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Blurring Lines: Loot Boxes and Gambling in the Video Game Industry

Deric Lui, Benjamin Thompson, and Carter Rich

Abstract

A loot box is a consumable virtual item which, upon redemption, provides the player with a randomised assortment of further virtual items within a video game. They have been adopted by highly popular multiplayer games as an alternative source of revenue, but have been criticised. The controversy lies in the fact that the precise virtual item that is awarded to the player is solely dependent upon an element of chance, which suggests a strong similarity with traditional gambling services. This paper examines a specific subset of loot boxes, the ‘closed-loop’ mechanic (which effectively excludes the loot box from constituting a form of gambling under the Gambling Act 2005) and explores the impact this has on children and young people. We address the current regulatory framework governing the gambling industry in England and Wales and how loot boxes fit in, before examining why the use of loot boxes might be considered gambling activity. We outline the psychological landscape of loot box consumption and the effects it has on young people, before finally examining whether or not the current approach in England and Wales provides sufficient protection. We conclude that legislative reform in this area must be based on evidence-led policies.

1 Introduction

Loot box mechanics in video games allow consumers to acquire an unknown quantity and quality of virtual in-game items such as abilities, weapons, and cosmetics.¹ Since its implementation in popular video games such as *Overwatch*² or, more famously, *Star-Wars Battlefront II*,³ the loot box business model has sparked international debate amongst the gaming community and gambling regulators alike due to its controversial similarities to traditional gambling services.⁴ This was made apparent by Chris Lee, an influential American politician, who described *Star-Wars Battlefront II* as a ‘Star Wars-themed online casino designed to lure kids into spending money’.⁵

This prompted international calls for a regulatory response, with much of the global audience demanding that loot boxes be classified legally as gambling.⁶ The video game industry is often associated with children and young people and, according to gambling literature, this demographic is the most vulnerable subpopulation to gambling.⁷ It is therefore disconcerting that a comparison between loot box consumption and traditional gambling is being drawn.

¹ Sebastian Schwiddessen and Philipp Karius, ‘Watch your Loot Boxes! – Recent Developments and Legal Assessment in Selected Key Jurisdictions from a Gambling Law Perspective’ (2018) *Interactive Entertainment Law Review* 18.

² Blizzard Entertainment, *Overwatch* (2019).

³ Electronic Arts Inc., *Star Wars Battlefront II* (2019).

⁴ Patrick Lum, ‘Video Game Loot Boxes Addictive and a Form of “Simulated Gambling”, Senate Inquiry Told’ *The Guardian* (London, 16 August 2018). <<https://www.theguardian.com/games/2018/aug/17/video-game-loot-boxes-addictive-and-a-form-of-simulated-gambling-senate-inquiry-told>> accessed 13 December 2018.

⁵ Chris Lee, ‘Highlights of the Predatory Gaming Announcement’ (21 November 2017) <www.youtube.com/watch?v=_akwfRuL4os> accessed 6 May 2019.

⁶ Lum (n 4).

⁷ Daniel King, Paul Delfabbro, and Mark Griffiths, ‘The Convergence of Gambling and Digital Media: Implications for Gambling in Young People’ (2010) 26(2) *Journal of Gambling Studies* 180.

Section 45 of the Gambling Act 2005 (the 2005 Act) defines children and young people as individuals who are ‘less than 16 years old’ and those ‘who [are] not a child but who [are] less than 18 years old’ respectively.⁸ Section 1 of the 2005 Act requires the Gambling Commission in England and Wales (the GC) to take action where such a person may be ‘harmed or exploited by gambling’.⁹ However, of the two types of loot boxes currently available on the market, one has effectively evaded regulation through its technical definition.

The loot box is currently understood as a consumable virtual item which, upon redemption, provides the consumer with a randomised assortment of further virtual items.¹⁰ It exists in two forms: closed-loop and cashing-in, both of which have structural similarities to traditional gambling services.¹¹ This includes the variable-ratio reinforcement schedule which underpins the reward structure of many forms of traditional gambling and is what makes gambling addictive.¹² The major difference between the two types of loot boxes, however, is that the contents of the closed-loop loot box cannot, in theory, be transferred to another consumer legitimately, whilst the cashing-in loot box can. This inability to transfer means that the latter satisfies the definition of gambling under the 2005 Act, and the former does not.¹³ Given that closed-loop mechanics are excluded from the definition of gambling under the 2005 Act, children and young people have unimpeded access to this form of loot box consumption.

This article will explore the impact of loot boxes in video games on children and young people in order to consider whether or not the 2005

⁸ Gambling Act 2005, s 45.

⁹ *ibid.*

¹⁰ Schwidessen and Karius (n 1).

¹¹ Christopher Arvidsson, ‘The Gambling Act 2005 and Loot Box Mechanics in Video Games’ (2018) 29(4) *Entertainment Law Review* 113.

¹² Kendra Cherry, ‘Variable-Ratio Schedules Characteristics’ (*VeryWellMind*, 7 October 2019) <<https://www.verywellmind.com/what-is-a-variable-ratio-schedule-2796012>> accessed 12 December 2019.

¹³ Lum (n 4).

Act in England and Wales should be reformed to include closed-loop loot boxes as a form of gambling. It will first address the current regulatory position of England and Wales in relation to gambling and loot box consumption before considering why the use of loot boxes might be considered as gambling activity. It will then outline the consequences of gambling and loot box consumption in relation to children and young people. A critical analysis will then be undertaken to determine whether the current approach to regulation affords sufficient protection to this demographic.

2 The current regulatory framework

The current legislative framework governing the gambling industry in England and Wales is set out in the 2005 Act. Its tripartite licensing objectives are outlined within section 1 of the Act and include the prevention of gambling from becoming a source of crime or disorder; the maintenance of an open and fair gambling environment; and the implementation of safeguards to prevent children and vulnerable persons from being harmed or exploited by gambling.¹⁴ Three forms of gambling are recognised by the Act: gaming, betting, and participating in a lottery.¹⁵ This article will focus on gaming because the definition is most applicable to loot box consumption. Under section 6 of the Act, gaming is defined as ‘playing a game of chance for a prize’.¹⁶

The general offences are set out in Part 3 of the 2005 Act and section 33(2) states that it is an offence to provide facilities for gambling services without a gambling licence.¹⁷ An additional layer of protection is offered to children and young people within Part 4, under section 46 of the Act, which states that a ‘person commits an offence if he, invites, causes or permits a child or young person to gamble’.¹⁸ The GC is an independent, non-departmental public body which licenses those who

¹⁴ Gambling Act, s 1.

¹⁵ *ibid* ss 6, 9, 14.

¹⁶ *ibid* s 6.

¹⁷ *ibid* s 33.

¹⁸ *ibid* s 46.

wish to provide consumers with gambling services while regulating the entire gambling industry in England and Wales. It is the responsibility of the GC to regulate and take action on these offences under its powers set out in Part 2 of the Act.

The GC's willingness to uphold the 2005 Act with regards to emergent forms of gambling has been shown most obviously by the *FutGalaxy* case, where the founders of a website were prosecuted and fined in excess of £200,000 for facilitating underage gambling for the popular football video game *FIFA*.¹⁹ This is important for two reasons: first, it illustrates that the GC can and will use the full range of their statutory powers to 'investigate and prosecute individuals and companies that try to operate illegally';²⁰ and secondly, it shows that the infringement of the tripartite licensing objectives, especially the harmful effects of gambling on children and vulnerable persons, was acknowledged to be both 'horrific' and 'serious' by District Judge McGarva.²¹

2.1 How do loot boxes fit in?

As Christopher Arvidsson explains, section 6 of the 2005 Act defines gaming as an activity made up of three core elements: a game, a chance and a prize.²² Although the concept of a closed-loop loot box seemingly fits with this definition – opening the loot box (game) to acquire a randomised assortment (chance) of virtual in-game goods (prize) – a minute detail within section 6(5) has helped closed-loop loot boxes escape regulatory capture. Section 6(5) stresses that the prize obtained must consist of 'money or money's worth'²³ and as closed-loop mechanics restrict items generated from loot box consumption from being traded or sold to other consumers, the lack of a market has

¹⁹ Hilary Stewart-Jones and Greg Mason, 'FutGalaxy and "Skin Betting"' (2017) 28(5) *Entertainment Law Review* 181.

²⁰ Gambling Commission, 'Virtual Currencies, eSports and Social Casino Gaming – Position Paper' (March 2017) <www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf> accessed 6 May 2019.

²¹ Stewart-Jones and Mason (n 19).

²² Arvidsson (n 11).

²³ Gambling Act, s 6.

prevented such items from being associated with a monetary value. This was reaffirmed by a position paper published in 2017 by the GC, which emphasised that only where ‘in-game items can be traded or exchanged for money or money’s worth outside a video game’ are they ‘themselves considered money or money’s worth’.²⁴

3 Loot boxes and gambling

Although closed-loop mechanic loot boxes are legally excluded from being a form of gambling, this section and the next explore why loot boxes should be considered as gambling. This section demonstrates why, save for the legal technicality of section 6(5) of the 2005 Act on paper, closed-loop loot boxes fulfil all other requirements to be considered gambling.

3.1 The fundamental flaws

Stakeholders within the video game industry that employ the loot box business model are quick to convey the message that loot boxes are not and should not be considered gambling. The motivations behind such arguments are clear, as loot boxes generate enormous profits. Sales of loot boxes and other micro-transactions alone reached upwards of US\$2.1 billion for *Electronic Arts (EA)* in 2018²⁵ and US\$1.2 billion just in Q4 of that year for *Activision Blizzard*.²⁶ Given that 93% of children play video games in the UK alone,²⁷ it is therefore clear that industry stakeholders would stand to lose a significant amount of their annual returns if closed-loop loot boxes were to be legally regulated as

²⁴ Gambling Commission (n 20).

²⁵ Electronic Arts, ‘Reports Q4 FY18 and Full Year FY18 Financial Results’ (2018) <https://s22.q4cdn.com/894350492/files/doc_financials/2018/q4/Q4_FY18_Earnings_Release_-_Final.pdf> accessed 30 March 2019.

²⁶ Activision Blizzard, ‘Fourth Quarter 2018 Results’ (2019) <<https://investor.activision.com/static-files/aef20fcf-3b72-44a5-bcd4-6ce49695bec4>> accessed 1 April 2019.

²⁷ Children’s Commissioner, ‘Gaming the System’ (*Children’s Commissioner*, October 2019) <<https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf>> accessed 16 December 2019.

gambling.

One of the most influential individuals to express such an opinion includes Andrew Wilson, the CEO of *EA*. After the popular video game *FIFA 18* was found to be in violation of national gambling laws in Belgium by the Belgium Gaming Commission, Wilson stated that:

We don't believe that FIFA Ultimate Team or loot boxes are gambling firstly because players always receive a specified number of items in each pack, and secondly we don't provide or authorize any way to cash out or sell items or virtual currency for real money. And there is no real-world value assigned to in-game items.²⁸

This has been reinforced by the American video game regulator, the Entertainment Software Ratings Board (ESRB), a representative of which justified the sale of loot boxes on the basis that while 'there's an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don't want)'.²⁹ This was likened to opening a pack of trading cards like *Pokémon* where sometimes 'you'll open a pack and get a brand new holographic card you've had your eye on for a while' whereas 'other times you'll end up with a pack of cards you already have'.³⁰

These statements contain two main arguments: that because players are guaranteed to receive a 'specified number of items', the element of chance does not exist; and that because these items are unable to attain

²⁸ Tom Hoggins, 'EA Faces Prosecution in Belgium over FIFA 19 Loot Boxes' *The Telegraph* (London, 11 September 2018) <www.telegraph.co.uk/gaming/news/ea-faces-prosecution-belgium-fifa-19-loot-boxes/> accessed 6 May 2019.

²⁹ Eric Kain, 'The ESRB is Wrong about Loot Boxes and Gambling' (*Forbes*, 12 October 2017) <<https://www.forbes.com/sites/erikkain/2017/10/12/the-esrb-is-wrong-about-loot-boxes-and-gambling/#72a56b572a64>> accessed 22 September 2019.

³⁰ *ibid.*

‘real-world value’, loot boxes cannot legally be defined as gambling.

Wilson’s first argument, that loot boxes do not involve an element of chance exhibits either a clear lack of understanding of what loot boxes are or intentional ignorance on the part of industry stakeholders towards what constitutes gambling. Skill and luck lie upon two opposite ends of a spectrum³¹ and to determine whether an activity is considered as gambling is ‘largely determined by an assessment of whether the underlying game is a game of skill, where the element of chance is so insignificant as not to matter’.³² It is true that consumers will, one 100% of the time, receive a specified number of prizes from a loot box, but the element of chance remains, as the consumer does not know what kind of prize they will receive. Therefore, unless the consumer knows exactly what it is that they will receive as a result of opening a loot box, chance will always be a factor.

Wilson’s second argument is that because prizes obtained from closed-loop mechanic loot boxes have no ‘real-world value’, they are not considered ‘money or money’s worth’, as required by the 2005 Act. The prizes are unable to constitute real-world value because *EA* does not permit the conversion of the consumer’s in-game items to real-world cash. However, there are two main reasons why this element of convertibility should not protect closed-loop mechanic loot boxes from being classified as gambling.

Firstly, the argument is based on the false assumption that just because the prize obtained from the loot box is restricted to the game and the consumer, a ‘real-world value’ is unobtainable. Lauren Foye, a senior analyst at Juniper Research, has suggested that while loot boxes may not be assigned an official monetary value, regulators have often

³¹ Stephen Dubner, ‘The Economics of Sports Gambling (Ep.388)’ (*Freakonomics*, 4 September 2019) <<http://freakonomics.com/podcast/sports-gambling/>> accessed 3 March 2020.

³² Gambling Commission (n 20).

underestimated the value consumers place on them.³³

Secondly, just because there exists no internal cashing-in mechanism within the game, this does not necessarily mean that consumers are unable to acquire ‘money or money’s worth’ for loot box items. Wilson’s claim displays ignorance on the part of industry stakeholders as to how third parties are exploiting the open nature of their games to convert virtual items into real-world money. Through websites such as *G2G*, and *PlayerAuctions*, individuals can effectively circumvent the trade restraint of closed-loop mechanic loot boxes and sell or purchase the entirety of another player’s account. As a result of these third-party websites, these theoretically untradeable virtual items derived from closed-loop loot boxes have been converted into real-world cash and thus constitute ‘money or money’s worth’ under the 2005 Act.

It is therefore doubtful that any game can truly be considered closed-loop in practice. However, the lack of proximity between game developers and third-party trading platforms has meant that no single party is providing the facilities for all three elements needed to constitute gaming under the 2005 Act and has consequently meant that no party is being held accountable.

4 Psychological consequences

Due to the structural similarities between traditional gambling and loot box consumption, it is important that this article addresses not only the legal landscape but also the relevant psychological impact. For the purposes of this section, the following definition of problem gambling will be utilised:

A pattern of gambling activity which is so extreme that it causes an individual to have problems in their personal, family, and

³³ Mike Wright, ‘Video Gamers will be Spending \$50 Billion on “Gambling-like” Loot Box Features by 2022, According to Analysts’, *The Telegraph* (London, 17 April 2018) <www.telegraph.co.uk/technology/2018/04/17/video-gamers-will-spending-50-billion-gambling-like-loot-box/> accessed 6 May 2019.

vocational life. These issues range from domestic abuse and intimate partner violence to involvement in illegal activities, increased medical costs, and suicidality.³⁴

It must be kept in mind, however, that the loot box debate currently lacks any truly conclusive forms of evidence and further research concerning the long-term effects of loot box consumption on the behaviours of children and young people is necessary to ensure that any regulation has an empirical evidence base.³⁵

4.1 Psychological addiction

Loot box consumption has been shown to have operated in a similar way to gambling activities, which suggests that its consequences could potentially be comparable.³⁶ A study carried out by Drummond and Sauer of twenty-two video games that employed the loot box business model found that 45.45% of the games assessed met all five of Griffiths' criteria for gambling.³⁷ These are: 1) the exchange of money or valuable goods; 2) an unknown future event determining the exchange; 3) chance at least partly determining the outcome; 4) non-participation can avoid incurring losses; and 5) winners gaining at the sole expense of losers.³⁸ The same study found that most games, even those that did not meet legal or psychological definitions of gambling, included mechanisms that initiated and maintained player engagement through psychological principles which are associated with gambling behaviour.³⁹ The most important of these is the variable-ratio reinforcement schedule (VRRS). VRRS is defined by Skinner and Ferster as 'a mode of reinforcement where rewards are provided after a given number of responses, with the

³⁴ David Zendle and Paul Cairns, 'Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-scale Survey' (2018) 13(11) PLoS ONE <<https://dx.doi.org/10.1371/journal.pone.0206767>> accessed 25 April 2020.

³⁵ *ibid.*

³⁶ Aaron Drummond and James Sauer, 'Video Game Loot Boxes are Psychologically Akin to Gambling' (2018) 2 Nature Human Behaviour 530.

³⁷ *ibid.*

³⁸ *ibid* 530–532.

³⁹ *ibid.*

number of responses required to gain a reward varying unpredictably from reinforcement to reinforcement'.⁴⁰

Traditional gambling services like slot machines are underpinned by the VRRS⁴¹ and, in the context of loot boxes, the possibility of the consumer receiving a desirable item when consuming loot boxes is unpredictable and thus reinforces the behaviour of making further purchases. Experts believe that this repetitive behaviour, motivated by the hope of eliciting a reward, biologically stems from the operation of the dopamine system which responds most actively when there is 'maximum uncertainty'.⁴²

The level of harm on children and young people from gambling is different to that experienced by adults not simply because their cognitive functions are not as developed, but also because of their lack of social experience.⁴³ Combined with a higher 'propensity for risk taking' and a relatively 'poor impulse control',⁴⁴ young people's vulnerability is considerably higher when consuming gambling or gambling-like goods.

Furthermore, with the rapid advancement of technology, the internet has made video games and related materials more accessible. With 90%

⁴⁰ Charles B Ferster and Burrhus F Skinner, *Schedules of Reinforcement* (1st edn, Appleton-Century-Crofts, 1957) 469.

⁴¹ John Haw, 'Random-ratio Schedules of Reinforcement: The Role of Early Wins and Unreinforced Trials' (2008) 21 *Journal of Gambling Issues* 57.

⁴² Alex Wiltshire, 'Behind the Addictive Psychology and Seductive Art of Loot Boxes' (*PC Gamer*, 28 September 2017) <www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/> accessed 6 May 2019.

⁴³ Responsible Gambling Strategy Board, 'Children, Young People and Gambling: A Case for Action' (Gambling Commission, 2018) <<https://www.gamblingcommission.gov.uk/PDF/RGSB-Gambling-and-children-and-young-people-2018.pdf>> accessed 24 March 2020.

⁴⁴ *ibid.*

of 13- to 18-year-olds playing video games online in the UK,⁴⁵ it is worrying that Drummond and Sauer's study found that all of the games they studied allowed for, if not actively encouraged, underage players to engage with gambling and gambling-like mechanics.⁴⁶ With age and gender presenting significant risk factors in developing problematic gambling, and those specifically at risk being overrepresented in the gaming population,⁴⁷ it has been suggested that this makes such games a 'ripe breeding ground' for problem gambling.⁴⁸

4.2 Risk factors

In addition to the VRRS, additional risk factors increase the likelihood of individuals, especially children and young people, consuming loot boxes. These factors include the in-game environment, the near-miss phenomenon, and different sensory-related characteristics. These factors are explored below.

Taking the popular online multiplayer game *Overwatch* as an example, the in-game environment is one of the major ways in which consumers can be encouraged to purchase more loot boxes. Within the game, players may either purchase or earn loot boxes. Purchasing a loot box is quick and can easily provide players with desirable items, such as rare in-game cosmetics or stronger abilities that can improve the consumer's overall experience of the game. Earning a loot box, on the other hand, could take hours upon hours of tedious, repetitive gameplay. As such, combined with the time-limited events where the virtual rewards are only available during a fixed time frame that may or may not be disclosed to the public, passionate video gamers may feel pressured to purchase loot boxes.

⁴⁵ ParentZone, 'Skin Gambling: Teenage Britain's Secret Habit' (ParentZone, 2018) <https://parentzone.org.uk/system/files/attachments/Skin_Gambling_Report_June_2018.pdf> accessed 24 March 2020.

⁴⁶ Drummond and Sauer (n 36).

⁴⁷ Anders Johansson and others, 'Risk Factors for Problematic Gambling: A Critical Literature Review' (2009) 25(1) *Journal of Gambling Studies* 67.

⁴⁸ Zendle and Cairns (n 34).

Another significant risk factor is the near-miss phenomenon that gives players the illusion of control. It is capable of potentially causing or further developing problem gambling and is present within a number of loot boxes.⁴⁹ The near-miss phenomenon deceives consumers into believing that they are closer to winning the more desirable item than they actually are. The most obvious example of this can be seen in the game *Counter-Strike: Global Offensive*, where the process of consuming pre-determined loot boxes involves an animation of a carousel of virtual prizes being cycled through before landing on the consumer's reward.⁵⁰ The animation has no practical purpose other than showing the consumer that if the carousel had stopped a little earlier or later, then the consumer would have won a completely different prize, often more valuable in terms of its rarity compared to the prize won. The animation is illusory as the actual reward was determined the moment the consumer consumed the loot box.

Sensory-related characteristics such as sounds or images also contribute towards encouraging individuals to spend more. Audio-visual cues, such as bright colours and suspenseful music work in tandem to produce an immersive and exciting environment for the consumer when purchasing loot boxes.⁵¹ An example can be seen within *Overwatch*, where different loot boxes light up the screen with a golden, purple, or blue glow. As Loba and others' study suggests, such cues cause players to have a real sense of excitement and achievement.⁵² Keith Whyte, Executive Director of the American National Council on Problem Gambling, has drawn a parallel with slot machines. He argues that the importance of audio-visual cues is highlighted by the maintained use of

⁴⁹ Mark Griffiths, 'Psychobiology of the Near Miss in Fruit Machine Gambling' (1991) 125(1) *Journal of Psychology* 347.

⁵⁰ Valve, *Counter-Strike: Global-Offensive* (2019).

⁵¹ Pamela Loba and others, 'Manipulations of the Features of Standard Video Lottery Terminal (VLT) Games: Effects in Pathological and Non-pathological Gamblers' (2001) 17(4) *Journal of Gambling Studies* 297.

⁵² *ibid.*

the sound of crashing coins even though slot machine winnings now come on slips of paper.⁵³

This section has explored the psychological impact of loot box consumption through its addictive nature coupled with an environment in which consumption is implicitly encouraged or even pressured. It concludes that as a form of ‘weaponized behavioural psychology’ that aims to exploit the cognitive weakness of the person,⁵⁴ the loot box is similar, if not identical, to traditional gambling services.

5 Is the current approach sufficient?

Having drawn similarities between loot box consumption and traditional gambling as well as its effects on children and young people, a case must be made to demonstrate whether or not the current approach to closed-loop loot boxes in England and Wales complies with the general licensing objectives set out in section 1(c) of the 2005 Act.

5.1 The tripartite licensing objectives

Of the three licensing objectives outlined within section 1 of the 2005 Act, subsection (c) sets out the protection of ‘children and other vulnerable persons from being harmed or exploited by gambling’ and is an essential guiding objective for the work of the GC.⁵⁵ Although Abarbanel is correct in arguing that the GC is ‘accurately doing its job in interpreting the set regulation within the scope of the law, rather than stepping outside the bounds of their scope of responsibility to become

⁵³ Jason Bailey, ‘A Video Game “Loot Box” Offers Coveted Rewards, but is it Gambling?’, *The New York Times* (New York, 24 April 2018) <www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html> accessed 6 May 2019.

⁵⁴ Alex Hern, ‘Video Games are Unlocking Child Gambling. This has to be Reined In’, *The Guardian* (London, 28 December 2017) <<https://www.theguardian.com/commentisfree/2017/dec/28/video-games-unlock-child-gambling-loot-box-addiction>> accessed 11 January 2019.

⁵⁵ Gambling Act, s 1.

a moral arbiter’,⁵⁶ the current regulatory approach is insufficient in upholding the licensing objectives of protecting children and young persons from gambling or gambling-related harms.

This must be understood through the rationale behind the legal gambling age, which in England and Wales is set at 18 years of age.⁵⁷ The reason for a blanket-ban approach to gambling and gambling-related services is because gambling is understood to be capable of causing severe psychological harm, which can adversely affect children and young people in the future. Yet, having established that the closed-loop loot box is in essence a legal form of underage gambling, the sole reliance on the technicality of its definition under the 2005 Act is effectively allowing unimpeded, unrestricted, and unregulated access to potentially harmful activities for children and young people. To put it bluntly, both the GC and the 2005 Act have failed to uphold a crucial component of the tripartite licensing objectives. Regardless of how effective it may have been in regulating traditional forms of gambling while generating revenue for the state, they have failed to adapt to emergent forms of gambling.

5.2 The failure of the Gambling Act 2005

The two factors underpinning the failure of the 2005 Act as it applies to closed-loop loot boxes are: the monetary loss for the consumer and the potentially predatory nature of loot boxes.

Excessive monetary loss for consumers who purchase loot boxes is the first route to demonstrating the failure of the 2005 Act. Closed-loop loot boxes are attractive not only because each and every possible prize is constantly being advertised to the consumer in-game, but also because of their low price points, which tempt players into spending more frequently. It is also possible to disconnect the consumer from the real

⁵⁶ Brett Abarbanel, ‘Gambling vs Gaming: A Commentary on the Role of Regulatory, Industry and Community Stakeholders in the Loot Box Debate’ (2018) 22(4) Gaming Law Review 231.

⁵⁷ Gambling Act, s 46.

costs of loot box spending through the introduction of in-game fictional currencies, which cannot be converted back into real money. As an example, a box of 1,500 pieces of fictional, in-game currency may be equivalent to approximately £5.00. By converting real money into fictional currency, minor transactions will feel less important.⁵⁸ While it may be argued that responsible financial planning is the responsibility of the consumer, the psychologically addictive nature of loot boxes may mask the actual costs of purchases and may result in excessive and potentially unnoticed spending.

Daniel Ziechner, a Labour MP, has requested that governmental interventions be put in place to ensure that vulnerable parties avoid losing excessive sums of money due to their lack of self-control.⁵⁹ The current lack of such regulation is without a doubt a failure of the 2005 Act.

Furthermore, loot boxes may also be considered predatory, in the sense that players may feel pressured to purchase them in order to enjoy the game. While the nature of loot boxes is not in itself unfair or predatory, there may be situations in which they can be. Where consumers are faced with an abnormally difficult in-game stage or overwhelmingly strong opponents, they may feel pressured to purchase loot boxes that could enable them to compete effectively and enjoy the game. Such purchases could include additional bonuses to the consumer, such as a stronger weapon or a more durable shield. Under these circumstances, the loot box could constitute a predatory monetisation scheme, which revolves around withholding the ‘true long-term costs of the activity’ until their players are either financially or psychologically committed

⁵⁸ Daniel King and Paul Delfabbro, ‘Predatory Monetization Schemes in Video Games (e.g. “loot boxes”) and Internet Gaming Disorder’ (2018) 113(11) *Addiction* 1967.

⁵⁹ Mattha Busby, ‘“Easy Trap to Fall Into”: Why Video-game Loot Boxes Need Regulation’, *The Guardian* (London, 29 May 2018) <<https://www.theguardian.com/games/2018/may/29/gamers-politicians-regulation-video-game-loot-boxes>> accessed 16 January 2019.

to spending more.⁶⁰

If we were to examine *Overwatch*, the conditions required to earn a single loot box without payment become exponentially more difficult and time-consuming as the player advances through the levels in the game. By enabling players to earn a relatively higher number of free loot boxes at the beginning of their game experience, the consumer slowly and without noticing, to varying degrees, becomes psychologically addicted to the random nature of loot box rewards. The harsh conditions to earn loot boxes late into the game further pressures players to purchase loot boxes, as the manual way takes far too long, and can therefore be considered a predatory monetisation scheme. This is made even more obvious during special events, such as Christmas, when special items are only available from loot boxes during a specific timeframe. Consumers earning loot boxes manually may feel even more pressured to purchase than usual, for fear that they might run out of time to get the exclusive items.

Coupled with the information asymmetry between the consumer and the loot box itself, such as the odds of acquiring a more desirable item versus acquiring a less desirable item, the predatory monetisation scheme is able to trap players into thinking they have invested far too much on trying to attain their desired item to justify quitting. This is also known as the sunk-cost effect, which irrationally justifies continuous spending because the player feels that the more they put in, the higher the likelihood of them securing their desired item.⁶¹ However, this is typically not the case, as the odds of the loot box do not change; whereas the perception of the player with regards to the odds of the loot box does. As the Belgian Gaming Commission's Director Peter Naessens suggested, 'loot boxes are not an innocent part of video games that present themselves as games of skill ... players are

⁶⁰ Daniel King and Paul Delfabbro, 'Video Game Monetization (e.g., 'Loot Boxes'): a Blueprint for Practical Social Responsibility Measures' (2019) 17(1) *International Journal of Mental Health and Addiction* 168.

⁶¹ *ibid.*

tempted and misled, and none of the protective measures for gambling are applied'.⁶²

6 Reform

Having addressed the shortcomings of the 2005 Act and its ability to protect children and young people from the harms of excessive loot box consumption, this section makes pragmatic proposals for reform of the 2005 Act.

6.1 The legislative reform of the Gambling Act 2005

The call for the legislative reform of the 2005 Act to incorporate closed-loop mechanic loot boxes as a form of gambling arises from international public outcry and media coverage of academic studies which suggest that loot boxes share the same structural traits as traditional gambling services and may, in fact, facilitate or exacerbate gambling-related harms.⁶³

A different approach to England and Wales has been adopted in Belgium. The Gaming Act of 7 May 1999 provides a similar regulatory framework to that adopted domestically in the 2005 Act. Article 4 of the Belgian Act states that:

It is prohibited for anyone to operate in any form, in any place and in any direct or indirect manner whatsoever, a game of chance or gaming establishment, without a licence obtained in advance from the Gaming Commission as governed by the present Act and by the exceptions as governed by the Act.⁶⁴

Under Belgian law, all games of chance are considered gambling and

⁶² Koen Geens, 'Loot Boxen in drie videogames in strijd met kansspelwetgeving', *Koen Geens* (Brussels, 2018) <<https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>> cited in Busby (n 59).

⁶³ BBC News, 'Loot Boxes should be Banned', *The BBC* (London, 9 May 2019) <<https://www.bbc.com/news/technology-48214293>> accessed 20 December 2019.

⁶⁴ Gaming Act of 7 May 1999 (BE).

are prohibited unless licensed or otherwise permitted by the Kansspelcommissie (the Belgian Gaming Commission). A game of chance under Belgian law is defined as:

...any game by which a stake of any kind is committed, the consequence of which is either loss of the stake by at least one of the players or a gain of any kind in favour of at least one of the players, or organisers of the game and in which chance is a factor...⁶⁵

From this definition, a distinction can be drawn between UK and Belgian gambling laws. While the three key elements of a game, chance, and prize are present in both, Belgian law requires not that the prize attained from the game of chance constitute ‘money or money’s worth’ for it to be classed as gambling, as it does in UK law, but that the consequence of the game is a ‘gain of any kind’.

However, while the authors of this article understand the concerns surrounding loot box consumption in relation to children and young people, we consider the legislative reform to incorporate closed-loop loot boxes as a form of gambling under the definitions provided in the 2005 Act not only inappropriate to counteract the problems arising from excessive loot box consumption, but also impractical. This article will outline why the approach adopted by Belgium is ineffective before suggesting what the GC could potentially do to remedy the issue at hand.

A blanket-ban approach would be severely impractical and short-sighted. While it may result in some form of prevention, the root of the problem lies not just within the unimpeded access of children and young people to loot boxes, but rather the logistics involved with the enforcement of a nation-wide ban by imposing a legal gambling age on loot boxes in video games. If children and young people really wished

⁶⁵ *ibid.*

to consume loot boxes, the geographical limits of any domestic legislation could easily be bypassed through different channels, such as the use of a virtual private network, which tricks game servers into thinking that the console is accessing the game from another location.

Furthermore, the current lack of a conclusive evidence base to prove that loot boxes can lead to problematic gambling must be considered. A legislative response to ban loot boxes would require game developers, such as *Activision Blizzard* and *EA* to acquire operating licences that comply with gambling regulations in England and Wales. While this is not a blacklist, it would place an onerous burden upon game companies that are historically unfamiliar with the gambling industry. In line with Zendle and Cairns, it is also important that further research is carried out about loot boxes before we can determine whether loot boxes are causing harmful gambling behaviours.⁶⁶ To rush into a legislative response may only exacerbate the situation. Gainsbury has argued that because technology rapidly outpaces research, there is ‘tension between rushing to implement protectionist policies based on limited data, and avoidance of issues through outdated policy, which may fail to offer adequate protections’.⁶⁷

A rush to legally classify loot boxes as gambling has also led to concerns that it would open a Pandora’s Box of sorts,⁶⁸ leading to other, less harmful elements of games being considered as gambling simply because they contain an element of chance to keep the games exciting for consumers. However, while this article considers a legal classification under the 2005 Act to be unnecessary, the GC’s current position in maintaining the status quo is also unreasonable given that the potential level of harm to children and young people is so obvious.

⁶⁶ Zendle and Cairns (n 34).

⁶⁷ Sally Gainsbury, ‘Gambling and Gaming are Converging: “Won’t Someone Think of the Children!”?’ (*BASIS*, 13 February 2017) <www.basionline.org/2017/02/gambling-and-gaming-are-converging-wont-someone-think-of-the-children-.html> accessed 6 May 2019.

⁶⁸ Abarbanel (n 56).

Rather than monitoring developments in the video game industry, the GC should actively commission relevant research into the gambling harms caused by closed-loop loot box consumption and base their future approach on an evidential basis.

6.2 Alternative proposals

There are three proposals the authors of this article believe to be appropriate: consumer protection, corporate social responsibility (CSR), and parental responsibility. The following have been constructed as alternatives to the legislative reform of the definitions of gambling under the 2005 Act. Our proposals address the issues of information asymmetry between consumer and corporation in relation to loot box consumption, introduce standardised industry self-regulation and peer-regulation, and offer a bottom-up approach to educate parents on loot boxes to prevent children and young people from experiencing gambling activity or gambling-related harms.

(A) Consumer protection

Information asymmetry between consumers and corporations with regards to loot box consumption has been a deficiency that the 2005 Act has failed to resolve. One solution may be to require companies to specify the odds of winning specific items and provide clear descriptions of their products. Within England and Wales, this could be achieved via the Consumer Rights Act 2015 (the 2015 Act),⁶⁹ as it is capable of reducing the information asymmetry by ensuring that game developers provide sufficient information regarding loot boxes to their consumers.

In employing this solution, there are four main steps that must be followed. Firstly, we must address the essential features of a valid contract when purchasing a loot box through the video game platform in order to establish that a binding agreement exists between the

⁶⁹ Consumer Rights Act 2015.

consumer and the corporation. There must first be an *offer* of a loot box, the *acceptance* of the loot box through the act of purchasing, the provision of *consideration* in terms of money paid and the *intention to create legal relations* in terms of wanting to purchase the loot box from the vendor (video game company), and the *certainty of terms* as it is clear that one party wishes to sell and the other to buy.

Secondly, having established that a valid contract exists, we must refer to section 37 of the 2015 Act. This provision states that any of the *pre-contract information* which is listed in Regulation 9, 10, or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the 2013 Regulations) that was provided by the trader ‘is to be treated as included as a term of the contract’.⁷⁰ This means that any pre-contract information listed in Regulation 9, 10, or 13 is to be treated as being a term of the contract between the seller and the buyer.

Thirdly, Regulations 9 and 13 state that the trader must ‘give or make available to the consumer the information’ that is listed in Schedule 1 and Schedule 2 respectively. This means that the seller must provide to the consumer any information about the consumption of the loot box that is listed in Schedule 1 or 2.

Lastly, Schedules 1 and 2 of the 2013 Regulations state that the information that must be disclosed includes ‘the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services.’ This means that the seller must disclose what are considered to be the main characteristics of loot boxes to the consumer in a manner that is appropriate.

As the odds of winning, the description of what a loot box is, as well as how the prize can be determined can be argued to be some of the main characteristics of loot box consumption, such requirements could

⁷⁰ Consumer Rights Act, s 37.

potentially pressure video game companies to go further and clearly disclose the odds of winning specific items. This solution is therefore capable of remedying the information asymmetry and potentially stopping the sunk-cost effect by showing that the odds of winning specific items do not change regardless of how much money is invested.

(B) Corporate social responsibility (CSR)

CSR is a business approach in which enterprises take it upon themselves to ensure the sustainable development of economic, social, or environmental factors is taken into account in their business model.⁷¹ It is not philanthropy, but rather the integration of social responsibility in the manner in which businesses make profit.⁷² Within the context of the video game industry, CSR is capable of facilitating the sustainable development of social factors, including the prevention of gambling-related harm to children and young people. This could take the form of industry-standardised limitations on loot box consumption or the greater exchange of information with regard to loot boxes from the corporation to the consumer.

The authors believe there are two reasons why CSR and self-regulation can be voluntarily implemented in the video game industry: the suitability of industry leaders in assuming the role of regulators and the importance of brand recognition in an increasingly globalised market.

Firstly, the reason why industry leaders are best suited to take up the role of regulators in the video game industry is that they are in the best position possible to handle regulation that strikes the right balance between the protection of vulnerable subpopulations in their consumer

⁷¹ Thomas Jones, 'Corporate Social Responsibility Revisited, Redefined' (1980) 22(2) *California Management Review* 59.

⁷² Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' (2009) University of Edinburgh School of Law Working Paper 3/2009 <<https://ssrn.com/abstract=1369305>> accessed 16 March 2020.

base and the advancement of game development.⁷³ With innovative games and business models constantly under development, the advancement of technology vastly outpaces research and implementation of safety measures.⁷⁴ As Gainsbury describes, ‘this gap creates tension between rushing to implement protectionist policies based on limited data and avoidance of issues through outdated policies, which may fail to offer adequate protections’.⁷⁵ If the regulation of loot box consumption was left to the government, there is a very real fear of governmental overreach that could result in unintended consequences for the video game industry.⁷⁶ As the development costs of AAA games has increased tenfold over the past decade⁷⁷ while retail prices of said games have remained unchanged,⁷⁸ the loot box business model is an integral component which seeks to increase the life span of the game itself.⁷⁹ Legislative reform to classify loot box consumption as gambling would effectively remove a major way in which game developers currently produce returns. In fact, there is evidence to further suggest that regulation within the video game industry works best when it is voluntary, rather than being forced via legislative intervention. For example, China required game developers to publish information with regards to loot box consumption in 2017 and made it clear that the odds of the loot box must be published whenever a product is sold to the consumer that uses an element of chance in deciding its

⁷³ Abarbanel (n 58).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Keza MacDonald, ‘Belgium is Right to Class Video Game Loot Boxes as Child Gambling’, *The Guardian* (London, 26 April 2018)

<<https://www.theguardian.com/games/2018/apr/26/belgium-is-right-to-legislate-against-video-game-loot-boxes>> accessed 13 December 2018.

⁷⁸ Raph Koster, ‘The Cost of Games’ (*Raph Koster*, 17 January 2018)

<<https://www.raphkoster.com/2018/01/17/the-cost-of-games/>> accessed 13 December 2018.

⁷⁹ Leo Lewis, ‘The “Loot Box” Showdown Facing Investors in Video Games’, *Financial Times* (London, 21 December 2017)

<<https://www.ft.com/content/81b2c328-e642-11e7-97e2-916d4fbac0da>> accessed 10 December 2019.

prize.⁸⁰ In response, *Activision Blizzard* utilised a loophole and began charging money for in-game currency while providing loot boxes as an added bonus to the currency, rendering the loot box free of charge to comply with the law in theory, but not in practice.⁸¹

Secondly, in an increasingly globalised market with advancements in technology, global communication systems have made the exchange of information incredibly simple between consumers.⁸² Brand recognition, or the relatively vulnerable state of it, facilitated by the internet through ‘a ready forum for instant criticism and publicity, with websites on all kinds of issues pointing fingers at specific companies’ has been a key driver for the corporation’s engagement with CSR.⁸³ Why this form of external stakeholder pressure in the form of consumers is effective in getting corporations to engage with CSR is because, as McBarnet suggests, the proportion of ‘corporate value that comes not from tangible assets ... but from “intangibles” has risen’.⁸⁴ A relevant example would include *Star Wars Battlefront II*, where *EA* faced international criticism and media coverage for their use of loot boxes in a manner that was deemed unfair and exploitative to consumers.⁸⁵ This is reinforced by McCaffrey, who suggests that global communication ‘facilitates accountability and encourages developers to be open and honest, while also spreading valuable information between consumers’.⁸⁶ A responsible manner adopted by corporations that takes social factors into account is therefore ‘necessary to ensure [the

⁸⁰ Matthew Handrahan, ‘Blizzard Avoids China’s Loot Laws by Selling Overwatch In-game Currency’ (*Games Industry*, 6 June 2017) <www.gamesindustry.biz/articles/2017-06-06-blizzard-avoids-chinas-loot-box-laws-by-selling-in-game-currency> accessed 6 May 2019.

⁸¹ *ibid.*

⁸² McBarnet (n 72).

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Matthew McCaffrey, ‘The Macro Problem of Microtransactions: The Self-Regulatory Challenges of Video Game Loot Boxes’ (2019) *Business Horizons* 62(4) 483 <<https://ssrn.com/abstract=3309612>>.

⁸⁶ *ibid.* 15.

corporation's] longevity in terms of both resources and public opinion'.⁸⁷

(C) Parental responsibility

In the prevention and reduction of gambling-related harms to children and young people, parents play a significant factor. Abarbanel has stated that:

Consumers, and parents of those consumers, hold equally valuable roles in this process, contributing toward best practices in responsible gaming and holding game developers, gambling entities, regulators, and themselves accountable.⁸⁸

While parents may not necessarily be interested in whether or not an activity reaches the legal threshold for gambling, the GC has recognised that their main concern is 'whether there is a product out there that could present a risk to their children'.⁸⁹ Parental oversight is therefore a valuable resource which could effectively protect vulnerable subpopulations in the video game industry. However, while it is more flexible than government intervention or industry self-regulation, consumer research carried out by the Entertainment Software Ratings Board in America has found that a large number of parents are not fully aware of what loot boxes are, how they work, and what controversies surround them.⁹⁰ As parents are often the primary source of money for children and young people to purchase and consume loot boxes, they

⁸⁷ Daniele Giovannucci, Oliver Von Hagen, and Joseph Wozniak, 'Corporate Social Responsibility and the Role of Voluntary Sustainability Standards' (2014) 1 NRMT 359.

⁸⁸ Abarbanel (n 56).

⁸⁹ T Miller, 'Loot Boxes within Video Games' (*Gambling Commission*, 24 November 2017) <www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx> accessed 6 May 2019.

⁹⁰ Paul Tassi, 'The ESRB Is Being Willfully Obtuse about Loot Boxes, and Will Never Be Any Help' (*Forbes*, 28 February 2018) <www.forbes.com/sites/insertcoin/2018/02/28/the-esrb-is-being-willfully-obtuse-about-loot-boxes-and-will-never-be-any-help/#a184fa76877a> accessed 6 May 2019.

must be given adequate information on the subject to fully understand what it is that their children are consuming. Aside from information given by industry leaders as suggested under the consumer rights solution in this article, parents are also able to self-educate on the issue through a variety of different free educational platforms. Such platforms include AskAboutGames, which is a joint venture between the VSC Rating Board and games trade body Ukie, which provides up-to-date answers about age ratings, tips about safe and beneficial play, and on-going debates.⁹¹ AskAboutGames has created a guide specifically for parents and legal guardians about loot boxes and simplifies the relevant definitions and information into a succinct and digestible format.⁹²

AskAboutGames has also educated concerned parents and other relevant stakeholders about the available payment channels and has offered advice and information about parental control options within devices to help reduce and prevent further undesired in-game purchases from being made.⁹³ In addition, parents may also prevent excessive, unnoticed spending by their children by preventing the storage of credit card details on their children's video game accounts. It is recommended that educational programmes must support parents to be more aware of the available payment channels available and to keep regular tabs on them.⁹⁴

⁹¹ AskAboutGames, 'About' (*AskAboutGames*, 2017)

<<https://www.askaboutgames.com/contact-links/>> accessed 20 December 2019.

⁹² Will Freeman, 'Loot Boxes: A Guide for Parents and Guardians' (*AskAboutGames*, 2019) <<https://www.askaboutgames.com/loot-boxes-a-guide-for-parents-and-guardians/>> accessed 20 December 2019.

⁹³ *ibid.*

⁹⁴ Georgios Floros and others, 'Adolescent Online Gambling: The Impact of Parental Practices and Correlates with Online Activities' (2013) 29(1) *Journal of Gambling Studies* 131.

7 Conclusion

This paper has carried out a critical appraisal of the 2005 Act as it applies to closed-loop loot boxes. It has illustrated that the legal definition of gambling where rewards can be converted for ‘money or money’s worth’ fails to cover closed-loop loot box consumption and, as such, the law is shown to remain unable to keep pace with emergent forms of gambling. It has exposed how the current operational framework of gambling regulation in England and Wales is flawed in practice. While the tripartite licensing objectives of the 2005 Act are reasonable, the circumvention of the legal definition of gambling (via the fragmentation of the process where loot boxes are purchased, used, and then converted into real money) and the subsequent exploitation of this process by industry stakeholders and third-party websites have shown that the present legal framework for gambling does not appear to be effective in protecting children and young people. As a result, the GC as a regulator for the gambling industry has failed both in upholding the tripartite licensing objectives and holding individual game companies accountable.

However, as a causal connection between loot boxes and problematic gambling in children has not been conclusively established, the authors recommend a patient and cautious approach. Technological advances that outpace research and regulation in the video game industry have led to rushed, impractical, and short-sighted legislative frameworks seen in both Belgium and China. Until the government is sufficiently satisfied that loot boxes are harmful, drastic legislative reforms are not advised.

This does not mean that the potential harm that loot box consumption could be causing to children and young people currently should be ignored, however, but in the interim, more proportionate solutions must be pursued instead. This includes consumer protection strategies to reduce information asymmetry between consumer and corporation, standardised industry self-regulation to introduce sustainable social

development, and the provision of sufficient educational information to allow parents and other stakeholders to become more aware of the current topic. Any legislative intervention must be based on the potential and actual severity of harm.

Moving forward, a research agenda must be established with respect to loot box consumption by children and young people. This would involve research into both the short-term and long-term impacts of loot box consumption such as excessive spending, psychological addiction, gateway products into traditional gambling services, and problematic gambling.