit card or bank account to participate in the game by offering pre-paid cards which can be used for game time or game accessories also does not automatically make the advertisement directed at minors. Such pre-paid cards can also be used by persons who like to avoid that their bank account or credit card is charged. Additionally no direct connection exists between these pre-paid cards and the advertisement at hand.
- The language used: The use of the informal language alone is not sufficient to assume that the advertisement is directed vis-à-vis minors. The use of the informal language in advertisement towards adults is quite common as well. This must therefore be decided on a case-by-case basis. The remaining language used in the advertisement at hand does not imply that it is directed only towards minors (note that the court provides several examples at this point). Furthermore, the product description would not consistently rely on the informal language and instead occasionally switch to the formal language. The advertisement at hand additionally does not make use of terms typically used by minors, e.g. terms which make the advertisement sound less square.

### iii) Conclusions, recommendations and additional remarks

The main conclusion that can be derived from the outlined decision is that loot boxes which are implemented in a video game which is only or mainly directed at kids are subject to an increased risk that the entire loot box mechanism constitutes a direct appeal to minors. This was already implied by the *Federal Supreme Court* in relation to a game which appeals to minors and adults but which might appeal slightly more to minors. Thus, this will all the more apply to games which without any doubt apply to children only (e.g. games with themes like *My Little Pony* or *Barbie*). This view is also shared by legal scholars in Germany (an important interpretation source). However, the KJM did not even consider this possibility and instead explained that although the investigated games directed at children included loot boxes they did not "include unlawful appeals which explicitly referred to these loot boxes". This implies that the KJM takes the view that a direct appeal requires that additional circumstances (i.e. aside from the underlying app/game directed at children) must be satisfied in order to meet the requirement of a direct appeal directed at minors (e.g. the used language). Nevertheless, since the KJM implied that it will investigate complaints based on applicable case law it might ultimately consider the *Federal Supreme Court's* ruling. Additionally, consumer protection associations and

competitors can claim a violation of the prohibition of direct appeals towards minors. Game developers should therefore be careful with implementing loot boxes in games directed at children. In terms of loot boxes which are added to games that appeal to minors and adults equally the risk is lower. In this case additional circumstances must apply which allow the assumption that the in-game purchase offer is a direct appeal vis-à-vis minors. Such circumstances can be the language used and/or the overall presentation (e.g. very colorful loot box).

### **3.2 Sec. 6 (4) JMStV: Advertising which is also directed at children shall not harm the interests of children or adolescents or exploit their inexperience.**

It is surprising that the KJM did not focus on the prohibition of Sec. 6 (4) JMStV any further. Sec. 6 (4) JMStV serves as a fall back provision for violations which are not caught by the catalogue outlined in Sec. 6 (2) JMStV. The major difference of Sec. 6 (4) JMStV is that it only requires that the advertisement is "also" directed at kids. Thus, it is not a requirement that the relevant game is a game which is only directed at kids. Instead any in-game offer where there is a reasonable expectation that the game is also played by minors can technically fall under Sec. 6 (4) JMStV. Furthermore, there are several secondary law sources available (an important interpretation source in Germany if no case law exists) which particularly state that Sec. 6 (4) JMStV applies to advertisement which serves the purpose to exploit the passion for gaming. The KJM even addresses this in its statement but does not draw any conclusions in this regard. Whether this applies to loot boxes is not cleared by scientific research yet. In similar cases, the KJM commissioned expert opinions to come to a better conclusion. That the KJM did not take this road shows again that it seems reluctant to regulate loot boxes.

## **4. Other Jurisdictions**

Aside from youth protection laws, loot boxes touch in particular gambling laws, consumer laws and sometimes even financial laws (in case virtual currency is used for the purchase). Other jurisdictions with recent regulatory, political and legal developments in relation to loot boxes are, amongst others, the USA, UK, Belgium, China, Japan, the Netherlands, France, South Korea, New Zealand, Australia, Singapore, Isle of Man, Sweden, Norway and Denmark.

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