Limiting the loot box: overview and difficulties of a common EU response

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Abstract: 2019 has seen loot boxes remain a prime target of concern for regulators, legislators and industry bodies alike, yet despite the work carried out in the Gambling Regulators European Forum in this regard, there have been no substantial efforts to develop a common EU response to date. This article aims to argue that such inaction at a European level is unsatisfactory from both the perspective of the European consumer and games companies alike, while highlighting that any broad regulatory attempts to limit loot boxes to date should be viewed with scepticism.

Having examined the three main approaches that could form the basis of a common EU response (gambling law, self-regulation and consumer law) that could deal with some of the issues that national fragmentation in the field have presented to date, it is submitted that a hybrid system, which draws together principles from these three main approaches, can strike the right level of balance between protecting innovative monetization systems for developers, whilst safeguarding consumers from practices deemed to be ‘predatory’.

Keywords: loot boxes, gambling law, consumer law, monetization, EU law, video games, regulatory models, meta-regulation

1. Introduction

Over the last 10‒15 years there has been a gradual retreat from a framework of monetization that promoted video games as a good, towards a model of monetization that views video games as a service.¹ This has brought about a bevy of new and increasingly complex ways to offset the rising costs of development for games, central to which has been the microtransaction.² The focus on this article will be on the type of microtransaction that has attracted more state responses than any other, the loot box.

There is some contention as to how exactly the phrase ‘loot box’ should be defined, or whether it is even possible to have an all-encompassing, legally effective definition in the first place,³ but for now the working definition used will be ‘an in-game reward system that can be purchased repeatedly with real money to obtain a random selection of virtual items’.⁴ In certain games, it may be the case that loot boxes can also be earned through gameplay. The focus of the article will remain on monetization practices whereby real money is exchanged either for loot boxes directly, or some type of in game currency which may be used to purchase them.

It has become clear from the responses of both states and consumer groups that the use of loot boxes as a form of video game monetization could be ethically questionable, to the point that it has been branded as a type of ‘predatory monetization’.⁵ This typically stems from comparisons drawn between mechanisms and techniques implemented in the sale of loot boxes and those already implemented as a part of traditional gambling services.⁶ In particular, attention has been drawn to the similarities between loot box and slot machines, be

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4 Aaron Drummond and James D. Sauer ‘Video Game Loot Boxes are Psychologically Akin to Gambling’ (2018) Nature Human Behaviour, 1, 530.
6 See e.g. the comments of Martin Heydon TD, Dáil Éireann debate - Wednesday, 30 January 2019, Other Questions, Gambling Sector.
it in terms of their visual similarity in pay-out screens,\(^7\) the requirement of a stake of value to play,\(^8\) the lack of skill required to attract pay-out, or the prevalence of elements of random chance.\(^9\)

Much of the literature to date focuses on addressing the issue of loot boxes from a United States perspective, with other works focusing on a single jurisdictional response. Here, it is intended to give a previously unaddressed take on the issue, the development of a common EU response.\(^10\)

Following the somewhat contradictory decisions of various state actors in Belgium,\(^11\) the Netherlands,\(^12\) the UK,\(^13\) Sweden,\(^14\) Germany\(^15\) and France,\(^16\) it has become clear that the industry must put forward workable solutions to deal with the complaints levied against them if they wish to avoid blanket bans on the types of monetization schemes they can implement.

This article aims to highlight that there has been no one approach to the issue to date has been fully satisfactory from either an industry or consumer standpoint, and that a hybrid approach is needed to balance the interests of these two groups.

The purpose of this article is to resolve two basic propositions, namely that:

1. The outright banning of emergent and disruptive monetization techniques will place an unjust burden on games companies to find alternative sources to offset the rising cost of development.\(^17\)

2. The current measures taken by the industry to date in self-regulation do not go far enough in ensuring that monetization techniques do not prey on vulnerable categories of consumers.

In broad terms this article will aim to set out the principles that will underpin this regulatory system, the scope of its content, the remedies that should be available under such a system and finally the enforcement mechanisms of said system.

Part 2 of this article will set out the various competing interests that surround the issue of predatory monetization in the EU.

Part 3 of this article will outline the various jurisdictional approaches to loot boxes to date, tracking the legislative, regulatory, political and judicial variations of said approaches. Particular attention will be paid to the classification of loot boxes, as their definition has been one of the more contentious issues in the debates to date.

Part 4 will analyse three of the most likely responses to deal with loot boxes in an EU wide context namely:

- Classifying loot boxes as a form of gambling and allowing member states to regulate them in accordance with national gambling legislation.
- Dealing with loot boxes in the context of the broader EU revision of consumer rights in relation to digital content.
- A laissez faire approach that relies on industry-imposed standards similar to those already used in age rating classifications.

Part 5 will draw out the optimal aspects of each of these approaches and combine them with the principles of modern EU meta-regulation in order to develop a blueprint for a coherent approach to loot boxes at the EU level.

### 2. Limiting the loot box: who does it serve and who is affected?

Before drawing up what key principles and practices should underpin a proposed regulatory approach to the issue of loot boxes, it is important to first identify and assess the various groups that are served and imposed upon by the presence of such legislation.
2.1. The consumer

Turning first to who exactly is served by the introduction of legislation limiting access to or the banning of loot boxes, much of the relevant literature to date focuses on the placement of loot boxes within existing gambling frameworks, rather than as an independent issue.18 Due to this type of comparative framing, the main group focused on in regards to protection are consumers. Consumers can in turn be divided into two sub-groups, those at risk of problem gambling, and those who are not. Furthermore, within the category of those who are at risk of problem gambling there is another division between those who have attained the age of majority to legally gamble, and those who have not.

While gambling may be a good comparator for what trends and practices can prove exploitative to the types of people who may be at risk of problem gambling, one of the key issues that distinguishes traditional forms of gambling and loot boxes is that traditional gambling is marketed towards those that have attained the age of majority, while loot boxes may be present in games that cater to all ages, or target minors in particular. For instance, in the 2016–2017 period, 22 major games that were deemed to be appropriate for those who were 17 and under were found to contain loot boxes.19 The market effect of these games was not small either in that 11 of the 22 games studied containing loot boxes were among the top 10 selling games of their respective years.20

The problem here is that the limited empirical evidence gathered to date has shown there is a not insignificant link between loot boxes and problem gambling,21 particularly in adolescents.22 This should be qualified by the fact that the data does not yet reveal if loot boxes act as a gateway to traditional forms of gambling by normalizing the economic risk associated with gambling, or if a willingness to spend money on loot boxes is instead symptomatic of problem gambling.23

Furthermore, as it has proven rather difficult to get data sets from games companies themselves, it may be that this research is too narrow in its sample sizes to draw a full picture of the psychological effects loot boxes have on the gaming industry.24 However, despite the limitations on this type of evidence, it, in combination with anecdotal testimony,25 has in turn led to the initiation of investigations into loot boxes in the previously mentioned countries.

2.2. Games companies

Turning then to the other main group, for the purposes of this article, in particular to demonstrate how loot boxes may fit as a consumer protection issue, it is important to distinguish between games companies who use loot boxes as a form of microtransaction and those who do not. Unlike with national authorities and consumers, there is a somewhat more divided opinion amongst developers as to whether they are a necessity or a drain on the industry.26
So why have games companies turned towards games as a service, and in particular allegedly predatory forms of monetization such as loot boxes? In the industry it is generally accepted that there are two main reasons that when combined lead to the transition away from games as a good, to games as a service. The first is rising development costs, which instead of increasing in a linear fashion, have for the most part increased exponentially, with an average cost per developer equalling circa $10,000 per month. This can be seen most clearly in what are referred to as AAA (triple A) games, whereby the most economically successful of these games often has a budget comparable to major film productions.

This increase in cost can be boiled down to a few reasons, including rising complexity in coding, increased licensing fees, anti-piracy installation and increased marketing due to an overabundance of products in the market. Secondly, alongside this exponential increase in rising costs is the fact that game prices have remained largely stable, with only slight increases in the last 30 years or so. In effect this has translated to consumer purchasing power almost doubling over this time period. In real terms this means it is no longer as viable as it once was to produce a game without a scheme for continued monetization post launch, and this trend looks to continue into the next generation of console games. Such a trend is further supported by the commercial incentive for games companies to maintain long term brand recognition, which may inter alia necessitate a shift towards more long form monetization strategies.

Some have characterized the largest of these types of games as AAA+. The economic effect of loot boxes is rather hard to estimate, but recent figures suggest that £23 billion was spent on them in 2018, and that this figure is predicted to rise to £39 billion by 2022. Within individual games themselves, loot boxes have also proven to be a valuable source of revenue, such as in the popular first person shooter Overwatch (Blizzard Entertainment, 2015), wherein loot boxes likely made up a large part of over $1 billion generated through in-game purchases. Another popular example of this comes in the form of Ultimate Team packs found in various EA sports titles, where EA reported generating $650 million through the sale of these popular loot boxes in one year alone.

2.3. Industry bodies

When it comes to the self-regulatory bodies of games companies, PEGI in Europe, and the ESRB in the US, there is a clear divide in their political response to date. PEGI have opted for a more politically neutral or governmentally referential stance stating that it is not their role to define what constitutes gambling, but are willing to adjust their self-regulating criteria in the event that national authorities decide that it is. The ESRB have taken the opposite approach, emphatically rejecting the view that loot boxes constitute gambling.

The other notable international organization within the game development community, the IGDA has gone

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31 Koster (fn 17).
37 Pan European Game Information.
38 Entertainment Software Rating Board.
further than either of these two bodies, \(^42\) with their executive director calling for the industry to:

1. Affirm an industry commitment to not market loot boxes to children.
2. Clearly disclose the odds of different rewards when purchasing loot boxes.
3. Launch a coordinated education campaign that boosts awareness of the parental controls that are available to appropriately limit how players engage with game.\(^43\)

Interestingly enough, the EGDF, \(^44\) which fills a similar role to the IGDA but only for European developers, are keen to emphasize that there is no formal definition of loot boxes, and that as such any assumptions concerning all loot boxes should be avoided. They also stress that while there have been actions taken to limit the use of loot boxes in certain jurisdictions, none of these were on a judicial basis, so any action taken in limiting them is not desirable.\(^45\) Their approach may be underpinned by a want for much stricter legal certainty about how exactly a loot box can or should be defined, as in absence of such definitions the tenability of any type of monetization scheme that involves random elements of chance may be called into question.

Having therefore established that the loot box debate involves the weighing up of the needs and opinions of various groups in the community, from developers, to consumer groups, to trade associations and academics, how exactly have state authorities responded to the issue?

3. Limiting the loot box: selected jurisdictional approaches to date

Within the EU there exists a wide variety of responses to loot boxes, be they administrative or political. A full outline of these responses, as seen in Table 1 of the appendix, demonstrates that most approaches are generally characterized by either inaction, or a minimal effort to legislate, regulate or investigate if loot boxes should be controlled in one form or another. To that point this Part will mainly focus on the EU member states which have taken action, along with an overview of the most active legislative responder to the issue, the US.

3.1. France

The French approach framed loot boxes as a gambling issue and tested the legality of loot box schemes through the four elements required for an activity to fall within said framework. This legal framework is made up of Article 2 of the law of the 12 May 2010 as amended by the Law of the 17 March 2014, and its relationship with Articles L. 322-2 and L. 322-2-1 of the Internal Security Code. Together, these Articles create four elements that signify if a particular activity will constitute gambling: there must be the existence of a public offering; the presence of chance; an expectation of a gain; and some form of player participation involving some kind of disbursement or costs.\(^46\)

The ARJEL in this case found that loot boxes constitute three of the four elements required for an activity to be considered gambling, (1, 2 and 4) and may meet the requirements for element 3 if the publisher allows for some mechanism for the contents of the loot box to be transferred into cash form outside of the game.\(^47\) The ARJEL did not explicitly say that this would constitute gambling, but that it was merely ‘questionable’ in its legality.\(^48\)

The regulatory framework for gambling in France relies much more on the stick than the carrot, so in the event that games companies were found to be operating a system of gambling to function through the mechanism of loot boxes, they could be criminally liable for up to three years in prison and €90,000 in fines.\(^49\)

This question of what penalties, if any, should be applied to bad faith actors in an EU approach to loot boxes will be dealt with later under Part 5.

3.2. Belgium

The issue of loot boxes was dealt with in Belgium through the release of a research report by the Secretariat of the Gaming Commission investigating to what extent the monetization schemes of four AAA games fell under the Gaming and Betting Act.\(^50\) Under Article 2(1) of the Act, a game of chance (which was chosen by the Commission as the closest comparator) is defined as

any game whereby a bet of any kind that is placed leads to the loss of this bet by at least one of the players, or a win of any

\(^42\) PEGI and the ESRB.
\(^46\) Rhadamès Killy and Jean-François Vilotte, ‘ARJEL’s Position on Loot Boxes’ (August 2018) Online Gambling Lawyer.
\(^48\) Ibid.
\(^49\) Ibid 19.
\(^50\) Naessens (fn 11).
kind for at least one of the players or organisers of the game, and whereby chance may even be a secondary element in the course of the game, indication of the winner or determination of the size of the winnings.\(^{51}\)

In the case of loot boxes, the Commission found that the opening of the boxes in and of itself constituted the game element,\(^{52}\) that the value of a bet was determined by a degree of usability by the bettor, hence loot boxes fell within the definition,\(^{53}\) that there was a real chance of wins and losses on the basis of this wager,\(^{54}\) and that chance is present in loot box monetization schemes through the use of subjective random number generators.\(^{55}\)

This approach, and particularly the discussion surrounding this notion of the value to a bettor, and whether this would be problematic in practice, will be discussed later in Part 5. Much like in the Netherlands, games companies, for the most part, were willing to block the purchase of loot boxes in their games with real money as a result of the findings of the study. The one exception, Electronic Arts, initially refused to comply on the grounds that they believed that the monetization techniques implemented in their games did not qualify as a form of gambling due to the lack of cash out options.\(^{56}\) They later reversed said decision on the foot of a threat of lawsuit from the Gambling Authority.\(^{57}\)

The Belgian approach to loot boxes matches that of France in that regard as under Chapter VII of the Betting and Gambling Act of 7 May 1999, games companies would be liable for criminal sanctions for implementing mechanisms for gambling in their games (without the requisite licenses) through the medium of loot boxes.

### 3.3. The Netherlands

Contrary to the approach taken in Belgium, the report of the Netherlands Gaming Authority found that a loot box monetization scheme could only be classified as gambling if the contents of the loot boxes could be transferred out of the game.\(^{58}\) This approach, which falls on whether a ‘market value’ can be ascribed to digital contents, rejected the Belgian idea of viewing the contents of loot boxes as valuable in and of themselves.\(^{59}\)

From a public policy perspective, this would encourage games companies to provide solely closed loop systems of monetization, which would not necessarily mean there would be a decline in problematic consumer spending. More data would be required on consumer spending patterns to quantify the percentage of consumers engaging with these types of monetization schemes for the purpose of winning money, and not the acquisition of items for in-game use. If the main concern for policy makers is the extent to which loot boxes act as a pathway towards other, more addictive, forms of gambling, then it seems hard to justify this approach on grounds other than legal as it would in effect render practices involving closed loop systems as unproblematic, regardless of their potential for incentivizing harmful consumer spending patterns.

The other noteworthy aspect of the study conducted by the NGA is that they classified the loot boxes studied as having a moderate to high potential to cause addiction, thus marking it as the first European governmental body to do so.\(^{60}\)

### 3.4. Ireland

Both under existing legislation,\(^{61}\) and the proposed Gambling Control Bill,\(^{62}\) the Irish government’s position had been that loot boxes do not constitute gambling. Instead, they have preferred to classify such types of in-game purchases as a type of e-commerce, and have stated that it is not the role of the Department of Justice to regulate the practice of games companies to offer in-game purchases.\(^{63}\) Their approach seems to hinge on the fact that they view a loot box as a purchase in and of itself, and not as an opportunity to receive a random selection of items, thus removing any element of chance from the transaction. This approach was earlier deemed

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\(^{51}\) Gaming and Betting Act of 7 May 1999, Article 2(1).

\(^{52}\) Naessens (fn 11) 10.

\(^{53}\) Ibid 11.

\(^{54}\) Ibid 12.

\(^{55}\) Ibid 13.


\(^{58}\) Netherlands Gaming Authority (fn 12) 2.

\(^{59}\) The NGA were not alone in this approach, as this is the one followed in Denmark as well. Spillemyndigheden, ‘Statement about loot boxes/loot crates’ (29 November 2017), available at: https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates (accessed 14 June 2021).

\(^{60}\) Netherlands Gaming Authority (fn 12) 9.

\(^{61}\) Gaming and Lotteries Act 1956, s 2.

\(^{62}\) Gambling Control Bill 2018, s 2.

'questionable' by the ARJEL when it was put forward to them by developers.\textsuperscript{64} It is unclear if this position would actually hold under the proposed reforms to the current gambling framework.\textsuperscript{65}

One of the consequences of the new definitions under the Gambling Control Bill is that under section 2 a game of chance can be defined as one in which the player participates and ‘is represented as involving an element of chance’.\textsuperscript{66} In practice this could mean that depending on the manner in which a developer advertises or explains loot boxes in game, they could set themselves up as having created a game of chance.

Additionally, unlike in the UK where a monetary reward is required for the activity to be classified as gaming, under the new bill a game of chance can be played for a monetary or ‘other form of reward’\textsuperscript{67} providing a much broader standard which may include loot boxes. It should be noted that at the time of writing this bill has lapsed since the dissolution of the 32nd Dáil, and so the chances of the bill being revived in its current form are uncertain.

3.5. United States

The US provides five varying approaches to loot box legislation to date, four at the state level (Washington,\textsuperscript{68} Hawaii,\textsuperscript{69} California\textsuperscript{70} and Minnesota\textsuperscript{71}) and one at the federal.\textsuperscript{72} In addition, the US provides one of the first examples of attempts at judicial regulation of loot boxes in the consumer sphere through the pursuance of a class action lawsuit.\textsuperscript{73}

The most minimalistic approach came from the state of Washington, whose legislation called for an investigation by the state gambling commission into four issues surrounding loot boxes, namely, do they fall within the state definition of gambling; do loot boxes belong in games and apps;\textsuperscript{74} whether minors and other categories of vulnerable people should have access to games that provide loot boxes; and the levels of transparency in odds of receiving a given item in a loot box.\textsuperscript{75} While no further legislative action was taken by state authorities, the gambling Commission became the first American entity to join an international effort to investigate the regulation of loot boxes.

The four remaining approaches are novel in their farming of loot boxes in that they are seen first and foremost as a consumer protection issue, and not one that falls strictly within a regulatory gambling framework.

The bill proposed in the state of California is the next least restrictive legislative approach taken in the US. The bill proposes that any video game manufacturer that sells their game in the state, and which has microtransactions included as a part of said game, must make it known on the box that the opportunity to purchase microtransactions is available in it. Failure to do so could result in a $1,000 fine per sale of a game in violation of this bill. Notably, the original bill applied only to physical boxes, meaning a potentially large cohort of games would not be caught by the bill as proposed.

The state legislatures of Minnesota and Hawaii go much further in their attempts to regulate the sale of games with loot boxes in them. The Minnesota bill bans the sale of games with loot boxes in them to those under the age of 18, and also places a ban on updating a game to include loot boxes unless they can prove that the game would not be available to those under the age of 18. Furthermore, games with loot boxes in them could only be sold to those over 18 if the following warning is included on the box in some form. ‘Warning: This game contains a gambling-like mechanism that may promote the development of a gambling disorder that increases the risk of harmful mental or physical health effects, and may expose the user to significant financial risk.’\textsuperscript{76} When it comes to digital distribution, such a warning must be acknowledged by the purchaser.

Hawaii, using the same definition of what constituted a loot box, sought to increase the age of this ban to those under the age of 21,\textsuperscript{77} along with mandatory disclosure of odds for the contents of loot boxes and a warning on the box similar to the one put forward in Minnesota.\textsuperscript{78}
In terms of digital distribution said warning must be prominently displayed to the purchaser at the time of purchase. The federal bill arguably goes the furthest in restricting the use of loot boxes in games in that it places a prohibition on the publication or distribution of minor orientated games which contain loot boxes, or introduce them into a game that is not aimed at minors via update if the publisher or distributor has constructive knowledge that any of the game’s users are under the age of 18.

While perhaps aligning with the sentiment in the IGDA’s call to stop the industry from marketing loot boxes to children, it is submitted that this bill in effect is the exact thing the industry was trying to avoid in their efforts to self-regulate. There are two particularly problematic elements of the bill that would represent a fundamental shift in the way games are monetized if passed, the definition of ‘minor-oriented’ and the introduction of a test of ‘constructive knowledge’.

Together these provisions would in effect place a ban on loot boxes not only in games that contain subject matter that is appealing to minors (such as all sports games), but any game which is marketed to adults that children might be interested in. Such a broad standard would essentially mean that any game that would not receive an Adults Only rating would be prohibited from including loot boxes.

While this may seem narrower than the blanket ban in countries such as Belgium, this approach is more fundamentally damaging to the industry in that it is taking an area that has traditionally worked well in in the context of self-regulatory age rating systems and suggested that it is not functional as it cannot take into account the fact that minors may get access to content not appropriate for them. This is particularly worrying as it in part absolves parents for a lack of vigilance as to what content their children are accessing, while asserting that it is the games companies’ fault for introducing such content in the first place, regardless of whom the content was actually aimed at.

4. Limiting the loot box: broad regulatory approaches and their difficulties

Having considered previously the responses of individual states to loot boxes we will turn now to a discussion of three broad regulatory frameworks that a common EU approach could be characterized by. The first of these approaches is what will be called the ‘baseline’ scenario, whereby loot boxes would be placed within the sphere of gambling legislation in each member state.

4.1. The ‘baseline’ scenario – tangible, state-led, but fractured

To date there has only been one international initiative to address the issue of loot boxes, which stemmed from a meeting in September of 2018 of the Gaming Regulators European Forum (GREF). The meeting ended with 19 regulators signing a Declaration of gambling regulators on their concerns related to the blurring of lines between gambling and gaming, with the aim of conducting a year-long study into any possible links between monetization practices such as loot boxes and problem gambling.

The GREF published the results of this year-long investigation on 2 October 2019 and ultimately held that the issue of whether loot boxes constituted gambling depended solely on how gambling was defined in national legislation. The only recommended actions were for national authorities to continue their dialogue with relevant stakeholders, and for increased transparency in odds disclosure for loot boxes from games companies.

Outside of the GREF, there are few EU wide mechanisms to help shape a common gambling policy. Historically, the EU gambling market, and particularly the online gambling market, is marked by a protectionist, volatile.
fragmentized regulatory framework,\textsuperscript{89} which is de­fer­en­tial to the member state\textsuperscript{80} and driven by sensi­tivi­ties over the prin­ci­ple of sub­si­da­ri­ty in the sec­tor.\textsuperscript{91} There ex­ists a co-ope­ra­tion agree­ment which ac­know­ledges that ‘Not­with­stand­ing diver­gent na­tional reg­u­la­tory frame­works, Mem­ber States share com­mon pub­lic pol­i­cy ob­jec­tives’.\textsuperscript{92}

Two of these ob­jec­tives, the pro­tec­tion of con­sumers, mi­nor­is and en­sured in­te­grity of the game, and the iden­ti­fi­ca­tion of ‘prac­tices in re­la­tion to player pro­tec­tion, tech­no­lo­gi­cal tools for ef­fective reg­u­la­tion and re­spon­sible gambling mea­sures’\textsuperscript{93} are cer­tainly re­le­vant to the dis­cus­sion of loot boxes, but the agree­ment, and the ob­jec­tives con­tained therein re­main non-bind­ing.\textsuperscript{94}

The re­sult of this reg­u­la­tory fram­e­menta­tion re­sults in dif­fi­cul­ties for con­sumers in par­ti­cu­lar in that many of the tradi­tion­al con­sumer pro­tec­tion di­rec­tives do not ap­ply in the gam­ing sphere.\textsuperscript{95} Eu­ro­pean Com­mis­sion ini­ti­a­tives, which sought to re­medy these lacu­nae through the is­sue­ance of rec­om­men­da­tions of what should be in­cluded in na­tion­al gam­bling legis­la­tion\textsuperscript{96} have largely gone unin­ple­mented.\textsuperscript{97}

In ad­di­tion to the fac­t that the mar­ket is frag­ment­ed and any ob­li­ga­tions be­tween reg­u­la­tors are non-bind­ing, ul­ti­liz­ing the gam­ing frame­work at a Eu­ro­pean lev­el is also prob­lem­atic from an en­force­ment per­spec­tive. In 2017, the Eu­ro­pean Com­mis­sion ef­fect­ively ac­know­ledged that it was no­t longer their role to be­come in­volved with the reg­u­la­tion of gam­ing in mem­ber states, cit­ing that com­plaints can be han­dled more ef­fectively in na­tion­al courts, and that na­tion­al reme­dies were more ap­propriate for con­sumers.\textsuperscript{98}

In one re­spect, the nar­ra­tive, from both an acade­mic and po­li­ti­cal sense, that places loot boxes within the gam­ing sphere could act as the largest ob­stacle to see­ing a com­mon EU re­g­u­la­tory re­sponse to the is­sue. Such en­tre­ch­ment could pro­ve prob­lem­atic to games com­pa­nies in that it could re­quire meet­ing up to 27 dif­fer­ent reg­u­la­tory schemes, dis­rupt­ing the na­ture of the sin­gle mar­ket\textsuperscript{99} while at the same time de­nying con­sumers rights en­acted under vari­ous con­sumer law di­rec­tives in so far as there may be a lack of reg­u­la­tory will­power in terms of en­force­ment from the Eu­ro­pean Com­mis­sion. It is there­fore sub­mit­ted that al­though pol­i­cy mak­ers may see gam­ing law as the most ac­cess­ible frame of ref­er­ence from which they should form the phi­lo­soph­i­cal un­derpin­ning of their ap­proach to re­gulat­ing loot boxes, it is far from ide­al.

This then begs the ques­tion, if not through gam­ing law, what oth­er broad re­g­u­la­tory ap­proaches can be taken? It is sub­mit­ted that to op­er­ate in a man­ner which al­lows for a com­mon EU re­sponse only two vi­a­ble op­tions re­main, self-reg­u­la­tion, and con­sumer law.

4.2. The self-regulatory approach – international, flexible, but unreliable

Turn­ing first then to self-reg­u­la­tion, one point in fa­vor of this type of re­g­u­la­tory ap­proach is that there already ex­ist com­mon Eu­ro­pean struc­tures whose pur­pose is to guide in­dustry pol­i­cy in re­la­tion to con­sumer pro­tec­tion and oth­er re­lated is­sues. In Eu­rope these take the for­m of the ISFE\textsuperscript{100} (a rep­re­sen­tative of a col­lec­tion of publish­ers and trade as­so­ci­a­tions) and PEGI\textsuperscript{101} (an or­gan­i­za­tion that sets the age ra­tions of games which was de­vel­oped by the ISFE).

The self-regu­la­tory ac­tions taken so far have chie­fly cen­tred around ed­u­ca­tion, through the intro­duc­tion of an in-app pur­chas­es label,\textsuperscript{102} and the pro­duc­tion of

\textsuperscript{89} Salvatore Casabona, ‘The EU’s online gambling regulatory approach and the crisis of legal modernity’ (2014) EU Centre in Singapore, Working Paper No. 19, 3.
\textsuperscript{91} Alan Littler, ‘The Regulation of Gambling at European Level. The Balance to be Found’ (2007) ERA Forum 8, 357.
\textsuperscript{92} ‘Cooperation Arrangement between the gambling regulatory authorities of the EEA Member States concerning online gambling service’ (last updated March 2019), available at: https://ec.europa.eu/docsroom/documents/44992 (accessed 14 June 2021).
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{99} Cerulli-Harms, Münsch, Thorun, Michaelsen and Hausemer (fn 23) 37.
\textsuperscript{100} Interactive Software Federation of Europe, available at: https://www.isfe.eu/ (accessed 14 June 2021).
\textsuperscript{102} PEGI, ‘PEGI announces new content descriptor: in-game purchases’ (30 August 2018).
guidelines for parental control measures in relation to ‘open loop’ systems of monetization, with a particular focus on skin betting.\textsuperscript{103} In addition to this, they have endorsed measures announced by the ESA\textsuperscript{104} at the FTC’s workshop investigating loot boxes\textsuperscript{105} for mandatory odds disclosure in loot boxes going forward.\textsuperscript{106}

This measure is certainly welcome, and had been consistently called for in the literature,\textsuperscript{107} but it is questionable as to whether this will have any real effect on spending\textsuperscript{108} or if consumers are rational enough to act on such information in the first place.\textsuperscript{109} Additionally, mandatory odd disclosure is relatively easy to work around depending on how the undertaking is worded,\textsuperscript{110} so ultimately the principle of good faith would govern more than any strict code of conduct.

Another issue with this is that as it currently stands there are no formal enforcement powers from either the ISFE or PEGI per se. Informally however, they have the potential to seriously impact the revenue generation of a game through three methods, media pressure, shame tactics and an update to the age classification system.

Turning first to media pressure, from both a theoretical\textsuperscript{111} and practical\textsuperscript{112} perspective it has been demonstrated that not only are games companies acutely aware of the effect that negative media attention has brought in relation to loot boxes, but they have been willing to act in such a way so as to placate this pressure. This pressure thus far has come mainly from consumers, but this was in a situation where there were little to no self-regulatory standards. In addition, games companies themselves recognize that failure to placate may lead to top-down regulation,\textsuperscript{113} which as seen in the section on gambling could come in a form that is harmful to both them and consumers. The concept of media pressure is an established factor in systems of self-regulation,\textsuperscript{114} and although this type of pressure does not come from within the industry itself, it must be taken into account when discussing the merits of this type of system.

The second tactic that could be implemented in a self-regulatory framework is the use of adverse publicity within the industry.

This type of informal shaming may even go further than top-down punishment in deterring games companies from including overly exploitative forms of monetization in their games. Indeed, evidence from a criminological perspective points to a higher deterrent factor from such informal sanctions over punishments met out by the state.\textsuperscript{115} While of course companies cannot be excluded from certain aspects of socialization in the same manner as an individual, ostracization from important trade shows and conventions may have the same effect in practice, although the shift towards more ‘direct’ forms of product announcements in light of COVID-19 developments may somewhat damper this possibility.

This has to be borne in mind with the fact that adverse publicity as a tool needs to be exercised with moderation in that it can quickly become a method of disproportional punishment,\textsuperscript{116} as although industry bodies may be able to control the narrative surrounding the initial publicity of their complaint, very little control can be exercised past this point.

Thirdly, an update to the age classification and ratings system from PEGI could allay some of the fears surrounding loot boxes depending on the manner in which it is “Virtually” Gambling? (2019) 28 Washington International Law Journal 763, 798.


which it is implemented. There are numerous approaches to age rating classification that could be taken as presented below, and although for now PEGI has rejected option 2,\(^{117}\) a hierarchy of options would allow for considerable flexibility in continuing in their role as an industry watchdog. In particular, this hierarchy could allow for the classification of loot boxes by a risk factor such as how likely a given loot box mechanism in a game will predominantly attract minors. Some of the potential options available are:

1. Clarify or separate loot boxes from the in-app purchases descriptor.
2. Include loot boxes under the gambling label.
3. Set a minimum age rating for any game that includes the use of loot boxes.
4. Any combination thereof of the above three options.

The main issue here is that under current standards PEGI defines gambling as ‘games of chance that are normally carried out in casinos or gambling halls’.\(^{118}\) It is rather difficult to interpret or imagine loot boxes in most conventional forms as falling under this orthodox definition of gambling, once again highlighting that in absence of definitional changes, such self-regulation would be quite unreliable in practice.

4.3. The consumer law approach – blended, proportional, but technocratic

Having previously placed loot boxes within the gambling framework of member states, or the national state-centred approach, and the self-regulatory approach which sees little to no state involvement, but involves an international element of cooperation, it is time to turn to the scheme that treads the line somewhere between these two, consumer law.

This section will look at EU consumer law through the lens of the reforms proposed in the New Deal for Consumers\(^ {119} \) and Digital Single Market Initiatives\(^ {120} \) and in particular the Directive as regards to the better enforcement and modernization of Union consumer protection rules.\(^ {121} \) The Directive involves the amendment of four interlocking directives covering unfair terms in consumer contracts,\(^ {122} \) price indications,\(^ {123} \) unfair business-to-consumer commercial practices\(^ {124} \) and consumer rights generally\(^ {125} \) and aims to address some of the issues in the Regulatory Fitness and Performance (REFIT) programme that was conducted in 2016 and 2017.

Fitting loot boxes into an EU consumer law framework is problematic for a few reasons. First, it would tacitly recognize that loot boxes are not gambling as such activities are not covered within the scope of the 2011 Directive,\(^ {126} \) nor the 2019 Directive covering contracts for the supply of digital content and digital services.\(^ {127} \) This would mark it as contradictory with the approaches taken in Belgium and the Netherlands.

Secondly is a question of definition. Unlike in the gambling law context, which focuses more on the mechanics of the system that provides the loot boxes, and the self-regulatory approach which emphasizes and controls bad faith practices, here the question becomes what exactly is being sold and marketed. Directive 2019/770 provides two definitions which loot boxes could fall under:

- ‘Digital Content: data which are produced and supplied in digital form.’\(^ {128} \)
- ‘Digital Services:
  a service that allows the consumer to create, process, store or access data in digital form; or
  b a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.’\(^ {129} \)

There are two schools of thought conflicting here. The first posits that when a loot box is purchased, you have

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\(^{117}\) Palumbo (fn 39).


\(^{125}\) Directive 2011/83/EU (fn 95).

\(^{126}\) Directive 2011/83/EU (fn 95) Article 3(3)(c).


\(^{128}\) Ibid Article 2(2).

\(^{129}\) Ibid.
been supplied either the box in and of itself, or the contents of the box. The second school of thought suggests that what is purchased is access to the data, which already exists in the game, but which has been locked by the developer until certain conditions are met.  

A way through this might be shown through Recital 12 of the Directive which states that it does not seek to impose a specific type of contractual form on the types of contract that can supply digital content and services. This is particularly pertinent given that the manner in which modern games are distributed is by purchasing a limited license for use of the game, and not the game in and of itself.

This does not however answer what exactly is to be supplied. One of the main requirements of the 2011 Directive as amended by the 2019 Modernisation Directive is that the trader must provide information on ‘the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services’, in a manner which is ‘clear and comprehensible’.

It is unclear in the case of loot boxes which characteristics would have to be supplied. If the ‘box’ is caught under this framework as specific content, then this might involve the mandatory disclosure of odds; what items exactly are in it; or a warning that the opening of such boxes may lead to addictive tendencies.

If the mechanism as a whole is viewed as a service, it might be enough to describe only the potential items the player would gain access to upon opening the box. The most difficult interpretation for games companies would be if the ‘loot’ itself were to be classified, as the requirement of a legal guarantee of conformity under Article 5 (1)(e) of the 2011 Directive would in essence remove one of the main draws of the loot box, that being chance. This does not rule it out per se, as Epic Games did implement transparent loot boxes in two of their products, however, seeing the reactive response of other firms to mandatory odds disclosure does not necessarily inspire confidence in other developer’s willingness to do so.

Table 1 in the appendix also notes a clear divide in definitional approaches between the US and the EU. The EU approaches to date lean more towards loot boxes as objects or items, with US approaches describing them as mechanisms or systems for acquiring said items. Which approach would be easier to regulate will be touched upon in Part 5.

Finally, apart from the definitional issues, there is a possibility that loot boxes, if caught under a consumer law framework, could be in breach of the Unfair Commercial Practices Directive. Two Articles (7 and 3) taken in conjunction could mean that the supply of loot boxes, as it currently stands, could be prohibited. Article 7 states:

A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

The preliminary concern here is with odd disclosures for loot boxes, in that an argument could be put forward that the disclosure of odds in circumstances involving low pay out loot boxes would give the average consumer pause on their purchase. However, as noted in Part 2, the main concern from consumer interest groups, regulators and academics has not been with the average consumer, but those at risk of developing an addiction to gambling on foot of loot box interactions.

This is where Article 3 may come in, which allows for a specific category of consumers to be identified as the average consumer if it is reasonably foreseeable that a practice would distort the economic behaviour of that group in particular. For present purposes, and as outlined in Part 2, three identifiable groups could be put forward, children, teenagers and problem gamblers.

It should be noted at this point that although an argument could be put forward that this mechanism is

130 This is reminiscent of the debates as to whether software is to be categorized as a good or a service. See Nicholas Tall, ‘Computer Associates Ltd v. The Software Incubator Ltd: Is Software Goods? Chapter and Verse from the Court of Appeal’ (2019) 25(3) Computer and Telecommunications Law Review 66; and Robert Clark, ‘Commercial Agents and Software Marketing: The Facts and Holding of the High Court in Software Incubator’ (2019) 25(1) Computer and Telecommunications Law Review 10 respectively for the two sides to this debate.


133 Directive 2011/83/EU (fn 95).


136 Ibid Article 5(1).

137 Recital 12/2019 (EU) 2019/770.


140 Ibid Article 7.

141 Frank de Leeuw, ‘The Convergence of Gaming and Gambling The Loot Box Conundrum’ (Thesis Department of Information and Computing Sciences Faculty of Science Utrecht University 2019) 4.4.2; King and Delabbio (fn 5) 1967, 1968; however see also Xiao Y (fn 108) for evidence that suggests in practice this may have little effect.
redundant in light of the developers’ promises to disclose odds, it is suggested that this provision is still useful in two scenarios. First, the promise stipulated to have mandatory odds disclosure by the end of 2020 if this is not the case, then consumer law may still be able to hold them to account. Secondly, in the event that the odds are disclosed, but not in a manner which is satisfactory, then the provision could be used in order to raise the standards of transparency. In that manner, perhaps it is fair to say that the consumer law approach serves as a backstop in which the worst tendencies of predatory monetization schemes can be curtailed, while still allowing ‘fair’ use of cost-effective games-as-a-service monetization techniques.

Having therefore identified both a group which could have standing and a potentially unfair commercial practice, what enforcement mechanisms can EU consumer law offer? The main difficulty here is how to avoid a similar situation as under the baseline scenario whereby there ends up being 27 different standards for what minimum amount of information is needed in order to go above the threshold of what constitutes a fair commercial practice.

In the absence of consumer class actions in the EU, one novel approach might be to look at how Ireland implemented the 2005 Directive into national law. Article 71(2) of the Consumer Protection Act 2007 through the use of the term ‘any person’ opened up the opportunity for not only consumers, but other traders to initiate proceedings against traders to prohibit them from using unfair practices. One important note is that the only action available for traders under this scheme is injunctive in nature so the lack of availability of damages may act as a barrier for traders to take a case. This approach could strike a balance between state intervention and full self-regulation, by offering more than the informal sanctions imposed via self-regulation, while easing the burden on national consumer authorities to pursue less problematic cases in favour of ones where there may be a greater impetus to act.

This approach would also acknowledge and give redress mechanisms to developers who believe loot boxes to be damaging for the industry as a whole, as mentioned in Part 2. Additionally, opening up traders as a potential class of litigants may go some way in alleviating the information asymmetry that would be inherent in consumer-developer litigation.

It should be noted however, that the EGDF asserts that video games already explicitly follow European consumer law, and in particular do not fall under the remit of the Unfair Commercial Practices Directive, so some push back is to be expected if this approach is taken.

5. Limiting the loot box: scope and suitability for a common EU response

Having examined both the approaches of individual jurisdictions and three broad regulatory approaches, it is clear that there are some significant issues present in each possible response. Most state responses, having framed it in terms of national gambling frameworks, have shut down some of the options that would have been available to consumers under consumer rights legislation. The US response on the other hand, although framed mainly as a consumer protection issue, denotes a lack of nuance in their approach, particularly at the federal level.

However, despite the issues associated with the baseline scenario, self-regulation and consumer law initiatives in and of themselves, taken together they provide the potential for a relatively responsive and proportionate system of regulation. This article will finish on what this potential model will look like, basing it on the pyramid of regulatory enforcement put forth by Ayres and Braithwaite. The proposed scheme could be categorized mainly as a reflexive, meta-regulatory approach, drawing on a combination of guidance measures from the state, self-regulatory codes of conduct and sanctions, and having at its highest level a robust ‘big gun’ that would allow the most predatory forms of loot box practices to be caught by EU consumer law.

148 Ian Ayres and John Braithwaite, Responsive Regulation 1st edn, Oxford University Press, 1992.)
5.1. Overview of the model

5.2. Governing principles and regulated categories

The governing principles of the regulatory architecture presented here fit rather neatly into the Commission’s approach to the New Deal for Consumers in that while there is a framework for limiting loot boxes, it is lacking in some elements of enforcement that could make it a truly reflexive type of regulation.

The categories to be regulated under a scheme such as this can be classified in one of two ways, the manner in which they are likely to be non-compliant with such a regulatory scheme, and their overall motivation for compliance.

Turning to the first category, the OECD has identified three primary reasons why a firm may be non-compliant with a particular regulatory regime, lack of knowledge, lack of willingness, and lack of ability.\footnote{Parker, Kuuttiniemi, Klaassen, Hill and Jacobs (fn 114) 14–20.} It is suggested that on the basis of the responses of games companies to date in complying with the various decisions of national authorities in regard to loot boxes\footnote{Oliver Rudgewick, ‘Games developers remove paid loot boxes in Belgium’ (28 August 2018) Gambling Insider, available at: https://www.gamblinginsider.com/news/5801/games-developers-remove-paid-loot-boxes-in-belgium (accessed 14 June 2021).} that lack of ability is unlikely to be much of an issue. Likewise, the acute responsiveness\footnote{Ben Gilbert, ““We got it wrong”: EA exec apologizes for “Star Wars” loot box fiasco, promises to “be better” (17 April 2018) Business Insider, available at: https://www.businessinsider.com/star-wars-battlefront-2-ea-apologizes-for-loot-box-fiasco-2018-4?r=US&IR=T (accessed 14 June 2021); McCaffrey (fn 110) 62, 483, 484.} to media pressure as highlighted in the discussion surrounding adverse publicity in Part 4 means that a lack of knowledge is also unlikely to be the main issue for companies under this regulatory scheme. Therefore, it is put forward that through the process of elimination, and case studies of this type of non-compliance,\footnote{For example Blizzard; Marshall Lemon, ‘Hearthstone has a new work-around to Chinese loot box regulations’ (28 June 2017) VG 24/7, available at: https://www.vg247.com/2017/06/28/hearthstone-has-a-new-work-around-to-chinese-loot-box-regulations/ (accessed 14 June 2021); and EA: Rebekah Valentine, ‘EA may go to court over loot boxes in Belgium’ (10 September 2018) gamesindustry.biz, available at: https://www.gamesindustry.biz/articles/2018-09-10-ea-may-go-to-court-over-loot-boxes-in-belgium (accessed 14 June 2021). This was eventually reversed, see Taylor (fn 57).} the main cause of non-compliance under this regulatory scheme would likely be lack of willingness.

On this basis, it is important to identify what types of motivation exist for this lack of willingness to comply. For the purposes of this models, actors captured under this regulatory system could fall into one of two categories, those who genuinely want to follow any ethical guidelines or codes put forward by industry or public bodies, and those who engage in ‘amoral calculation’ whereby they will only comply to the extent that it is in their best interests to do so.\footnote{Colin Scott, ‘Consumer Law, Enforcement and the New Deal for Consumers’ (2019) European Review of Private Law 6, 1279, 1288.} The hierarchical model of enforcement is designed to tackle this type of actor and has thus been selected for present purposes.

5.3. Measures and enforcement

Finally, in terms of sanctions it is important to note that this proposed regulatory compliance model does not exist in a theoretical vacuum, but in a culture of regulatory responses already taken by national authorities. In that respect, the ‘benign big gun’ which sits at the top of a traditional Ayres and Braithwaite model in this scheme consists of two elements, one that exists as an influential externality that pushes games companies towards engaging with the model in the first place, and another that exists at the top of the regulatory model in and of itself.
External 'Big Gun' – Existing Actions: The influential externality in this case comes in the form that the 'gun' has already been fired in the Netherlands and Belgium when they declared that loot boxes can constitute a form of gambling. At the same time there have been a few cases of misfire of this gun in the US in that the majority of legislative efforts to date which attempted to regulate loot boxes in one form or another has failed at some step in the legislative process. In a certain respect however, the patchwork of approaches taken to date, as detailed in Table 1 of the appendix, could in fact be a boon to encouraging games companies to engage with this type of regulatory model.

From the gambling law approaches in the Netherlands, Belgium, Czechia, Denmark, France and Finland, to purely consumer law approaches as seen in the US, Germany, Sweden and Italy, to the hybrid approach adopted in the UK, the regulatory responses to date signify that national authorities are willing to use different tools to limit the form or use of loot boxes. This variety of approaches, if acknowledged by games companies, should in theory make the soft-spoken approach at the bottom of the pyramid more effective in practice.158

Internal 'Big Gun' – Civil Sanctions: It is submitted that from a common EU perspective, the most effective enforcement agency is likely to be found in a consumer law sphere, particularly in light of the proposed159 and realized actions160 taken to date under the New Deal for Consumers161 and regulations supporting this framework.162 While most of the discussion about how these type of sanctions would work in practice were discussed under Part 4.3, one additional feature of this architecture could be the use of the more general Article 5 prohibition under the Unfair Commercial Practices Directive.163

This, in combination with either the type of collective consumer actions considered under the revised Injunctions Directive,164 or the types of cross national cooperative measures envisaged under the 2017 Regulations,165 has the potential to capture what would in essence be considered the most unfair or predatory aspects of a particular loot box scheme by offering an expansive list of both public and private sector responses, without necessarily placing a prohibition on their use as a whole.

Shame Tactics and Retrograde Reclassification: This element of the regulatory pyramid would be almost entirely reliant on industry bodies such as the ISFE or PEGI to curb what could be seen as the worst tendencies towards predatory monetization in the industry. The manner in which it would ideally operate was set out previously in Part 4.2.

Warning: Self-explanatory, in that depending on where the pressure is coming from, game companies should have the option to address or remedy the allegedly predatory aspects being investigated by either industry bodies or those in the consumer law sphere. Such an opportunity to provide for redress would be considered under the 2019 Modernisation Directive and may reduce or increase penalties for any harm caused by the developer depending on their response to the warning.166 Where this warning might be seen most commonly is in areas where systemic checks on transparency, informational asymmetry and player control can occur readily.167

Persuasion – Tax Relief: To date two European governments, France,168 and the UK169 have introduced tax credits specifically for the development of video games. These tax credit systems have been investigated and deemed treaty compliant by the EU Commission.170 The French system consists of passing two tests, one negative, and one positive.171 For present purposes, the negative test is more relevant to promote the limitation of predatory types of loot box monetization. Currently,

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154 Ayres and Braithwaite (fn 148) 19.
164 Cerruti-Harms, Münsch, Thorun, Michaelsen and Hausemer (fn 23) 25.
168 The negative test, as under Decree no. 2015-722 of 23 June 2015 – Article 4, holds that a game will not benefit from the tax credit if three of the following elements are simultaneously present in one or several sequences of the video game: the violence displayed is disproportionate and gratuitous;
this test is mainly focused on the types of content present in the game and not necessarily on the mechanics of how the game generates revenue. The extension of such a test to include such features could prove a lucrative incentive for games companies to include principles of ethical monetization in their products, as both schemes have been quite popular in practice.

In terms of feasibility of the introduction of such measures as part of a common EU response, tax of course remains one of the areas where member states do not have to engage in harmonization, but there is evidence that other member states are beginning to consider similar types of initiatives. One factor which might push this along is the impact of Brexit upon the video games industry, with a reported 40% of firms considering relocation as a result of the Brexit referendum, the door may be open to more member states to take advantage of this talent flight.

Education: While a full break down of the extensive literature on what constitutes ethical game design would be outside the scope of this article, the fact that regulators have placed loot boxes as akin to gambling may point to some of the practices that could form a basis of meta-regulatory guidance. An easy example of this is to make sure a monetization system does not get captured by gambling frameworks by guaranteeing that it only operates in a closed loop system, removing the discussion as to whether the items contained in a loot box need to have an objective value.

It is envisaged that any educational scheme or guidance adopted as a part of this meta regulation would come in the form of the enhanced stakeholder dialogue envisaged under the GREF study. Taking this a step further, the study provides a solid primer on the main concerns from a consumer point of view which could be addressed through an educational programme. This should be taken and synthesized with existing industry guidelines on the code of conduct for age ratings to determine a starting point for what principles should underpin a new industry code of conduct for the design of monetization schemes.

6. Conclusion: limiting the loot box — a way forward?

This article has attempted to explore some of the issues faced from both micro and macro regulatory level approaches to curbing the use of what have been deemed to be monetization techniques of a predatory nature. Additionally, this article has attempted to highlight that from neither a consumer nor developer point of view have any of these approaches in and of themselves have been sufficient to allay the concerns of either side. It is submitted that taken together, and as modified in a manner that encompasses some of the principles of the New Deal for Consumers, a meta-regulatory model for limiting the most egregious practices surrounding loot boxes could be workable in practice. All it needs is a recognition of the potential that existing measures have in striking a proportionate balance between the interests of these two groups. Whether an appetite exists for such a meta-regulatory approach, remains to be seen.

...
## Appendix 1

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Tool Used in Investigating/Controlling Loot Boxes</th>
<th>Definition of a Loot Box</th>
<th>Sphere in which Loot Boxes were Placed</th>
<th>Actionable Penalty (Proposed, Potential or Actual)</th>
<th>Penalty (Proposed, Potential or Actual)</th>
<th>GREF Signatory</th>
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<td>Austria</td>
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<td>Belgium</td>
<td>Report of an Administrative Authority(^{176})</td>
<td>‘One or more game elements that are integrated into a video game whereby the player acquires game items either for payment or for free in an apparently random manner(^{177})</td>
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<td>Yes</td>
<td>Criminal Sanctions (Potential)</td>
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<td>-</td>
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<td>International Agreement/Administrative Statements</td>
<td>‘a box with randomly generated gaming equipment(^{178})’</td>
<td>Gambling Law</td>
<td>Potentially(^{179})</td>
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<td>Denmark</td>
<td>Statement of an Administrative Authority</td>
<td>‘a virtual box containing random items in a computer game(^{180})’</td>
<td>Gambling Law</td>
<td>Potentially(^{181})</td>
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<td>Yes</td>
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<td>France</td>
<td>Report of an Administrative Authority(^{182})</td>
<td>‘Plunder chests that allowed the player to acquire, randomly and for a fee, a virtual object useful or indispensable for his progress in the game(^{183})’</td>
<td>Gambling Law</td>
<td>Potentially</td>
<td>Criminal liability of up to 3 years in prison and fines of €90,000 (In the case of potential breach)</td>
<td>Yes</td>
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</tbody>
</table>

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176 Naessens (fn 11).
177 Ibid 5.
179 Ibid.
180 Spillemyndigheden 'Statement about loot boxes/loot crates’ (fn 59).
181 Ibid.
183 Ibid 4.
<table>
<thead>
<tr>
<th>Country</th>
<th>Type</th>
<th>Description</th>
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<td>Finland</td>
<td>International Agreement/</td>
<td>'a general term for various virtual boxes or packs of cards integrated</td>
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<td></td>
<td>Report of an Administrative</td>
<td>in video games. By unlocking a loot box, a player will obtain randomly</td>
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<td></td>
<td>Body</td>
<td>assigned in-game items, such as avatars</td>
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<td>Germany</td>
<td>Legislative Bill</td>
<td>-</td>
<td>Consumer Law</td>
<td>Fines of up to €500,000 but often lower</td>
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<td></td>
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<td>Maximum fine of up to €330,000, but difficult to enforce</td>
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<td></td>
<td></td>
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185 Ibid.
188 Ibid.
191 Seanad Éireann debate – Thursday, 27 September 2018 Vol. 260 No. 5 Speech No. 3 of Deputy David Staunton Minister of State at the Department of Justice and Equality.
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<td>Gambling Law</td>
<td>Yes</td>
<td>An administrative penalty of up to €830,000 or 10% of turnover of the previous year in the event that this figure is higher. In addition, criminal sanctions may be imposed (Potential)</td>
<td></td>
<td></td>
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<tr>
<td>Poland</td>
<td>International Agreement</td>
<td>-</td>
<td>Gambling Law</td>
<td>No</td>
<td>-</td>
<td>-</td>
<td>Yes</td>
<td></td>
<td></td>
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<tr>
<td>Portugal</td>
<td>International Agreement</td>
<td>-</td>
<td>Gambling Law</td>
<td>Unclear</td>
<td>-</td>
<td>-</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>-</td>
<td>-</td>
<td>Gambling Law</td>
<td>Potentially</td>
<td>-</td>
<td>-</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>International Agreement/Investigations being prepared</td>
<td>-</td>
<td>Unclear</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>Yes</td>
<td></td>
<td></td>
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<tr>
<td>Sweden</td>
<td>Consumer Law Investigation</td>
<td>-</td>
<td>Consumer Law</td>
<td>Potentially</td>
<td>-</td>
<td>-</td>
<td>No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Report of an Administrative Authority and the Report of a Governmental Department</td>
<td>-</td>
<td>Gambling Law/Consumer Law</td>
<td>No</td>
<td>None (Potential)</td>
<td>A prohibition on the sale of games containing loot boxes to minors (Proposed) Any penalties that may be applied to licensees under the Gambling Act 2005 (Proposed)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

194 Netherlands Gaming Authority (fn 12).
**US (Washington)** Legislative Bill (Failed to advance to committee stage)\(^{203}\)

Mechanisms that provide randomized virtual items in online games or apps\(^{204}\)

| Gambling Law | N/A | n/a | Yes |

**US (California)** Legislative Bill (allowed to die)\(^{205}\)

The ability to use real-world currency, including, but not limited to, a credit card, to purchase an item or download or unlock content within the game\(^{206}\) (Microtransaction)

| Consumer Law | N/A | Civil Penalty of up to $1000 per violation (Proposed) | No |

**US (Minnesota)** Legislative Bill\(^{207}\)

'A system that permits the in-game purchase of (1) a randomized reward or rewards, or (2) a virtual item that can be redeemed to directly or indirectly receive a randomized reward or rewards\(^{208}\)

| Consumer Law | N/A | Places a prohibition on sales, no strict mention of a penalty per se | No |

**US (Hawaii)** Legislative Bill(s) (allowed to die)\(^{209}\)

'A system of further purchasing:

(1) A randomized reward or rewards; or

(2) A virtual item which can be redeemed to directly or indirectly receive a randomized reward or reward\(^{210}\)

| Consumer Law | N/A | Places a prohibition on sales, no strict mention of a penalty per se | No |

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\(^{203}\) SB 6266 (fn 68).

\(^{204}\) Ibid S1(1).


\(^{206}\) Ibid s 1, Chap 6, 20660 (b).

\(^{207}\) A bill for an act relating to consumer protection; video games; prohibiting certain sales; proposing coding for new law in Minnesota Statutes, chapter 325I. H. F. No. 4460.

\(^{208}\) Ibid s 1(2)(a).

\(^{209}\) H.B. NO. 2686; HI HB2727.

\(^{210}\) H.B. NO. 2686, s 2; HI HB2727, s 2.
‘an add-on transaction to an interactive digital entertainment product that—

(A) in a randomized or partially randomized fashion—
   (i) unlocks a feature of the product; or
   (ii) adds to or enhances the entertainment value of the product; or

(B) allows the user to make 1 or more additional add-on transactions—
   (i) that the user could not have made without making the first add-on transaction; and
   (ii) the content of which is unknown to the user until after the user has made the first add-on transaction\(^\text{212}\)

\(^{211}\) S.1629 – A bill to regulate certain pay-to-win microtransactions and sales of loot boxes in interactive digital entertainment products, and for other purposes.
\(^{212}\) ibid s 2(8).