

1 **Paid video game loot boxes are *not* gambling under Dutch gambling regulation?**
2 **Shifting the goalpost in *Electronic Arts v Kansspelautoriteit***

3
4 Leon Y. Xiao^{*†‡¶} [0000-0003-0709-0777] <lexi@itu.dk>

5 Pieterjan Declerck[§] [0000-0002-0120-5441] <pieterjan.declerck@ugent.be>

6
7 *: Center for Digital Play, IT University of Copenhagen, København, Denmark

8
9 †: Department of Computer Science, University of York, York, UK

10
11 ‡: Transatlantic Technology Law Forum, Stanford Law School, Stanford University,
12 Stanford, CA, USA

13
14 ¶: The Honourable Society of Lincoln's Inn, Lincoln's Inn, London, UK

15
16 §: Department of Law and Technology, Faculty of Law and Criminology, Ghent
17 University, Ghent, Belgium

18 **Abstract**

19 In March 2022, the highest administrative court in the Netherlands, the
20 Administrative Jurisdiction Division of the Council of State, found that loot boxes in
21 the Ultimate Team Mode of the FIFA video games ('FUT') published by Electronic
22 Arts ('EA') did not contravene Dutch gambling law, contrary to the Netherlands
23 Gambling Authority's (Kansspelautoriteit) previous 2018 interpretation of the law
24 and overruling a previous 2020 judgment that confirmed the Kansspelautoriteit's
25 aforementioned interpretation. The Council of State decided that the player packs (*i.e.*,
26 loot boxes) in the FUT mode cannot be considered a separate game that is capable of
27 being assessed on its own as to whether it constitutes a 'game of chance' and therefore
28 potentially contravenes gambling regulation. Instead, the overarching video game
29 containing the loot boxes should be assessed more broadly as to whether *that* game
30 constitutes a 'game of chance' or a 'game of skill.' We argue that the Council of State's
31 unique approach of not considering the loot boxes separately as to whether they
32 constitute gambling underplayed the importance of paid loot boxes as a monetisation
33 method in contemporary video games. The Council of State unsatisfyingly built its
34 main argument on the supposed 'importance' of non-paid loot boxes. Further, the
35 Council of State's overreliance on how the so-called 'majority' of players experience
36 the video game importantly failed to account for the experiences of the small minority
37 of high-spending players who are most at risk of potential harms and in need of
38 consumer protection. The Council of State's interpretation of Dutch gambling law
39 should not necessarily be relied on by other countries considering the regulation of
40 loot boxes. Dutch legislators should consider whether this restrictive interpretation,
41 which has made future application of gambling regulation to loot boxes highly
42 unlikely, was intended and may require legislative amendments.

43

44 **Keywords:**

45 Loot boxes; Video game; Video gaming regulation; Interactive entertainment law;
46 Gambling regulation; Video game player protection; The Netherlands and Dutch
47 law.

48 1. Introduction

49 Paid loot boxes are virtual products in video games that can be purchased by players
50 with real-world money to obtain randomised rewards.¹ Other loot boxes can be
51 obtained by players without paying real-world money (so-called 'non-paid loot
52 boxes'). The distinction between 'paid' and 'non-paid' loot boxes often becomes
53 blurred because the virtual currency, with which some loot boxes can be obtained,
54 can itself both be obtained through gameplay or direct purchase with real-world
55 money. References below to 'loot boxes' refer exclusively to 'paid loot boxes' that
56 players must spend real-world money to buy directly or indirectly (*e.g.*, through a
57 so-called intermediary 'premium' virtual currency), unless otherwise specified. To
58 illustrate how loot boxes are implemented in practice: for example, in the FIFA video
59 game series, the player competes against other players with a team of virtual
60 footballers; however, the player can obtain footballers who are stronger and would
61 make the team better by purchasing and opening loot boxes (referred to as 'player
62 packs'). Players can therefore gain a competitive advantage over other players by
63 trying to obtain random footballers by spending real-world money. Different
64 footballers have varying percentage chances of being obtained and are valued
65 differently based on their rarity and in-game utility. The footballers can also be
66 bought and sold between players through an in-game auction house.

67
68 Loot boxes are conceptually similar to gambling,² but are presently widely available
69 for purchase by both adults and children without regulatory restrictions in nearly all
70 countries across the world.³ Empirical psychology research has consistently
71 established a link between loot boxes and gambling: particularly, a positive
72 correlation has been found between loot box expenditure and self-reported problem
73 gambling severity in cross-sectional studies.⁴ Importantly, more recently, two peer-

¹ Leon Y Xiao and others, 'Loot Boxes, Gambling-Like Mechanics in Video Games' in Newton Lee (ed), *Encyclopedia of Computer Graphics and Games* (Springer 2021) <https://doi.org/10.1007/978-3-319-08234-9_459-1> accessed 3 July 2022. Leon Y Xiao, 'Loot Boxes' in Paweł Grabarczyk and others (eds), *Encyclopedia of Ludic Terms* (IT University of Copenhagen 2022) <<https://eolt.org/articles/loot-boxes>> accessed 19 July 2023.

² Aaron Drummond and James D Sauer, 'Video Game Loot Boxes Are Psychologically Akin to Gambling' (2018) 2 *Nature Human Behaviour* 530; Aaron Drummond and others, 'Why Loot Boxes Could Be Regulated as Gambling' (2020) 4 *Nature Human Behaviour* 986.

³ David Zendle and others, 'The Prevalence of Loot Boxes in Mobile and Desktop Games' (2020) 115 *Addiction* 1768; Leon Y Xiao and others, 'Gaming the System: Suboptimal Compliance with Loot Box Probability Disclosure Regulations in China' (2021) *Advance Online Publication Behavioural Public Policy* 1.

⁴ David Zendle and Paul Cairns, 'Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey' (2018) 13 *PLOS ONE* e0206767; Stuart Gordon Spicer and others, 'Loot Boxes,

74 reviewed longitudinal studies have found that loot box engagement/expenditure is
75 linked to traditional gambling in terms of ‘both a binary measure reflecting self-
76 identified gambling initiation and a continuous measure of gambling spend.’⁵
77
78 Although empirical research is still in its developing phase and needs further
79 refining,⁶ the preliminary results and findings have caused policymakers and other
80 stakeholders to raise concerns regarding the prevention of potential gambling harms
81 related to loot boxes, including direct financial harm through overspending.⁷
82 Accordingly, policymakers and gambling authorities around the world have
83 considered whether loot boxes might legally constitute gambling.⁸ For example, the
84 Belgian Gaming Commission, after analysing four video games, has opined that all
85 loot boxes that require purchase using real-world money are prohibited under
86 Belgian gambling regulation.⁹ Some countries have also considered amending
87 existing gambling law to potentially include loot boxes: the UK Government decided

Problem Gambling and Problem Video Gaming: A Systematic Review and Meta-Synthesis’ [2021] *New Media & Society* 14614448211027176; Shaun Stephen Garea and others, ‘Meta-Analysis of the Relationship between Problem Gambling, Excessive Gaming and Loot Box Spending’ (2021) 21 *International Gambling Studies* 460.

⁵ Gabriel A Brooks and Luke Clark, ‘The Gamblers of the Future? Migration from Loot Boxes to Gambling in a Longitudinal Study of Young Adults’ (2022) 141 *Computers in Human Behavior* 107605, 7. J González-Cabrera and others, ‘Loot Box Purchases and Their Relationship with Internet Gaming Disorder and Online Gambling Disorder in Adolescents: A Prospective Study’ (2023) 143 *Computers in Human Behavior* 107685.

⁶ Matthew McCaffrey, ‘A Cautious Approach to Public Policy and Loot Box Regulation’ (2020) 102 *Addictive Behaviors* 106136.

⁷ Digital, Culture, Media and Sport Committee of the House of Commons (UK), ‘Immersive and Addictive Technologies: Fifteenth Report of Session 2017–19’ (2019) HC 1846 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/1846.pdf>> accessed 18 July 2023; Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK), ‘Report of Session 2019–21: Gambling Harm— Time for Action’ (2020) HL 79 <<https://publications.parliament.uk/pa/ld5801/ldselect/ldgamb/79/79.pdf>> accessed 18 July 2023.

⁸ For example, in the UK, Belgium and Denmark, see UK Gambling Commission, ‘Virtual Currencies, ESports and Social Gaming — Position Paper’ (2017) <<https://web.archive.org/web/20210111075348/http://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>> accessed 10 March 2022; Belgische Kansspelcommissie [Belgian Gaming Commission], ‘Onderzoeksrapport loot boxen [Research Report on Loot Boxes]’ (2018) <https://web.archive.org/web/20200414184710/https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-final-publicatie.pdf> accessed 9 July 2023; Spillemyndigheden [Danish Gambling Authority], ‘Statement about Loot Boxes / Loot Crates’ (29 November 2017) <<https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates>> accessed 3 March 2021.

⁹ Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8). However, note that the enforcement and the effectiveness of this loot box ‘ban’ has been poor, see Leon Y Xiao, ‘Breaking Ban: Belgium’s Ineffective Gambling Law Regulation of Video Game Loot Boxes’ (2023) 9 *Collabra: Psychology Article* 57641..

88 *not* to do so yet following a dedicated public consultation¹⁰ on loot boxes and
89 potential law reform but has plans to review that decision in the future.¹¹ Spain and
90 Singapore have also recently consulted on law reform regarding loot boxes,¹² and the
91 Spanish Ministry of Consumer Affairs has since published a draft law intending to
92 establish an ad hoc regulatory regime for loot boxes that closely resembles the
93 existing gambling regulatory regime in Spain.¹³ Bills intending to regulate loot boxes
94 as gambling have been proposed in Finland¹⁴ and Brazil.¹⁵ Detailed analysis of the
95 comparative law aspects of loot box regulation in some countries has been

¹⁰ Department for Digital, Culture, Media & Sport (UK), 'Loot Boxes in Video Games: Call for Evidence' (September 2020) <<https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/loot-boxes-in-video-games-call-for-evidence>> accessed 6 June 2023.

¹¹ Department for Digital, Culture, Media & Sport (UK), 'Government Response to the Call for Evidence on Loot Boxes in Video Games' (*GOV.UK*, 17 July 2022) <<https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-for-evidence-on-loot-boxes-in-video-games>> accessed 18 July 2023.

¹² Dirección General de Ordenación del Juego [Directorate General for the Regulation of Gambling], 'Proceso Participativo Sobre Los Mecanismos Aleatorios de Recompensa (Cajas Botín) [Participatory Process on Random Reward Mechanisms (Loot Boxes)]' (19 February 2021) <<https://www.ordenacionjuego.es/en/Noticia-Cajas-Botin>> accessed 21 March 2021; Ministry of Home Affairs (Singapore), 'Public Consultation on Proposed Amendments to Laws Governing Gambling Activities' (12 July 2021) <<https://web.archive.org/web/20210712113340/https://www.mha.gov.sg/docs/default-source/media-room-doc/public-consultation-on-proposed-amendments-to-laws-governing-gambling-activities.pdf>> accessed 25 July 2021.

¹³ Ministerio de Consumo [Ministry of Consumer Affairs] (Spain), 'Anteproyecto de Ley Por El Que Se Regulan Los Mecanismos Aleatorios de Recompensa Asociados a Productos de Software Interactivo de Ocio [Consultation on the Bill of Law That Regulates Random Reward Mechanisms Associated with Interactive Entertainment Software Products]' (1 July 2022) <<https://www.consumo.gob.es/sites/consumo.gob.es/files/BORRADOR%20APL%20Y%20MAIN%20MECANISMOS%20ALEATORIOS%20RECOMPENSA%20010722.pdf>> accessed 5 July 2022.

¹⁴ Lakialoite LA 42/2022 vp [Legislative initiative LA 42 /2022 vp] (Finland) <https://www.eduskunta.fi/FI/vaski/Lakialoite/Sivut/LA_42+2022.aspx> accessed 11 January 2023.

¹⁵ Alessandro Vieira, 'Projeto de Lei N° 2628, de 2022 [Senate Bill No 2628 of 2022] (Brazil)' (18 October 2022) <<https://www25.senado.leg.br/web/atividade/materias/-/materia/154901>> accessed 6 June 2023; cf Heitor Freire, 'Projeto de Lei N° 4148, de 2019 [Chamber Bill No 4148 of 2019] (Brazil)' (18 July 2019) <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2212564>> accessed 6 June 2023.

96 conducted elsewhere,¹⁶ including very recently.¹⁷ This article focuses instead
97 specifically on the state of regulation in the Netherlands, which has recently been
98 changed by a remarkable final appeal decision: *Electronic Arts v Kansspelautoriteit*
99 (2022).¹⁸

100

101 **1.1. Historical background on loot box regulation in the Netherlands**

102 Under Dutch law, gambling or a ‘game of chance’ [Dutch: *Kansspel*] is defined in and
103 prohibited by Article 1 of the Betting and Gaming Act [Dutch: *Wet op de Kansspelen*]
104 as ‘an opportunity to compete for prizes or premiums if the winners are designated
105 by means of any random process over which the participants are generally unable to
106 exercise a dominant influence, unless a licence for this has been granted pursuant to
107 this Act.’ In 2018, the Netherlands Gambling Authority [Dutch: *Kansspelautoriteit*]
108 opined that both paid *and* non-paid loot boxes (i) whose results are determined
109 through a random process and (ii) whose randomised content (or ‘prizes’) are
110 transferable between players and therefore possessed ‘market value’ or real-world
111 monetary value would legally constitute a ‘game of chance’ under the Act and
112 contravene Dutch gambling law if offered without appropriate licencing.¹⁹ In
113 addition, the Netherlands Gambling Authority explained that there is a blanket
114 prohibition for such loot boxes because it is not empowered to grant gambling

¹⁶ Leon Y Xiao, ‘Loot Box State of Play 2022: Regulatory and Policy Research Developments’ (*GamesIndustry.biz*, 13 December 2022) <<https://www.gamesindustry.biz/loot-box-state-of-play-2022-regulatory-and-policy-research-developments>> accessed 11 January 2023; Pieterjan Declerck and Nadia Feci, ‘Mapping and Analysis of the Current Regulatory Framework on Gambling(-like) Elements in Video Games – a Report in the Framework of the “Gam(e)(a)Ble” Research Project’ (2022) <https://web.archive.org/web/20220726133203/https://www.gameable.info/_files/ugd/7f91ff_0b51d9c313db43729fe6150ec671219a.pdf> accessed 26 July 2022; Stephanie Derrington, Shaun Star and Sarah J Kelly, ‘The Case for Uniform Loot Box Regulation: A New Classification Typology and Reform Agenda’ (2021) 46 *Journal of Gambling Issues* 302; Leon Y Xiao and others, ‘Regulating Gambling-like Video Game Loot Boxes: A Public Health Framework Comparing Industry Self-Regulation, Existing National Legal Approaches, and Other Potential Approaches’ (26 July 2022) <<https://doi.org/10.1007/s40429-022-00424-9>> accessed 13 May 2022.

¹⁷ Leon Y Xiao, ‘Loot Box State of Play 2023: Law, Regulation, Policy, and Enforcement Around the World’ (OSF Preprints, 19 July 2023) <<https://osf.io/q2yv6/>> accessed 20 July 2023.

¹⁸ Uitspraak [Ruling] 202005769/1/A3 (2022) Afdeling Bestuursrechtspraak Raad van State [Administrative Jurisdiction Division of the Council of State (The Netherlands)] (9 March 2022) ECLI:NL:RVS:2022:690 (hereinafter, the ‘Ruling’) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2022:690>> accessed 20 November 2022.

¹⁹ Kansspelautoriteit [The Netherlands Gambling Authority], ‘Onderzoek naar loot boxes: Een buit of een last? [Study into Loot Boxes: A Treasure or a Burden?]' (2018) paras 4.2–4.7 <https://web.archive.org/web/20190503232356/https://kansspelautoriteit.nl/publish/library/6/onderzoek_naar_loot_boxes_-_een_buit_of_een_last_-_nl.pdf> accessed 19 July 2023.

115 licences to video game companies for offering loot boxes.²⁰ The UK Gambling
116 Commission, the Danish Gambling Authority, and other gambling authorities came
117 to similar conclusions in relation to their gambling laws for paid loot boxes
118 containing rewards with transferable real-world monetary value.²¹ Notably, unlike
119 in the Netherlands, non-paid loot boxes containing the same are generally *not*
120 deemed as constituting gambling in other countries because an additional ‘stake’
121 legal element—dictating that the player must have spent real-world money to
122 participate (which is not present in Dutch gambling law)—is generally present in the
123 laws of other countries. However, these other countries’ gambling authorities have
124 reportedly not taken any enforcement actions, unlike the Netherlands Gambling
125 Authority as detailed below.

126
127 In 2019, the Netherlands Gambling Authority then enforced the law according to its
128 interpretation by imposing a financial penalty on Electronic Arts for its allegedly
129 illegal loot box implementations in the widely popular FIFA video games.²² In 2020,
130 on appeal by Electronic Arts against the financial penalty imposed in 2019, the
131 District Court of The Hague upheld the Netherlands Gambling Authority’s
132 interpretation of Dutch law and opined that the loot boxes do indeed constitute a
133 ‘game of chance’ and that consequently Electronic Arts’ inclusion of loot boxes in the
134 FIFA games violated Dutch gambling law, as the company did not (and cannot)
135 possess a gambling licence.²³

136
137 **1.2. The present final appeal: *Electronic Arts v Kansspelautoriteit* (2022)**
138 However, Electronic Arts then successfully appealed to the highest administrative
139 court in the Netherlands, the Administrative Jurisdiction Division of the Council of
140 State [Dutch: *Afdeling Bestuursrechtspraak Raad van State*], whose ‘Ruling [Dutch:
141 *Uitspraak*]’ was handed down on 9 March 2022. The Netherlands Gambling

²⁰ *ibid* 4.7.

²¹ UK Gambling Commission (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

²² Kansspelautoriteit [The Netherlands Gambling Authority], ‘Imposition of an Order Subject to a Penalty on Electronic Arts for FIFA Video Game’ (29 October 2020) <<https://web.archive.org/web/20201127222346/https://kansspelautoriteit.nl/nieuws/nieuwsberichten/2020/oktober/imposition-an-order/>> accessed 19 July 2023.

²³ *Electronic Arts Inc & Electronic Arts Swiss Sàrl v Kansspelautoriteit* (2020) Rechtbank Den Haag [District Court of The Hague] (15 October 2020) ECLI:NL:RBDHA:2020:10428 (hereinafter, the ‘District Court Decision’) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:10428>> accessed 11 March 2021.

142 Authority was wrong to have determined that the loot boxes are a separate ‘game of
143 chance’ without considering the wider video game that contains them.²⁴ The Council
144 of State decided that, before evaluating whether any loot boxes potentially constitute
145 a ‘game of chance’ under Article 1 of the Betting and Gaming Act, a preliminary
146 question that must be posed (and answered in the affirmative, for the enforcement
147 action to proceed lawfully) is whether those loot boxes constitute a sufficiently
148 separate ‘game’ that is capable of being assessed as to whether it is a ‘game of
149 chance,’ or whether those loot boxes are merely part of a broader video game, which
150 should be holistically assessed instead as to whether that overarching video game
151 constitutes a ‘game of chance.’²⁵ As such, the Council of State interpreted Dutch
152 gambling regulation in such a way that, generally, the overarching video game
153 containing the loot boxes itself must constitute a ‘game of chance’ (irrespective of
154 whether the loot boxes contained therein would be a ‘game of chance’, had they been
155 separately assessed) before gambling regulation can be applied, barring extreme
156 examples where the loot boxes might justifiably be separately assessed, as discussed
157 below.

158

159 The Council of State then decided that, taking into account the gameplay experience
160 of the so-called ‘majority’ of players, the FIFA Ultimate Team (FUT) mode of the
161 FIFA games, holistically considered, is a ‘game of skill’ involving the playing of
162 virtual soccer matches, wherein the player packs (*i.e.*, the loot boxes) only added an
163 element of chance and did not fundamentally alter the overarching video game into
164 a ‘game of chance.’²⁶ Therefore, the loot boxes in the FIFA games cannot be deemed
165 as a separate game that is capable of being separately assessed as to whether it
166 independently constitutes a ‘game of chance’ under Article 1 of the Betting and
167 Gaming Act, because the ‘vast majority’ of players engage with the loot boxes only
168 as a part of the broader skill-based FUT mode (which itself remains a ‘game of skill’)
169 and that this majority of players do not treat engaging with the loot boxes in these
170 games as a separate game.²⁷ Accordingly, because the FUT mode is predominantly a

²⁴ Ruling (n 17) para 9.

²⁵ *ibid* paras. 7.4 and 8.3

²⁶ *ibid* para. 8.5. Note that within the FIFA games, there are several (single player) game modes aside from the FUT mode, such as Kick-Off or Career Mode. The FUT mode is perceived as the multiplayer aspect of the FIFA games, and the player packs (*i.e.*, loot boxes) are only available inside the FUT mode.

²⁷ *ibid* para. 8.5

171 'game of skill,' Electronic Arts has not contravened Dutch gambling law by
172 implementing loot boxes in the FIFA video games. Notably, this Dutch Ruling of the
173 Council of State is the final interpretation in this particular case on loot boxes in the
174 Netherlands as it cannot be further appealed.

175

176 The video game loot box issue continues to develop globally, perhaps taking
177 surprising turns at times. How other countries will regulate this mechanic (if at all)
178 remains to be seen. Laws might be changing. Cases might also be brought in other
179 jurisdictions on the same points of law (as was done in Austria²⁸). Recognising that
180 the laws of different countries will differ on how these questions are to be
181 determined, this article seeks to evaluate the logic that the Dutch Council of State
182 has adopted and to identify how the gambling laws of other countries may not
183 necessarily come to the same conclusion, particularly with regard to *paid* loot boxes.
184 Section 1 introduced the factual background and summarised the Dutch Ruling.
185 Section 2 argues that, rather than examining whether the whole video game
186 constitutes a 'game of chance,' paid loot boxes (as a separate, potentially problematic
187 element of video games) should be scrutinised on their own as to whether they
188 constitute a 'game of chance.' Section 3 highlights that the various elements of the
189 newly invented legal test of 'how the majority of players play the video game' were
190 not adequately defined by the Council of State and failed to duly account for the
191 minority experience of the most vulnerable players, who spend the highest amount
192 of money on loot boxes and are most in need of protection. Finally, we conclude that
193 paid loot boxes containing rewards with transferable real-world monetary value,
194 specifically, constitute gambling, as the gambling authorities of other countries (*e.g.*,
195 the UK and Denmark) have previously determined.²⁹

²⁸ Where loot boxes were held to constitute illegal gambling and the relevant video game company was asked to refund the player and decided not to appeal the judgment, see Gameswirtschaft, 'Rechtskräftig: FIFA-Lootboxen Sind Illegales Glücksspiel (Update) [Legal: FIFA Loot Boxes Are Illegal Gambling (Update)]' (*GamesWirtschaft.de*, 5 April 2023) <<https://www.gameswirtschaft.de/wirtschaft/fifa-lootboxen-sony-klage-gluecksspiel-oesterreich-040423/>> accessed 7 July 2023.

²⁹ See UK Gambling Commission (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

196 **2. Not considering loot boxes separately: a unique interpretation**

197 Importantly, and unlike previous assessments made by policymakers,³⁰ national
198 gambling authorities,³¹ and the substantial academic literature that has developed
199 surrounding this issue,³² the Dutch Council of State has determined potential
200 contravention of gambling law based on the overarching video game and not based
201 on the loot boxes as a separate mechanic or ‘game’,³³ although it did recognise the
202 possibility that certain extreme loot boxes that are not related to the video game’s
203 gameplay could in theory be deemed as a separate ‘game of chance.’³⁴ The
204 interpretation given by the Dutch Council of State, whereby *some* (in reality
205 *practically all*) loot boxes do not constitute a separate game, and whereby the video
206 game as a whole (rather than the loot box mechanic itself) is assessed, is a unique
207 interpretation which might appear to be a paradigm shift in loot box regulation. This
208 was the first instance of any competent body adopting such an interpretation. The
209 approach taken by the Council of State also differs from the interpretation intended
210 by the Dutch legislature as shown through the preparatory works³⁵ and the
211 Netherlands Gambling Authority’s interpretation that was previously approved by
212 the District Court of The Hague.³⁶ Previously, loot boxes were classified as separate
213 gambling activities offered in video games: specifically, a type that the Dutch
214 legislators referred to as ‘mixed games of chance’ [Dutch: *gemengde kansspelen*].³⁷ We

³⁰ For example, Digital, Culture, Media and Sport Committee of the House of Commons (UK) (n 7); Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK) (n 7).

³¹ For example, UK Gambling Commission (n 8); Kansspelautoriteit [The Netherlands Gambling Authority] (n 19); Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

³² See Andrew Moshirnia, ‘Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling’ (2018) 20 *Minnesota Journal of Law, Science & Technology* 77; Peter Honer, ‘Limiting the Loot Box: Overview and Difficulties of a Common EU Response’ (2021) 4 *Interactive Entertainment Law Review* 63; Sebastian Schwiddessen and Philipp Karius, ‘Watch Your Loot Boxes! – Recent Developments and Legal Assessment in Selected Key Jurisdictions From a Gambling Law Perspective’ (2018) 1 *Interactive Entertainment Law Review* 17; Stephanie Derrington, Shaun Star and Sarah J Kelly, ‘The Case for Uniform Loot Box Regulation: A New Classification Typology and Reform Agenda’ (2021) 46 *Journal of Gambling Issues* 302

³³ Ruling (n 17) para. 8.5.

³⁴ *ibid* paras 8.3 and 8.5.

³⁵ Eerste Kamer der Staten-Generaal [First Chamber of the States-General], Kamerstukken [Parliamentary papers] Kamerstuk Vergaderjaar 2017-2018, 33 996 G (13 September 2018), 72 <<https://zoek.officielebekendmakingen.nl/kst-33996-G.html>> accessed 22 April 2022.

³⁶ The District Court Decision (n 22) para 7.5.

³⁷ The legislator clearly distinguishes between mixed games of chance (where the game of chance is surrounded by other aspects of the video game which do not influence the outcome of the game of chance but do influence the outcome of the game) and games of chance with an element of skill (such as poker), see Eerste Kamer der Staten-Generaal (n 35), 71-72.

215 prefer the previous position and argues that, at least in relation to *paid* loot boxes
216 specifically, other countries should not follow the Dutch Council of State's new
217 approach.

218

219 **2.1. Paid loot boxes should be considered separately**

220 In the video game environment, elements that may be harmful to the audience have
221 been singled out for (regulatory) scrutiny in the past, such as violent conduct or
222 sexual content. The Council of State's view that specific loot box elements of the
223 video game cannot be scrutinised on their own is incongruent with how other
224 aspects of video game regulation have approached individual problematic elements.
225 For example, in the context of content moderation and the provision of appropriate
226 age ratings (which is presently industry self-regulation in North America and
227 Europe by the Electronic Software Rating Board (ESRB) and Pan-European Game
228 Information (PEGI), respectively), the assessment is made precisely on the basis of
229 specific problematic elements. The inclusion of *any* problematic content would
230 render the entire game subject to the highest age rating that the most problematic
231 content would attract. An example illustrating this point is *Grand Theft Auto: San*
232 *Andreas* (Rockstar Games, 2004), which contained explicit sex scenes that were
233 present within the game's files but were *disabled* by the developers (after realising
234 that they would receive too high an age rating as a result of their inclusion) and
235 therefore inaccessible by the player unless the game was then modified using third-
236 party software.³⁸ Despite this, upon discovery, the game's rating was changed from
237 'Mature' to 'Adults Only' by the ESRB to reflect the inclusion of the explicit sexual
238 content in the game files, which no players can access through regular gameplay and
239 most players could not easily access.³⁹ This change in age ratings caused many major
240 US retailers to stop selling the game until a new version was produced following a
241 product recall.⁴⁰ Similarly, companies have been willing, and continue, to censor
242 specific, individual elements of sexual and violent content in order to release
243 dedicated national versions of video games that accord with the social and
244 regulatory expectations of different markets. If other elements of video games can be

³⁸ Simon Parkin, 'Who Spilled Hot Coffee?' (*Eurogamer*, 2 December 2012) <<https://www.eurogamer.net/articles/2012-11-30-who-spilled-hot-coffee>> accessed 15 March 2022.

³⁹ Tor Thorsen, 'San Andreas Rated AO, Take-Two Suspends Production' (*GameSpot*, 14 December 2005) <<https://www.gamespot.com/articles/san-andreas-rated-ao-take-two-suspends-production/1100-6129500/>> accessed 15 March 2022.

⁴⁰ Parkin (n 38).

245 singled out for (self-)regulatory scrutiny and compliance actions, then loot boxes
246 should also be so treated as a standalone element in all circumstances.
247
248 Indeed, both the ESRB and PEGI recognise 'In-Game Purchases (Includes Random
249 Items)' (*i.e.*, loot boxes and similar paid in-game mechanics involving
250 randomisation) as a specific element of video games that deserves being individually
251 identified and highlighted to consumers and parents.⁴¹ The debate surrounding, and
252 the industry's stance on, whether loot boxes are gambling is visible on the websites
253 of these self-regulatory bodies: PEGI does not include loot boxes under the scope of
254 its 'gambling' content descriptor, and the ESRB also does not use its 'simulated
255 gambling' or 'real gambling' content descriptor for games with loot boxes. Despite
256 that, video game companies are specifically required to self-declare the presence of
257 loot boxes as part of the rating process for both organisations.⁴² The interpretations
258 by self-regulatory bodies are not necessarily representative of the views of all
259 industry members or shared by other stakeholders, but it is important to recognise
260 that these organisations play an important role in regulating the video game
261 industry.⁴³ Accordingly, their decision to recognise loot boxes as a specific aspect of
262 video games that should be recognised as a separate element could be relied upon
263 by policymakers (even if policymakers disagree with the ESRB's and PEGI's non-
264 recognition of loot boxes as 'gambling'). The alternative approach of not considering
265 loot boxes separately, and only assessing whether the overarching video game in
266 which they are included is problematic, potentially underplays the impact that loot
267 boxes might have on the assessment of the video game. When only considering the
268 overarching game, loot boxes are viewed only as a minor element of gameplay,
269 when in practice they are potentially more important to players, particularly those

⁴¹ Entertainment Software Rating Board (ESRB), 'Introducing a New Interactive Element: In-Game Purchases (Includes Random Items)' (*ESRB Official Website*, 13 April 2020) <<https://www.esrb.org/blog/in-game-purchases-includes-random-items/>> accessed 13 April 2020; Pan European Game Information (PEGI), 'PEGI Introduces Notice To Inform About Presence of Paid Random Items' (*PEGI Official Website*, 13 April 2020) <<https://pegi.info/news/pegi-introduces-feature-notice>> accessed 14 April 2020; see also Leon Y Xiao, 'ESRB's and PEGI's Self-Regulatory "Includes Random Items" Labels Fail to Ensure Consumer Protection' (2021) 19 *International Journal of Mental Health and Addiction* 2358.

⁴² Entertainment Software Rating Board (ESRB), 'Ratings Process' (*ESRB Official Website*, 2023) <<https://www.esrb.org/ratings/ratings-process/>> accessed 16 January 2023; Pan European Game Information (PEGI), 'How We Rate Games' (*PEGI Official Website*, 2023) <<https://pegi.info/page/how-we-rate-games>> accessed 16 January 2023.

⁴³ See *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011), 803 (Scalia J).

270 highly dedicated and high-spending players,⁴⁴ who are arguably also most in need
271 of protection. In the current regulatory landscape, many policymakers and gambling
272 authorities have rightfully adopted an approach where loot boxes are examined
273 separately and not as a part of the video game they are integrated in, contrary to the
274 Dutch Council of State’s interpretation.

275

276 Further support for this proposition that paid loot boxes should be scrutinised
277 separately can be identified in how video games and loot boxes are purchased as
278 separate ‘products’ in practice. Taking the FUT mode as an example: the loot boxes
279 are bought *after* the video game has already been bought. Loot boxes are a form of
280 video game ‘microtransaction’ or an additional purchase that is made after the
281 player has already bought or started playing the game.⁴⁵ Extended discussion on
282 private law aspects of video game contracts in general and loot box contracts
283 specifically falls outside the scope of this article; however, the assertion that the loot
284 box purchase contract is a separate contract which exists alongside other contracts
285 relevant to the video game, such as the terms of use, is unlikely to be disputed.⁴⁶ It is
286 this contract of purchasing loot boxes—and/or of purchasing virtual currency that is
287 then spent in exchange for loot boxes—that potentially represents the provision of
288 ‘gambling.’ With free-to-play (F2P) video games that can be downloaded and played
289 without monetary purchase (as opposed to FIFA),⁴⁷ the in-game loot box purchasing
290 transaction might be the only time that money is transferred from the player to the
291 video game company. In any case, the implementation of loot boxes in a video game
292 is not necessary: it is an optional additional element that companies decided to
293 include and must therefore take responsibility for.⁴⁸ Therefore, offering the
294 possibility to purchase loot boxes with real-world money should be subjected to a

⁴⁴ James Close and others, ‘Secondary Analysis of Loot Box Data: Are High-Spending “Whales” Wealthy Gamers or Problem Gamblers?’ (2021) 117 *Addictive Behaviors* 106851.

⁴⁵ Erica L Neely, ‘Come for the Game, Stay for the Cash Grab: The Ethics of Loot Boxes, Microtransactions, and Freemium Games’ [2019] *Games and Culture* 1555412019887658.

⁴⁶ Joke Baeck and Ignace Claeys, ‘Restitution of Money Spent on Loot Boxes in Video Games?’ (2021) 41 *Computer Law & Security Review* 105566; on the point that agreeing to any broader preliminary terms and conditions or end-user licensing agreement (EULA) for playing the game or using the software is separate from agreeing to a discrete contract of ‘gambling’ when each individual bet is placed and accepted in a casino game software context, see *Green v Petfre (Gibraltar) Ltd (t/a Betfred)* [2021] EWHC 842 (QB) [125].

⁴⁷ Alha Kati and others, ‘Free-to-Play Games: Professionals’ Perspectives’, *DiGRA Nordic 2014: Proceedings of the 2014 International DiGRA Nordic Conference* (DiGRA 2014) <http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014_submission_8.pdf>.

⁴⁸ Neely (n 45).

295 separate assessment of whether doing so constitutes gambling under national
296 legislation, which the Ruling failed to make.⁴⁹

297

298 **2.2. Some appreciable difficulties with differentiating between paid and non-paid** 299 **loot boxes**

300 A potential explanation as to why the Ruling did not specifically identify and
301 distinguish *paid* loot boxes as an element to be assessed separately is that Dutch
302 gambling law, specifically, Article 1 of the Betting and Gaming Act, does not actually
303 distinguish between games of chance that the player must pay for to participate in
304 (*e.g.*, *paid* loot boxes) and those that do not need payment (*e.g.*, *non-paid* loot boxes).
305 Whether or not a 'stake' was paid to participate in the activity (which is a legal
306 element of gambling in other jurisdictions, *e.g.*, Belgium⁵⁰ and Denmark⁵¹) is not a
307 criterion under Dutch law. Therefore, this might explain why the Ruling proceeded
308 by considering paid and non-paid loot boxes together as one issue. It is also worth
309 recognising that non-paid loot boxes are generally more difficult to single out than
310 paid loot boxes, because it can be difficult to label only some randomised mechanics
311 in video games as 'non-paid loot boxes', but not others.

312

313 For example, when there is no distinction between the premium currency that the
314 player earns through gameplay and the currency purchased with real-world money:
315 are all purchases of loot boxes thereafter 'paid loot boxes' or should the player be
316 assumed to always be spending all 'paid' premium currency first to buy 'paid loot
317 boxes' and after which only spending 'earned' premium currency to buy 'non-paid
318 loot boxes'? If the player has 50 'paid' premium currency and 50 'earned' premium
319 currency (but both are mixed into one pot of 100 indistinguishable 'generic'
320 premium currency) and each loot box costs 50 premium currency, when the player
321 buys two loot boxes: are they (a) buying two paid loot boxes (spending 25 'paid' and
322 25 'earned' premium currencies) or (b) buying one paid loot box (spending 50 'paid'
323 premium currency) and one non-paid loot box (spending 50 'earned' premium
324 currency)?

325

⁴⁹ Ruling (n 17) para. 8.5.

⁵⁰ Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8) 8–9.

⁵¹ Spillemyndigheden [Danish Gambling Authority] (n 8).

326 Indeed, concerns of overregulation and overextension of gambling law arise when
327 all video game elements including a randomised aspect (*e.g.*, obtaining random loot,
328 such as stronger weapons, from defeating enemies without spending any real-world
329 money) would constitute gambling. Policymakers should therefore be cautious
330 when considering the potential regulation of non-paid loot boxes under their
331 gambling laws, in order to avoid capturing everyday products and design features
332 that are generally viewed as harmless.⁵² It is important to note that the empirical
333 psychology literature has focused on paid loot boxes and identified their potential
334 harms specifically (whilst the potential harms of non-paid loot boxes are much less
335 established and understood). Hence, the Dutch Council of State could have
336 considered focusing on paid loot boxes specifically and separately as a video game
337 element capable of constituting a ‘game of chance’ on its own under Article 1 of the
338 Betting and Gaming Act.

339

340 **3. How the ‘majority of players’ play the game: an unsatisfactory criterion**

341 When coming to the conclusion that loot boxes in the FUT game mode do not
342 represent a separate game, the Dutch Council of State decided that this should
343 depend on ‘how the game is played by the majority of gamers.’⁵³ This unique
344 interpretation and its underlying argumentation must be scrutinised. The Council of
345 State found that ‘the practice is that gamers only open the packs with a view to
346 playing virtual football matches,’⁵⁴ and that therefore the loot box purchasing and
347 opening process is not treated by players as a separate game. Indeed, the Council of
348 State decided that it is necessary for players to treat the loot box purchasing and
349 opening process as its own game ‘on a large scale,’⁵⁵ before the Netherlands
350 Gambling Authority would be justified to intervene.

351

352 **3.1. Failure to define and clarify various criteria used in the Ruling**

353 Notably, the Ruling used the terms ‘average player [Dutch: *gemiddelde speler*];’⁵⁶ ‘vast
354 majority [Dutch: *grote meerderheid*];’⁵⁷ ‘the majority of gamers [Dutch: *de meerderheid*

⁵² Which is something the UK Government specifically identified. See Department for Digital, Culture, Media & Sport (UK) (n 11) paras 246–247.

⁵³ *ibid* para 8.4.

⁵⁴ *ibid* para 8.5.

⁵⁵ *ibid*.

⁵⁶ *ibid* para 8.4.

⁵⁷ *ibid*.

355 *van spelers*];⁵⁸ and ‘a large scale [Dutch: *een grote schaal*]⁵⁹ without defining what they
356 mean. These criteria were clearly important for the Council of State in determining
357 when a loot box may be treated as its own separate game and when a loot box
358 (rather than the overarching video game) may be separately assessed as to whether
359 it legally constitutes a ‘game of chance.’ Following the Ruling, the Netherlands
360 Gambling Authority would need to apply these criteria to decide whether and when
361 to take enforcement actions. Companies that want to market their video games in the
362 Netherlands would also need this information so that they can self-assess the loot
363 box mechanics that they are designing or have already implemented in order to
364 comply with the law. Finally, players (and parents of child players and other
365 interested parties) would also benefit from knowing this information so that they
366 can report potentially non-compliant games to be sanctioned by the gambling
367 regulator. However, despite these obvious justifications, the Ruling has left all of
368 these terms undefined. Without further elaboration, it cannot be known who the
369 ‘average player’ is. Several questions arise as a result: for example, is said ‘average
370 player’ the ‘average’ amongst all registered users including inactive players or
371 amongst only monthly active players? What percentage would represent the
372 ‘majority’ of players (as this can potentially range from 51% to 90% or even higher)
373 or, in contrast, a ‘vast majority’ specifically? What would constitute ‘on a large scale’
374 and upon what or whom would this ‘scale’ be determined (*e.g.*, based on the number
375 of monthly active users or on the amount of revenue generated)? Leaving these
376 important criteria undefined and unquantified meant that the Ruling failed to
377 provide legal certainty for future cases.

378

379 **3.2. The criterion is highly difficult to satisfy and fails to adequately protect** 380 **players against the gaming-gambling convergence**

381 Regardless, the Council of State’s ruling that it is a prerequisite for gambling law to
382 apply that the ‘majority’ of players must treat the loot box opening and purchasing
383 process as a separate game and as such decide not to engage with the overarching
384 video game’s gameplay, is a very high, if not impossible, hurdle to overcome, given
385 the commercial realities of video game production. It is difficult to imagine a
386 hypothetical loot box in a video game that would satisfy this prerequisite because

⁵⁸ *ibid.*

⁵⁹ *ibid* para 8.5.

387 the majority of players must collectively decide not to engage with the intended
388 gameplay of the video game itself, but still somehow want to purchase and open
389 loot boxes in that game. Loot boxes are generally bought by players because of their
390 content's (perceived) value inside that video game (e.g., allowing the player
391 character's cosmetic appearance to change or unlocking additional gameplay
392 content).⁶⁰ It would therefore seem improbable that players would desire to purchase
393 loot boxes in a video game that they, and most other players, would not want to
394 play, as this would be contrary to the video game company's commercial interests.
395 The only exception where loot boxes will constitute a separate game following this
396 legal test to its logical end is when the majority of players only engage with the loot
397 box aspect of the video game in order to participate in actual gambling (e.g.,
398 participate in 'skin betting'⁶¹ without playing the game that those skins are used in).
399 In other words, the company effectively has to offer or facilitate traditional gambling
400 in the guise of being a part of a video game (that itself must be uninteresting
401 gameplay-wise to the majority of players) before gambling law applies.

402

403 According to the Dutch Council of State's interpretation of the law, the company
404 would be permitted to introduce gambling-like mechanics into its video games as
405 long as the majority of players use the content obtained through these gambling-like
406 mechanics as part of the video game's regular gameplay. This legal test seems
407 contrary to the principle of providing better protection for vulnerable players: the
408 more integrated into the video game the gambling-like mechanics are, the less likely
409 those gambling-like mechanics can be regulated under gambling law. This
410 counterproductively encourages the 'blurring of lines' between video gaming and
411 gambling that gives rise to significant consumer protection and gambling harm
412 prevention concerns, particularly in relation to children who might struggle to
413 distinguish between the two activities, as previously recognised by many gambling
414 authorities as an important issue that needs addressing.⁶² The legislative purposes of

⁶⁰ Laura Louise Nicklin and others, "It's the Attraction of Winning That Draws You in"—A Qualitative Investigation of Reasons and Facilitators for Videogame Loot Box Engagement in UK Gamers' (2021) 10 *Journal of Clinical Medicine* 2103.

⁶¹ Skin betting is an activity where cosmetic virtual items are wagered for money or for other, higher valued cosmetic items; Heather Wardle and Sarah Tipping, 'The Relationship between Problematic Gambling Severity and Engagement with Gambling Products: Longitudinal Analysis of the Emerging Adults Gambling Survey' n/a *Addiction* <<https://doi.org/10.1111/add.16125>> accessed 10 January 2023.

⁶² See UK Gambling Commission and others, *Declaration of Gambling Regulators on Their Concerns Related to the Blurring of Lines Between Gambling and Gaming* (2018)

415 the Dutch Betting and Gaming Act include protecting vulnerable consumers
416 (including underage players), preventing addiction, and reducing harm.⁶³ The
417 interpretation by the Council of State limits the applicability of Dutch gambling law
418 to this novel phenomenon of the convergence of video gaming and gambling. This
419 interpretation, therefore, arguably fails to accord with the original legislative
420 purposes. Under the Council of State's interpretation of the law, it would be near
421 impossible for the Netherlands Gambling Authority to ever justify an intervention
422 against loot boxes. Only purported 'loot boxes' (that are not actually loot boxes)
423 designed as traditional gambling in a video game, which itself is not intended to be
424 played or enjoyed by the majority of players, would potentially be subject to
425 enforcement actions.

426

427 **3.3. Focusing on the 'majority' of players ignores the highest-spending and most** 428 **vulnerable players**

429 Moreover, the Council of State's focus on the 'majority of players' fails to account for
430 the experiences of a small minority of vulnerable players. Video game monetisation
431 has changed: where revenues used to be predominantly generated by the sale of the
432 game itself, players now can make additional purchases (microtransactions) after
433 buying the game (*e.g.*, in FIFA) or after downloading the game for free (*e.g.*, in 'free-
434 to-play games'⁶⁴). Unlike in the past when every player spent largely similar
435 amounts of money to purchase a copy of the software, many games are now reliant
436 on a small minority of high-spending players (often referred to as 'whales'⁶⁵) to
437 generate revenue. A substantial number of players (generally significantly more than
438 half—in other words, a 'majority'—in many games) spend *no* or very little money on
439 loot boxes and, by implication, are unlikely to ever be 'harmed' by loot boxes.⁶⁶
440 Research suggests that 5% of the highest-spending players contributed more than
441 half of all loot box revenue.⁶⁷ One FIFA player reportedly spent over US\$10,000 on

<<https://web.archive.org/web/20210528215648/http://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>> accessed 29 June 2021.

⁶³ Kansspelautoriteit [The Netherlands Gambling Authority] (n 19) 14, para 4.1.

⁶⁴ Kati and others (n 47); Janne Paavilainen and others, 'Social Network Games: Players' Perspectives' (2013) 44 *Simulation & Gaming* 794.

⁶⁵ Close and others (n 44).

⁶⁶ Leon Y Xiao, 'Loot Boxes Are Good (or at Least Not That Bad)...? Arguing against a Ban' (OSF Preprints, 23 June 2022) <<https://osf.io/eztvd/>> accessed 23 June 2022.

⁶⁷ Close and others (n 44).

442 loot boxes in the FUT game mode in two years.⁶⁸ Those highest-spending players are
443 arguably most at risk of experiencing potential financial harms from loot boxes.
444 However, their experiences are not reflected, and their concerns are not adequately
445 addressed if the court decides only to focus on and consider how the so-called
446 ‘majority’ of players (who are, in fact, non-spending or low spending) experience the
447 video game. The Council of State’s interpretation fails to account for the interests
448 and the experiences of the most vulnerable consumers (*i.e.*, the whales⁶⁹) when it is
449 this minority of players that are arguably the main intended beneficiary of gambling
450 regulation.

451

452 Indeed, to derive the majority from amongst *all* players means that both underage
453 and adult players were considered together and not separately. (For context, the
454 FIFA video game series is deemed suitable for young people of all ages by PEGI,
455 whilst traditional licensed gambling is only permitted for those aged 18+ in the
456 Netherlands.) This mixing of the age groups is not ideal for two reasons. Firstly,
457 underage players may play significantly differently from how adult players play the
458 game (in terms of, *e.g.*, how much money is spent purchasing loot boxes). Underage
459 players’ lower prevalence rate for participating in adjacent gambling activities like
460 skin betting or in prohibited black market trading of in-game items, for example,
461 might be diluting the supposed participation rates of the whole mixed population
462 (when it is the participation rates amongst vulnerable players that is actually
463 relevant). Secondly, underage players are, or at least are perceived to be, more
464 vulnerable than adult players to gambling-related harms such that regulatory
465 intervention is more justifiable. This may warrant the relevant legal test for whether
466 a certain activity may be treated as a standalone ‘game of chance’ as applied to
467 underage players to be different and less strict. To illustrate, it might be reasonable
468 to require the ‘majority’ (meaning >50%) of adults to play the game in order to
469 gamble to justify the game being treated as a separate ‘game of chance,’ but

⁶⁸ Wesley Yin-Poole, ‘FIFA Player Uses GDPR to Find out Everything EA Has on Him, Realises He’s Spent over \$10,000 in Two Years on Ultimate Team’ (*Eurogamer*, 25 July 2018) <<https://www.eurogamer.net/articles/2018-07-23-fifa-player-uses-gdpr-to-find-out-everything-ea-has-on-him-realises-hes-spent-over-usd10-000-in-two-years-on-ultimate-team>> accessed 3 August 2020.

⁶⁹ Similarly, further research is needed on players who are not classified as whales, but belong to the category just below, namely those players whose spending behaviour may be seen as dangerous but is not sufficient to trigger any regulatory threshold. These players are sometimes referred to as ‘dolphins.’

470 only >20% of underage players doing the same might already warrant regulatory
471 intervention.

472

473 **3.4. Overreliance on the presence of non-paid loot boxes**

474 Further, the Council of State appears to have classified paid loot boxes as
475 unimportant because they only represent a small minority of all loot boxes
476 (including non-paid loot boxes) used by players.⁷⁰ When assessing how the
477 ‘majority’ of players experience the FUT game mode, the Council of State seems to
478 have accepted the arguments presented by Electronic Arts uncritically and without
479 sufficient further scrutiny. Specifically, the Council of State relied on Electronic Arts’
480 assertion that ‘92 percent of packs are obtained through game engagement [and are
481 not purchased using real-world money, unlike the remaining 8%].’⁷¹ It is not known
482 what other evidence was available to the Council of State; however, that assertion by
483 Electronic Arts must be challenged. More contextual information about both
484 percentages (rather than merely those two figures alone) should have been
485 considered by the Council of State. Reliance on the 8% out of context is misleading:
486 although only 8% of loot boxes are bought with real-world money and this
487 percentage appears comparatively small, these loot boxes generated a substantial
488 amount of revenue for the company. Electronic Arts’ own 2021 annual report
489 revealed that: ‘Net revenue from Ultimate Team represented 29 percent of our total
490 net revenue during fiscal year 2021, a substantial portion of which was derived from
491 FIFA Ultimate Team.’⁷² Electronic Arts’ 2021 net revenue was stated to be
492 ‘[US]\$5.629 billion’ in the same report.⁷³ Therefore, the FUT mode (*i.e.*, paid loot
493 boxes in various Electronic Arts sports games, including but not limited to FIFA
494 games) generated over US\$1.6 billion. This substantial amount of revenue generated
495 by paid loot boxes in the FUT mode justifies a separate assessment of them on their
496 own, without considering non-paid loot boxes.

497

498 Further information on who bought that 8% of paid loot boxes should also have
499 been sought. This percentage itself is not informative as to who exactly bought the

⁷⁰ *ibid* para. 8.5

⁷¹ Ruling (n 17) para 8.5.

⁷² Electronic Arts, ‘Notice of 2021 Annual Meeting and Proxy Statement’ (26 May 2021) app 1, p 4
<[https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-\(2021\).pdf](https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-(2021).pdf)>
accessed 27 September 2021.

⁷³ *ibid* 4.

500 loot boxes and why. Some players may have purchased loot boxes because they do
501 not want to spend time earning non-paid loot boxes, whilst other players, more
502 concerningly, may have purchased them due to underlying problematic behaviour
503 and spent significant sums of money. In our view, the Council of State should not
504 have so easily accepted and relied upon the 8% figure without seeking further
505 contextual information from Electronic Arts.⁷⁴ Indeed, if the relative percentages of
506 paid and non-paid loot boxes become a legal consideration, companies could
507 artificially increase the prevalence of non-paid loot boxes (containing worthless
508 content) in order to make their game's loot box statistics appear more acceptable in
509 order to hide behind the argument that the majority of loot boxes are non-paid and
510 'safe.'

511

512 Additionally, Electronic Arts' presentation of the two figures without context
513 misrepresents paid and non-paid loot boxes as being identical to each other and
514 equally desirable by players. The Council of State took the percentages presented by
515 Electronic Arts at face value and seemingly assumed that, because only 8% are paid
516 loot boxes, they are therefore unimportant for the assessment of whether the loot
517 boxes (both paid and non-paid combined) represent a separate game.⁷⁵ However, the
518 fact that 92% of loot boxes were non-paid and obtained through gameplay but that
519 players were still willing to purchase the other 8% of loot boxes demonstrates the
520 perceived importance of *paid* loot boxes by players. Popular media has reported that
521 players are generally unable to obtain all desirable loot box content purely through
522 gameplay without purchasing paid loot boxes because of the extensive amount of
523 time they must spend on the game in order to obtain sufficient numbers of non-paid
524 loot boxes⁷⁶ Further, the paid loot boxes and the non-paid, 'free' loot boxes in these
525 games do not always contain similar content: some desirable loot box content that
526 provides the best competitive advantage may appear *exclusively* in, or may have a
527 higher probability of being obtained from, paid loot boxes. Electronic Arts also
528 places restrictions on how loot box content obtained from non-paid loot boxes can be
529 used: specifically, loot box content obtained from paid loot boxes is generally

⁷⁴ Ruling (n 17) para 8.5.

⁷⁵ Ruling (n 17) para 8.5

⁷⁶ Wesley Yin-Poole, 'Putting EA's Claim "You Can Acquire All Items without Spending Money" in FIFA Ultimate Team to the Test' (*Eurogamer*, 22 March 2021) <<https://www.eurogamer.net/putting-eas-claim-you-can-acquire-all-items-without-spending-money-in-fifa-ultimate-team-to-the-test>> accessed 19 April 2022.

530 transferable to other players on the games' internal marketplace and therefore has
531 more utility and desirability, whilst loot box content from non-paid loot boxes is not
532 always similarly transferable and would therefore be less valuable within the FUT
533 mode's in-game economy.

534

535 **3.5. An alternative: The 'majority' of paying players' (rather than all players') 536 experience?**

537 The Council of State did not recognise these important technical distinctions
538 between paid and non-paid loot boxes. It also did not consider how fundamental
539 purchasing paid loot boxes may be to the experience of the averagely skilled FUT
540 mode players who want to play somewhat competitively without spending too
541 much time doing repetitive tasks. In particular, it failed to account for the experience
542 of those highly competitive, high spending players who are arguably most at risk of
543 potential harms. The Council of State should have required more in-depth
544 information regarding the respective importance of items obtained from non-paid
545 and paid loot boxes respectively. This could have shed more light on how difficult it
546 is for players to consistently obtain the highly desired items through gameplay
547 alone, which incentivises these players to resort to purchasing loot boxes.⁷⁷ If the
548 'majority of players' criterion must be retained in some form, that 'majority' should
549 alternatively be derived from only paying players, or arguably even only high-
550 spending (and potentially vulnerable) players who purchase loot boxes, rather than
551 from all players. This is because the latter approach adopted by the Council of State
552 presents a 'majority' that is irrelevant: it unhelpfully considers the experience of
553 many non-paying players who do not encounter any potential harm from non-paid
554 loot boxes and do not engage with paid loot boxes at all. This approach dilutes, and
555 fails to duly account for, the experience of loot box-purchasing players who might
556 actually experience harm.

557

558 **4. Different countries' gambling laws potentially provide divergent 559 interpretations**

560 Although the case did not turn on this point (because the Netherlands Gambling
561 Authority did not dispute it), the Dutch Council of State decided that the FUT game
562 mode is considered a game of skill, despite it involving an element of chance (*i.e.*, the

⁷⁷ *ibid.*

563 loot boxes).⁷⁸ Reliance was placed on previous case law (specifically, the *Saturne*
564 (1965)⁷⁹ and *Golden Ten* (1991)⁸⁰ judgments), which enunciated the legal principle that
565 a game of chance remains a game of chance, even if a small minority of players
566 might be able to influence their chances of winning through an element of skill,
567 because the majority of players continue to play it as a game of chance.⁸¹ In other
568 words, a small element of skill in a broader game of chance does not render that
569 game into a game of skill. Yet, the reverse of this legal principle (that a small element
570 of chance does not ‘pollute’ the predominantly skill-based game into a game of
571 chance) should not automatically be assumed to be true, which the Council of State
572 has done by ruling that a (small) element of chance in a broader game of skill does
573 not change this game into a game of chance. An element of chance (however small)
574 introduced by the rules of the game itself, rather than arising purely from external
575 factors (e.g., changing wind directions in golf),⁸² in a game of skill arguably could
576 potentially change the game of skill into a game of chance. This position is taken, for
577 example, in the UK, whose simple definition of a ‘game of chance’ includes ‘a game
578 that involves both an element of chance and an element of skill.’⁸³ In comparison, the
579 legal principle in *Saturne* and *Golden Ten* seems present instead in how UK law
580 deems ‘a game that involves an element of chance that can be eliminated by
581 superlative skill’ to still be a game of chance,⁸⁴ given that a ‘superlative’ skill, by
582 definition, could only be exercised by a small minority and not by the majority of
583 players. This again reflects that the Dutch decision is restricted to an interpretation
584 of the application of Dutch gambling law. Other countries might come to a different

⁷⁸ Ruling (n 17) para 8.5.

⁷⁹ *Saturnespel* [*Saturne game*] (1965) Hoge Raad [Supreme Court of the Netherlands] (21 December 1965) ECLI:NL:PHR:1965:AB5541, NJ 1966, 364
<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1965:AB5541>> accessed 19 April 2022.

⁸⁰ *Golden Ten* (1991) Hoge Raad [Supreme Court of the Netherlands] (25 June 1991) ECLI:NL:PHR:1991:AD1447, NJ 1991, 808
<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1991:AD1447>> accessed 19 April 2022.

⁸¹ Ruling (n 17) para 8.4.

⁸² For the similar Canadian law position, see Michael D Lipton, Morden C Lazarus and Kevin J Weber, ‘Games of Skill and Chance in Canada’ (2005) 9 *Gaming Law Review* 10, 13.

⁸³ UK Gambling Act 2005, s 6(2)(a)(i).

⁸⁴ *ibid*, s 6(2)(a)(ii).

585 view as to the legality of different types of video game loot boxes depending on their
586 applicable gambling laws.⁸⁵

587

588 **5. Unsatisfyingly little discussion of the ‘prize’ criterion**

589 In the Ruling, the discussion on the ‘prize’ criterion (*i.e.*, whether the loot box
590 content is transferable and therefore gains market or real-world monetary value)
591 was not given specific attention, as the Ruling focused on the ‘separate game’ issue.
592 As such, the Ruling did not engage with the most controversial question with loot
593 box regulation using gambling law (which also troubles many other countries and
594 the academic literature): whether the *de facto* real-world economic value of loot box
595 content gained through the use of ‘black market’ trading practices satisfies the ‘prize’
596 (or equivalent) criterion of gambling law⁸⁶, despite the company explicitly
597 prohibiting players from selling loot box content in exchange for real-world money
598 (*i.e.*, participating in black market practices) and thereby granting them real-world
599 economic value.⁸⁷ In other words, if paid loot boxes are implemented, must the
600 company be forced to terminate all potential player-to-player trading facilities in the
601 game to be compliant with the law (as some companies have previously done in the
602 Netherlands following the Netherlands Gambling Authority’s since overruled
603 interpretation of the law⁸⁸)?⁸⁹ The Council of State had an opportunity to clarify this
604 important point of law, but it did not express a view as it was instead preoccupied
605 with the preliminary question of whether loot boxes represent a separate game. This
606 most important question remains unanswered and subject to debate.

607

608 **6. Conclusion**

609 Paid loot boxes, as a potentially problematic element of video games, should
610 continue to be examined separately as to whether they would legally constitute
611 gambling. The Dutch Council of State has taken a unique interpretation that,
612 generally, only the overarching video game should be scrutinised: this approach

⁸⁵ Leon Y Xiao, ‘Which Implementations of Loot Boxes Constitute Gambling? A UK Legal Perspective on the Potential Harms of Random Reward Mechanisms’ (2022) 20 *International Journal of Mental Health and Addiction* 437.

⁸⁶ Xiao (n 81).

⁸⁷ The Ruling (n 17), para 8.5; Xiao (n 81).

⁸⁸ For example, 2K Games, ‘Statement Netherlands’ (2K Games Official Website, 2018) <<https://www.2k.com/myteaminfo/nl/>> accessed 12 March 2021.

⁸⁹ Leon Y Xiao, ‘Regulating Loot Boxes as Gambling? Towards a Combined Legal and Self-Regulatory Consumer Protection Approach’ (2021) 4 *Interactive Entertainment Law Review* 27, 43–44.

613 differs from how the issue has hitherto been examined and, as we have argued in
614 this article, improperly underplays the potential gambling-related dangers and
615 concerns that *paid* loot boxes specifically pose. The Dutch Council of State's reliance
616 on what it referred to as how the 'majority' of players engage with the game was
617 criticised. Insufficient attention was given to the respective importance of paid and
618 non-paid loot boxes and their differing impact on the gameplay experience of
619 players within the FUT mode. In particular, this approach of considering the
620 supposedly 'majority' player experience failed to specifically consider how the
621 important *minority* of highest spending and most vulnerable consumers experience
622 loot boxes and might potentially be harmed by them. Indeed, the interpretation of
623 Dutch gambling regulation adopted by the Council of State would *de facto* cause loot
624 boxes in video games to never be seen as a 'game of chance' or 'gambling,' except in
625 extreme cases where actual gambling has been implemented in the guise of a video
626 game.

627
628 When compared to the gambling regulations of other countries (*e.g.*, the UK,
629 Belgium, and Denmark), the Council of State has added a unique legal criterion in its
630 interpretation (whether the loot boxes represent a 'separate game'). This
631 interpretation arguably renders gambling regulation toothless in relation to
632 gambling-like mechanisms in video games, due to the convergence of, or blurring of
633 lines between, video gaming and gambling. Policymakers and regulators in other
634 countries should therefore consider the shortcomings of emulating the Dutch
635 Council of State's approach to loot boxes. Importantly, Dutch policymakers should
636 also consider whether this narrow interpretation of gambling law by the Council of
637 State, whose implication is that very few, if any, (paid) loot boxes in video games
638 could be regulated via gambling law, is what the legislature originally intended and
639 continues to intend. Preparatory documents to gambling legislation suggest a
640 contrary intention: to prevent the migration of young players from video games to
641 gambling, it was intended that 'games offering loot boxes containing prizes with
642 monetary value cannot be offered.'⁹⁰ There appears to be some uncomfortable
643 discrepancy between the intentions of the legislature in drafting the law (which the
644 Netherlands Gambling Authority and the District Court of The Hague at first

⁹⁰ See Eerste Kamer der Staten-Generaal [First Chamber of the States-General], Kamerstukken [Parliamentary papers] Kamerstuk Vergaderjaar 2018-2019, 33 996, I (14 December 2018) 9 <<https://zoek.officielebekendmakingen.nl/kst-33996-I.html>> accessed 21 April 2022.

645 instance attempted unsuccessfully to more closely follow) and how the law has been
646 judicially applied in practice by the Council of State in the final appeal. If wider and
647 more effective regulation of loot boxes is deemed appropriate and intended by the
648 legislature, then changes to Dutch law should be brought to override the Council of
649 State's restrictive interpretation.

650

651 **7. Postscript**

652 Since the initial drafting of this article in April 2022, six political parties, which then
653 together held a majority in both houses of the Dutch Parliament,⁹¹ have submitted a
654 Motion in the lower house asking the Cabinet to investigate the possibility for loot
655 boxes to be banned, potentially through amending existing law if necessary.⁹² That
656 Motion specifically recognised that the Netherlands Gambling Authority has
657 attempted to regulate these mechanics but that the Council of State overruled those
658 enforcement actions. It remains to be seen whether that Motion seeks to ban only
659 paid loot boxes (given that the Motion references 'these loot boxes' having already
660 been prohibited in Belgium, which could only refer to paid loot boxes, unless the
661 Belgian regulatory position has been misunderstood by the Motion's petitioners) or
662 all loot boxes regardless of their paid or non-paid status (given that the same Motion
663 references that the Netherlands Gambling Authority's previous attempted
664 regulation of 'these loot boxes,' which would include both paid and non-paid loot
665 boxes whose content possess real-world monetary value). This Motion lends
666 credence to the assertion that many Dutch members of parliament might not agree
667 with the Council of State's Ruling. Indeed, a year after the Ruling, the Dutch
668 Government has confirmed that it is seeking a ban on loot boxes nationally⁹³ and is
669 also aiming for stricter regulation at an EU level.⁹⁴

⁹¹ Marie Dealessandri, 'Six Political Parties Campaign for Loot Boxes Ban in the Netherlands' (*GamesIndustry.biz*, 4 July 2022) <<https://www.gamesindustry.biz/articles/2022-07-04-six-political-parties-campaign-for-loot-boxes-ban-in-the-netherlands>> accessed 18 July 2022.

⁹² Henri Bontenbal and others, 'Motie van het lid Bontenbal c.s. over loot boxes in videogames ook in Nederland verbieden [Motion by members Bontenbal et al. on banning loot boxes in video games in the Netherlands as well]' (30 June 2022) <<https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2022Z13703&did=2022D28235>> accessed 16 July 2022.

⁹³ Public Information Service, Government of the Netherlands, 'Email Sent on Behalf of the Dutch Government to the Author, Re: EM2499804 [Official Confirmation A Loot Box Ban Is Being Pursued]'.

⁹⁴ Micky Adriaansens, 'Letter from Micky Adriaansens to the President of the House of Representatives, Re Nederlandse Consumentenagenda [Dutch Consumer Agenda]' (28 June 2023) <https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z12262&did=2023D29134> accessed 5 July 2023.

670 **Data Availability Statement**

671 Previous draft versions of this manuscript are available via:

672 <https://doi.org/10.31219/osf.io/pz24d>. The peer review and editorial history of this
673 article is available via: <https://doi.org/10.17605/OSF.IO/4NVPU>.

674

675 **Acknowledgement**

676 We thank Rune Kristian Lundedal Nielsen, Sean Thomas, Eva Lievens for helpful
677 comments on previous drafts and members of the Gam(e)(a)ble project for their
678 continued support.

679

680 **Author Contribution Statement**

681 **LYX:** Conceptualisation; Investigation; Writing – Original Draft Preparation; Writing
682 – Review & Editing

683 **PD:** Conceptualisation; Investigation; Writing – Original Draft Preparation; Writing
684 – Review & Editing

685

686 **Author Disclosure Statement: Conflict of Interest**

687 L.Y.X. is supported by a PhD Fellowship funded by the IT University of Copenhagen
688 (IT-Universitetet i København), which is publicly funded by the Kingdom of
689 Denmark (Kongeriget Danmark). L.Y.X. was employed by LiveMe, then a subsidiary
690 of Cheetah Mobile (NYSE:CMCM), as an in-house counsel intern from July to
691 August 2019 in Beijing, People’s Republic of China. L.Y.X. was not involved with the
692 monetisation of video games by Cheetah Mobile or its subsidiaries. L.Y.X. undertook
693 a brief period of voluntary work experience at Wiggin LLP (Solicitors Regulation
694 Authority (SRA) number: 420659) in London, England in August 2022. L.Y.X. has
695 contributed and continues to contribute to research projects that were enabled by
696 data access provided by the video game industry, specifically Unity Technologies
697 (NYSE:U) (October 2022 – Present). L.Y.X. has met and discussed policy, regulation,
698 and enforcement with the Belgian Gaming Commission [Belgische
699 Kansspelcommissie] (June 2022 & February 2023), the Danish Competition and
700 Consumer Authority [Konkurrence- og Forbrugerstyrelsen] (August 2022), the
701 Department for Digital, Culture, Media and Sport (DCMS) of the UK Government
702 (August 2022), PEGI (Pan-European Game Information) (January & March 2023), a
703 member of the European Parliament (February 2023), the US Federal Trade
704 Commission (February 2023), the Finnish Gambling Administration at the National

705 Police Board [Poliisihallituksen arpajaishallinto / Polisstyrelsens lotteriförvaltning]
706 (March 2023), the Danish Gambling Authority [Spillemyndigheden] (April 2023), the
707 Netherlands Authority for Consumers and Markets [Autoriteit Consument & Markt]
708 (May & June 2023), and the Swedish Gambling Authority [Spelinspektionen] (June
709 2023). L.Y.X. has been invited to provide advice to the DCMS on the technical
710 working group for loot boxes and the Video Games Research Framework. L.Y.X. was
711 the recipient of two AFSG (Academic Forum for the Study of Gambling)
712 Postgraduate Research Support Grants that were derived from ‘regulatory
713 settlements applied for socially responsible purposes’ received by the UK Gambling
714 Commission and administered by Gambling Research Exchange Ontario (GREO)
715 (March 2022 & January 2023). L.Y.X. has accepted funding to publish academic
716 papers open access from GREO that was received by the UK Gambling Commission
717 as above (October, November, & December 2022). L.Y.X. has accepted conference
718 travel and attendance grants from the Socio-Legal Studies Association (February
719 2022 & February 2023); the Current Advances in Gambling Research Conference
720 Organising Committee with support from GREO (February 2022); the International
721 Relations Office of The Jagiellonian University (Uniwersytet Jagielloński), the Polish
722 National Agency for Academic Exchange (NAWA; Narodowa Agencja Wymiany
723 Akademickiej), and the Republic of Poland (Rzeczpospolita Polska) with co-
724 financing from the European Social Fund of the European Commission of the
725 European Union under the Knowledge Education Development Operational
726 Programme (May 2022); the Society for the Study of Addiction (November 2022 &
727 March 2023); and the organisers of the 13th Nordic SNSUS (Stiftelsen Nordiska
728 Sällskapet för Upplysning om Spelberoende; the Nordic Society Foundation for
729 Information about Problem Gambling) Conference, which received gambling
730 industry sponsorship (January 2023). L.Y.X. has received an honorarium from the
731 Center for Ludomani for contributing a parent guide about a mobile game for
732 Tjekspillet.dk, which is funded by the Danish Ministry of Health’s gambling
733 addiction pool (Sundhedsministeriets Ludomanipulje) (March 2023). The up-to-date
734 version of L.Y.X.’s conflict of interest statement is available via:
735 <https://sites.google.com/view/leon-xiao/about/conflict-of-interest>. P.D. is
736 supported by a PhD fellowship awarded by Ghent University (Universiteit Gent)
737 and funded by the Flemish FWO (Fonds voor Wetenschappelijk Onderzoek –
738 Vlaanderen [Research Foundation – Flanders]) Gam(e)(a)ble Project.
739

740 **Funding Sources**

741 IT University of Copenhagen (IT-Universitetet i København)

742 Ghent University (Universiteit Gent)

743 **References**

- 744 2K Games, 'Statement Netherlands' (2K Games Official Website, 2018)
745 <<https://www.2k.com/myteaminfo/nl/>> accessed 12 March 2021
- 746 Adriaansens M, 'Letter from Micky Adriaansens to the President of the House of
747 Representatives, Re Nederlandse Consumentenagenda [Dutch Consumer Agenda]'
748 (28 June 2023)
749 <https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2023Z12262&did=2023D29134> accessed 5 July 2023
- 751 Afdeling Bestuursrechtspraak Raad van State [Administrative Jurisdiction Division
752 of the Council of State] (The Netherlands), 'Uitspraak [Ruling] 202005769/1/A3,
753 ECLI:NL:RVS:2022:690 (9 March 2022)' (9 March 2022)
754 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2022:690>>
755 accessed 6 June 2023
- 756 Baeck J and Claeys I, 'Restitution of Money Spent on Loot Boxes in Video Games?'
757 (2021) 41 Computer Law & Security Review 105566
- 758 Belgische Kansspelcommissie [Belgian Gaming Commission], 'Onderzoeksrapport
759 loot boxen [Research Report on Loot Boxes]' (2018)
760 <https://web.archive.org/web/20200414184710/https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-final-publicatie.pdf> accessed 9 July 2023
- 763 Bontenbal H and others, 'Motie van het lid Bontenbal c.s. over loot boxes in
764 videogames ook in Nederland verbieden [Motion by members Bontenbal et al. on
765 banning loot boxes in video games in the Netherlands as well]' (30 June 2022)
766 <<https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2022Z13703&did=2022D28235>> accessed 16 July 2022
- 768 Brooks GA and Clark L, 'The Gamblers of the Future? Migration from Loot Boxes to
769 Gambling in a Longitudinal Study of Young Adults' (2022) 141 Computers in
770 Human Behavior 107605
- 771 Close J and others, 'Secondary Analysis of Loot Box Data: Are High-Spending
772 "Whales" Wealthy Gamers or Problem Gamblers?' (2021) 117 Addictive Behaviors
773 106851
- 774 Dealessandri M, 'Six Political Parties Campaign for Loot Boxes Ban in the
775 Netherlands' (*GamesIndustry.biz*, 4 July 2022)
776 <<https://www.gamesindustry.biz/articles/2022-07-04-six-political-parties-campaign-for-loot-boxes-ban-in-the-netherlands>> accessed 18 July 2022
- 778 Declerck P and Feci N, 'Mapping and Analysis of the Current Regulatory
779 Framework on Gambling(-like) Elements in Video Games – a Report in the
780 Framework of the "Gam(e)(a)Ble" Research Project" (2022)
781 <https://web.archive.org/web/20220726133203/https://www.gameable.info/_files/ugd/7f91ff_0b51d9c313db43729fe6150ec671219a.pdf> accessed 26 July 2022
- 783 Department for Digital, Culture, Media & Sport (UK), 'Loot Boxes in Video Games:
784 Call for Evidence' (September 2020)

785 <<https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/loot-boxes-in-video-games-call-for-evidence>> accessed 6 June 2023
786

787 —, ‘Government Response to the Call for Evidence on Loot Boxes in Video Games’
788 (GOV.UK, 17 July 2022) <[https://www.gov.uk/government/consultations/loot-](https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-for-evidence-on-loot-boxes-in-video-games)
789 [boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-](https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-for-evidence-on-loot-boxes-in-video-games)
790 [for-evidence-on-loot-boxes-in-video-games](https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence/outcome/government-response-to-the-call-for-evidence-on-loot-boxes-in-video-games)> accessed 18 July 2023

791 Derrington S, Star S and Kelly SJ, ‘The Case for Uniform Loot Box Regulation: A
792 New Classification Typology and Reform Agenda’ (2021) 46 *Journal of Gambling*
793 *Issues* 302

794 Digital, Culture, Media and Sport Committee of the House of Commons (UK),
795 ‘Immersive and Addictive Technologies: Fifteenth Report of Session 2017–19’ (2019)
796 HC 1846
797 <[https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1846/184](https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1846/1846.pdf)
798 [6.pdf](https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1846/1846.pdf)> accessed 18 July 2023

799 Dirección General de Ordenación del Juego [Directorate General for the Regulation
800 of Gambling], ‘Proceso Participativo Sobre Los Mecanismos Aleatorios de
801 Recompensa (Cajas Botín) [Participatory Process on Random Reward Mechanisms
802 (Loot Boxes)]’ (19 February 2021) <[https://www.ordenacionjuego.es/en/Noticia-](https://www.ordenacionjuego.es/en/Noticia-Cajas-Botin)
803 [Cajas-Botin](https://www.ordenacionjuego.es/en/Noticia-Cajas-Botin)> accessed 21 March 2021

804 Drummond A and others, ‘Why Loot Boxes Could Be Regulated as Gambling’ (2020)
805 4 *Nature Human Behaviour* 986

806 Drummond A and Sauer JD, ‘Video Game Loot Boxes Are Psychologically Akin to
807 Gambling’ (2018) 2 *Nature Human Behaviour* 530

808 Electronic Arts, ‘Notice of 2021 Annual Meeting and Proxy Statement’ (26 May 2021)
809 <[https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-](https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-(2021).pdf)
810 [2021\).pdf](https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-(2021).pdf)> accessed 27 September 2021

811 ‘Electronic Arts Inc & Electronic Arts Swiss Sàrl v Kansspelautoriteit (2020)
812 Rechtbank Den Haag [District Court of The Hague]’ (15 October 2020)
813 <[https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:104](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:10428)
814 [28](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:10428)> accessed 19 July 2023

815 Entertainment Software Rating Board (ESRB), ‘Introducing a New Interactive
816 Element: In-Game Purchases (Includes Random Items)’ (*ESRB Official Website*, 13
817 April 2020) <[https://www.esrb.org/blog/in-game-purchases-includes-random-](https://www.esrb.org/blog/in-game-purchases-includes-random-items/)
818 [items/](https://www.esrb.org/blog/in-game-purchases-includes-random-items/)> accessed 19 July 2023

819 —, ‘Ratings Process’ (*ESRB Official Website*, 2023)
820 <<https://www.esrb.org/ratings/ratings-process/>> accessed 16 January 2023

821 Freire H, ‘Projeto de Lei N° 4148, de 2019 [Chamber Bill No 4148 of 2019] (Brazil)’ (18
822 July 2019)
823 <[https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=22](https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2212564)
824 [12564](https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2212564)> accessed 6 June 2023

- 825 Gameswirtschaft, 'Rechtskräftig: FIFA-Lootboxen Sind Illegales Glücksspiel
826 (Update) [Legal: FIFA Loot Boxes Are Illegal Gambling (Update)]'
827 (*GamesWirtschaft.de*, 5 April 2023)
828 <[https://www.gameswirtschaft.de/wirtschaft/fifa-lootboxen-sony-klage-
829 gluecksspiel-oesterreich-040423/](https://www.gameswirtschaft.de/wirtschaft/fifa-lootboxen-sony-klage-gluecksspiel-oesterreich-040423/)> accessed 7 July 2023
- 830 Garea SS and others, 'Meta-Analysis of the Relationship between Problem
831 Gambling, Excessive Gaming and Loot Box Spending' (2021) 21 *International
832 Gambling Studies* 460
- 833 González-Cabrera J and others, 'Loot Box Purchases and Their Relationship with
834 Internet Gaming Disorder and Online Gambling Disorder in Adolescents: A
835 Prospective Study' (2023) 143 *Computers in Human Behavior* 107685
- 836 Honer P, 'Limiting the Loot Box: Overview and Difficulties of a Common EU
837 Response' (2021) 4 *Interactive Entertainment Law Review* 63
- 838 Kansspelautoriteit [The Netherlands Gambling Authority], 'Onderzoek naar loot
839 boxes: Een buit of een last? [Study into Loot Boxes: A Treasure or a Burden?]' (2018)
840 <[https://web.archive.org/web/20190503232356/https://kansspelautoriteit.nl/publ
841 ish/library/6/onderzoek_naar_loot_boxes_-_een_buit_of_een_last_-_nl.pdf](https://web.archive.org/web/20190503232356/https://kansspelautoriteit.nl/publication/library/6/onderzoek_naar_loot_boxes_-_een_buit_of_een_last_-_nl.pdf)>
842 accessed 19 July 2023
- 843 —, 'Imposition of an Order Subject to a Penalty on Electronic Arts for FIFA Video
844 Game' (29 October 2020)
845 <[https://web.archive.org/web/20201127222346/https://kansspelautoriteit.nl/nieu
846 ws/nieuwsberichten/2020/oktober/imposition-an-order/](https://web.archive.org/web/20201127222346/https://kansspelautoriteit.nl/nieuws/nieuwsberichten/2020/oktober/imposition-an-order/)> accessed 19 July 2023
- 847 Kati A and others, 'Free-to-Play Games: Professionals' Perspectives', *DiGRA Nordic
848 2014: Proceedings of the 2014 International DiGRA Nordic Conference* (DiGRA 2014)
849 <[http://www.digra.org/wp-content/uploads/digital-
850 library/nordicdigra2014_submission_8.pdf](http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014_submission_8.pdf)>
- 851 Lipton MD, Lazarus MC and Weber KJ, 'Games of Skill and Chance in Canada'
852 (2005) 9 *Gaming Law Review* 10
- 853 McCaffrey M, 'A Cautious Approach to Public Policy and Loot Box Regulation'
854 (2020) 102 *Addictive Behaviors* 106136
- 855 Ministerio de Consumo [Ministry of Consumer Affairs] (Spain), 'Anteproyecto de
856 Ley Por El Que Se Regulan Los Mecanismos Aleatorios de Recompensa Asociados a
857 Productos de Software Interactivo de Ocio [Consultation on the Bill of Law That
858 Regulates Random Reward Mechanisms Associated with Interactive Entertainment
859 Software Products]' (1 July 2022)
860 <[https://www.consumo.gob.es/sites/consumo.gob.es/files/BORRADOR%20APL
861 %20Y%20MAIN%20MECANISMOS%20ALEATORIOS%20RECOMPENSA%200107
862 22.pdf](https://www.consumo.gob.es/sites/consumo.gob.es/files/BORRADOR%20APL%20Y%20MAIN%20MECANISMOS%20ALEATORIOS%20RECOMPENSA%20010722.pdf)> accessed 5 July 2022
- 863 Ministry of Home Affairs (Singapore), 'Public Consultation on Proposed
864 Amendments to Laws Governing Gambling Activities' (12 July 2021)
865 <[https://web.archive.org/web/20210712113340/https://www.mha.gov.sg/docs/d
866 efault-source/media-room-doc/public-consultation-on-proposed-amendments-to-
867 laws-governing-gambling-activities.pdf](https://web.archive.org/web/20210712113340/https://www.mha.gov.sg/docs/default-source/media-room-doc/public-consultation-on-proposed-amendments-to-laws-governing-gambling-activities.pdf)> accessed 25 July 2021

- 868 Moshirnia A, 'Precious and Worthless: A Comparative Perspective on Loot Boxes
869 and Gambling' (2018) 20 *Minnesota Journal of Law, Science & Technology* 77
- 870 Neely EL, 'Come for the Game, Stay for the Cash Grab: The Ethics of Loot Boxes,
871 Microtransactions, and Freemium Games' [2019] *Games and Culture*
872 1555412019887658
- 873 Nicklin LL and others, "'It's the Attraction of Winning That Draws You in"—A
874 Qualitative Investigation of Reasons and Facilitators for Videogame Loot Box
875 Engagement in UK Gamers' (2021) 10 *Journal of Clinical Medicine* 2103
- 876 Paavilainen J and others, 'Social Network Games: Players' Perspectives' (2013) 44
877 *Simulation & Gaming* 794
- 878 Pan European Game Information (PEGI), 'PEGI Introduces Notice To Inform About
879 Presence of Paid Random Items' (*PEGI Official Website*, 13 April 2020)
880 <<https://pegi.info/news/pegi-introduces-feature-notice>> accessed 18 July 2023
- 881 —, 'How We Rate Games' (*PEGI Official Website*, 2023)
882 <<https://pegi.info/page/how-we-rate-games>> accessed 16 January 2023
- 883 Parkin S, 'Who Spilled Hot Coffee?' (*Eurogamer*, 2 December 2012)
884 <<https://www.eurogamer.net/articles/2012-11-30-who-spilled-hot-coffee>>
885 accessed 15 March 2022
- 886 Public Information Service, Government of the Netherlands, 'Email Sent on Behalf of
887 the Dutch Government to the Author, Re: EM2499804 [Official Confirmation A Loot
888 Box Ban Is Being Pursued]'
- 889 Schwiddessen S and Karius P, 'Watch Your Loot Boxes! – Recent Developments and
890 Legal Assessment in Selected Key Jurisdictions from a Gambling Law Perspective'
891 (2018) 1 *Interactive Entertainment Law Review* 17
- 892 Select Committee on the Social and Economic Impact of the Gambling Industry of
893 the House of Lords (UK), 'Report of Session 2019–21: Gambling Harm— Time for
894 Action' (2020) HL 79
895 <<https://publications.parliament.uk/pa/ld5801/ldselect/ldgamb/79/79.pdf>>
896 accessed 18 July 2023
- 897 Spicer SG and others, 'Loot Boxes, Problem Gambling and Problem Video Gaming:
898 A Systematic Review and Meta-Synthesis' [2021] *New Media & Society*
899 14614448211027176
- 900 Spillemyndigheden [Danish Gambling Authority], 'Statement about Loot Boxes /
901 Loot Crates' (29 November 2017)
902 <[https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-
903 crates](https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates)> accessed 3 March 2021
- 904 Thorsen T, 'San Andreas Rated AO, Take-Two Suspends Production' (*GameSpot*, 14
905 December 2005) <[https://www.gamespot.com/articles/san-andreas-rated-ao-take-
906 two-suspends-production/1100-6129500/](https://www.gamespot.com/articles/san-andreas-rated-ao-take-two-suspends-production/1100-6129500/)> accessed 15 March 2022
- 907 UK Gambling Commission, 'Virtual Currencies, ESports and Social Gaming —
908 Position Paper' (2017)

- 909 <<https://web.archive.org/web/20210111075348/http://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>> accessed
910 10 March 2022
911
- 912 —, *Declaration of Gambling Regulators on Their Concerns Related to the Blurring of*
913 *Lines Between Gambling and Gaming* (2018)
914 <<https://web.archive.org/web/20210528215648/http://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>> accessed
915 29 June 2021
916
- 917 Vieira A, 'Projeto de Lei N° 2628, de 2022 [Senate Bill No 2628 of 2022] (Brazil)' (18
918 October 2022) <<https://www25.senado.leg.br/web/atividade/materias/-/materia/154901>> accessed 6 June 2023
919
- 920 Wardle H and Tipping S, 'The Relationship between Problematic Gambling Severity
921 and Engagement with Gambling Products: Longitudinal Analysis of the Emerging
922 Adults Gambling Survey' *n/a Addiction* <<https://doi.org/10.1111/add.16125>>
923 accessed 10 January 2023
- 924 Xiao LY, 'Regulating Loot Boxes as Gambling? Towards a Combined Legal and Self-
925 Regulatory Consumer Protection Approach' (2021) 4 *Interactive Entertainment Law*
926 *Review* 27
- 927 —, 'Loot Boxes' in Paweł Grabarczyk and others (eds), *Encyclopedia of Ludic Terms*
928 (IT University of Copenhagen 2022) <<https://eolt.org/articles/loot-boxes>> accessed
929 19 July 2023
- 930 —, 'Which Implementations of Loot Boxes Constitute Gambling? A UK Legal
931 Perspective on the Potential Harms of Random Reward Mechanisms' (2022) 20
932 *International Journal of Mental Health and Addiction* 437
- 933 —, 'Loot Boxes Are Good (or at Least Not That Bad)...? Arguing against a Ban'
934 (OSF Preprints, 23 June 2022) <<https://osf.io/eztvd/>> accessed 23 June 2022
- 935 —, 'Loot Box State of Play 2022: Regulatory and Policy Research Developments'
936 (*GamesIndustry.biz*, 13 December 2022) <<https://www.gamesindustry.biz/loot-box-state-of-play-2022-regulatory-and-policy-research-developments>> accessed 11
937 January 2023
938
- 939 —, 'Breaking Ban: Belgium's Ineffective Gambling Law Regulation of Video Game
940 Loot Boxes' (2023) 9 *Collabra: Psychology Article* 57641
- 941 —, 'Loot Box State of Play 2023: Law, Regulation, Policy, and Enforcement
942 Around the World' (OSF Preprints, 19 July 2023) <<https://osf.io/q2yv6/>> accessed
943 20 July 2023
- 944 —, 'Gaming the System: Suboptimal Compliance with Loot Box Probability
945 Disclosure Regulations in China' (2021) *Advance Online Publication Behavioural*
946 *Public Policy* 1
- 947 —, 'Loot Boxes, Gambling-Like Mechanics in Video Games' in Newton Lee (ed),
948 *Encyclopedia of Computer Graphics and Games* (Springer 2021)
949 <https://doi.org/10.1007/978-3-319-08234-9_459-1> accessed 3 July 2022

- 950 —, 'Regulating Gambling-like Video Game Loot Boxes: A Public Health
951 Framework Comparing Industry Self-Regulation, Existing National Legal
952 Approaches, and Other Potential Approaches' (2022) 9 *Current Addiction Reports*
953 163
- 954 Yin-Poole W, 'FIFA Player Uses GDPR to Find out Everything EA Has on Him,
955 Realises He's Spent over \$10,000 in Two Years on Ultimate Team' (*Eurogamer*, 25 July
956 2018) <[https://www.eurogamer.net/articles/2018-07-23-fifa-player-uses-gdpr-to-
957 find-out-everything-ea-has-on-him-realises-hes-spent-over-usd10-000-in-two-years-
958 on-ultimate-team](https://www.eurogamer.net/articles/2018-07-23-fifa-player-uses-gdpr-to-find-out-everything-ea-has-on-him-realises-hes-spent-over-usd10-000-in-two-years-on-ultimate-team)> accessed 3 August 2020
- 959 —, 'Putting EA's Claim "You Can Acquire All Items without Spending Money" in
960 FIFA Ultimate Team to the Test' (*Eurogamer*, 22 March 2021)
961 <[https://www.eurogamer.net/putting-eas-claim-you-can-acquire-all-items-
962 without-spending-money-in-fifa-ultimate-team-to-the-test](https://www.eurogamer.net/putting-eas-claim-you-can-acquire-all-items-without-spending-money-in-fifa-ultimate-team-to-the-test)> accessed 19 April 2022
- 963 Zendle D and others, 'The Prevalence of Loot Boxes in Mobile and Desktop Games'
964 (2020) 115 *Addiction* 1768
- 965 Zendle D and Cairns P, 'Video Game Loot Boxes Are Linked to Problem Gambling:
966 Results of a Large-Scale Survey' (2018) 13 *PLOS ONE* e0206767
- 967