

Video game loot boxes are NOT gambling under Dutch gambling regulation?
Shifting the goalpost in *Electronic Arts v Kansspelautoriteit*

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Abstract

In March 2022, the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State, found that loot boxes in the Ultimate Team Mode of the FIFA video games (FUT) published by Electronic Arts (EA) did not contravene Dutch gambling law, contrary to the Netherlands Gambling Authority's (Kansspelautoriteit) previous 2018 interpretation of the law and overruling a previous 2020 judgment that affirmed the Kansspelautoriteit's previous interpretation. The Council of State decided that the player packs (*i.e.*, loot boxes) in FUT cannot be deemed as a separate game that is capable of being assessed on their own as to whether they constitute a 'game of chance' and therefore potentially contravene gambling regulation. Instead, the overarching video game containing the loot boxes should be assessed more broadly as to whether *that* game constitutes a 'game of chance' or a 'game of skill.' The Council of State's unique approach of not considering the loot boxes in the abstract as to whether or not they constitute gambling is (i) inconsistent with how other problematic elements of video games (*e.g.*, sexual content) are singled out for regulatory scrutiny and (ii) underplays the importance of loot boxes as a monetisation method in contemporary video games. Further, the Council of State's overreliance on how the so-called 'majority' of players experience the video game importantly failed to account for the experiences of the small minority of high-spending players who are most at risk of potential harms and in need of consumer protection. The Council of State's narrow interpretation of Dutch law should not be assumed to be applicable to other countries whose gambling laws differ. Dutch legislators should consider whether this restrictive interpretation that has effectively nullified the possibility of using gambling law to regulate loot boxes was intended and may require legislative amendment.

Keywords:

Loot boxes; Video game; Video gaming regulation; Interactive entertainment law; Gambling regulation; Consumer protection; The Netherlands and Dutch law.

1. Introduction: Historical background on loot box regulation in the Netherlands

Loot boxes are virtual products in video games that can be purchased by players to obtain randomised rewards.¹ Loot boxes are conceptually similar to gambling,² but are presently widely available for purchase by both adults and children without restrictions in most countries across the world.³ Empirical psychology research has consistently established a link between loot boxes and gambling: particularly, a positive correlation has been found between loot box expenditure and self-reported problem gambling severity.⁴ Consumer protection and gambling harm-related concerns about the potential harms of loot boxes, including direct financial harm through overspending, have been raised by policymakers.⁵ Accordingly, policymakers and gambling authorities around the world have considered whether loot boxes might legally constitute gambling.⁶ For example, the Belgian Gaming Commission has already opined that all loot boxes that require purchase using real-world money are prohibited under Belgian gambling regulation.⁷ Some countries are also presently considering

¹ Leon Y Xiao and others, 'Loot Boxes, Gambling-Like Mechanics in Video Games' in Newton Lee (ed), *Encyclopedia of Computer Graphics and Games* (Springer 2021).

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

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

⁴ David Zendle and Paul Cairns, 'Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey' (2018) 13 *PLOS ONE* e0206767; Stuart Gordon Spicer and others, 'Loot Boxes, Problem Gambling and Problem Video Gaming: A Systematic Review and Meta-Synthesis' [2021] *New Media & Society* 14614448211027176; Shaun Stephen Garea and others, 'Meta-Analysis of the Relationship between Problem Gambling, Excessive Gaming and Loot Box Spending' (2021) *Advance Online Publication International Gambling Studies* 1.

⁵ Digital, Culture, Media and Sport Committee of the House of Commons (UK), 'Immersive and Addictive Technologies: Fifteenth Report of Session 2017–19' (2019) HC 1846 <<https://web.archive.org/web/20210609191037/https://publications.parliament.uk/pa/cm201719/cmselect/cmcmu/meds/1846/1846.pdf>> accessed 20 June 2021; Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK), 'Report of Session 2019–21: Gambling Harm— Time for Action' (2020) HL Paper 79 <<https://web.archive.org/web/20200702195336/https://publications.parliament.uk/pa/ld5801/ldselect/ldgamb/79/79.pdf>> accessed 2 July 2020.

⁶ For example, in the UK, Belgium and Denmark, see UK Gambling Commission, 'Virtual Currencies, ESports and Social Gaming — Position Paper' (2017) <<https://web.archive.org/web/20210111075348/http://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>> accessed 10 March 2022; Belgische Kansspelcommissie [Belgian Gaming Commission], 'Onderzoeksrapport loot boxen [Research Report on Loot Boxes]' (2018) <https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-final-publicatie.pdf> accessed 14 April 2020; Spillemyndigheden [Danish Gambling Authority], 'Statement about Loot Boxes / Loot Crates' (29 November 2017) <<https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates>> accessed 3 March 2021.

⁷ Belgische Kansspelcommissie [Belgian Gaming Commission] (n 6). However, note that the enforcement and the effectiveness of this loot box 'ban' has not yet been evaluated, although a study has been planned for mid-2022 and a registered report thereof has been recommended, see Leon Y Xiao, 'Breaking Ban: Assessing the Effectiveness of Belgium's Gambling Law Regulation of Video Game Loot Boxes' [2022] Stage 1 Registered Report recommended by Peer Community in Registered Reports <<https://osf.io/8ftv2/>> accessed 13 April 2022..

amending existing gambling law to potentially include loot boxes: the UK Government closed a dedicated public consultation on loot boxes and potential law reform in late 2020; a white paper is expected imminently.⁸ Spain and Singapore have also recently consulted on law reform regarding loot boxes.⁹

In 2018, the Netherlands Gambling Authority [Dutch: *Kansspelautoriteit*] opined that loot boxes that require players to pay real-world money to purchase and whose content possessed real-world monetary value (because the content can subsequently be transferred and thereby bought and sold between players) legally constitute a ‘game of chance’ and therefore contravene Dutch gambling law if offered without appropriate licencing.¹⁰ The UK Gambling Commission, the Danish Gambling Authority, and other gambling authorities came to similar conclusions in relation to their gambling laws for this specific type of loot boxes,¹¹ although these gambling authorities have not reportedly taken any enforcement actions, unlike the Netherlands Gambling Authority as detailed below.

In 2019, the Netherlands Gambling Authority then enforced the law according to its interpretation by imposing a financial penalty on Electronic Arts for its allegedly illegal loot box implementations (which require purchase using real-world money and whose content has transferable real-world monetary value) in the widely popular FIFA video games.¹² In 2020, on appeal by Electronic Arts against the financial penalty imposed in 2019, the District Court of The Hague upheld the Netherlands Gambling Authority’s interpretation of Dutch law and opined that loot boxes do indeed constitute a

⁸ Department for Digital, Culture, Media & Sport (UK), ‘Loot Boxes in Video Games: Call for Evidence’ (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920393/Loot_Box_Call_for_Evidence_Document_.pdf> accessed 15 March 2022.

⁹ Dirección General de Ordenación del Juego (Directorate General for the Regulation of Gambling), ‘Proceso Participativo Sobre Los Mecanismos Aleatorios de Recompensa (Cajas Botín)’ (19 February 2021) <<https://www.ordenacionjuego.es/en/Noticia-Cajas-Botin>> accessed 21 March 2021; Ministry of Home Affairs (Singapore), ‘Public Consultation on Proposed Amendments to Laws Governing Gambling Activities’ (12 July 2021) <<https://web.archive.org/web/20210712113340/https://www.mha.gov.sg/docs/default-source/media-room-doc/public-consultation-on-proposed-amendments-to-laws-governing-gambling-activities.pdf>> accessed 25 July 2021.

¹⁰ Kansspelautoriteit [The Netherlands Gambling Authority], ‘Onderzoek naar loot boxes: Een buit of een last? [Study into Loot Boxes: A Treasure or a Burden?]’ (2018) <https://web.archive.org/web/20190503232356/https://kansspelautoriteit.nl/publish/library/6/onderzoek_naar_loot_boxes_-_een_buit_of_eeen_last_-_nl.pdf> accessed 10 March 2022.

¹¹ UK Gambling Commission (n 6); Spillemyndigheden [Danish Gambling Authority] (n 6).

¹² Kansspelautoriteit [The Netherlands Gambling Authority], ‘Imposition of an Order Subject to a Penalty on Electronic Arts for FIFA Video Game’ (29 October 2020) <<https://web.archive.org/web/20201127222346/https://kansspelautoriteit.nl/nieuws/nieuwsberichten/2020/oktober/imposition-an-order/>> accessed 11 March 2021.

‘game of chance’ and that consequently Electronic Arts’ sale of loot boxes in the FIFA games violated Dutch gambling law, as the company did not possess a gambling licence.¹³

However, Electronic Arts then successfully appealed to the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State [Dutch: *Afdeling Bestuursrechtspraak Raad van State*], whose ‘Ruling [Dutch: *Uitspraak*]’ was handed down on 9 March 2022: the Netherlands Gambling Authority was wrong to have determined loot boxes as a standalone ‘game of chance’ without considering the wider video game that contains them.¹⁴ The Council of State decided that before evaluating whether any loot boxes potentially constitute a ‘game of chance’ under article 1 of the Gaming and Betting Act [Dutch: *Wet op de kansspelen*], a preliminary question that must be posed (and answered in the affirmative, for the enforcement action to proceed lawfully) is whether those loot boxes constitute a sufficiently independent ‘game’ that is capable of being assessed separately or whether those loot boxes are merely part of a broader video game, which should be holistically assessed instead as to whether that overarching video game constitutes a ‘game of chance.’¹⁵ The Council of State effectively interpreted Dutch gambling regulation in such a way that the overarching video game containing the loot boxes must constitute a ‘game of chance’ before gambling regulation can be applied, barring extreme examples discussed below, because most loot boxes would *not* be deemed as sufficiently ‘separated’ from the video game. The Council of State then decided that, taking into account the gameplay experience of the so-called ‘majority’ of players, the FIFA Ultimate Team (FUT) mode of the FIFA games, holistically considered, is a ‘game of skill’ involving the playing of virtual soccer matches, wherein the player packs (*i.e.*, the loot boxes) only added an element of chance and did not fundamentally alter the overarching video game into a ‘game of chance.’¹⁶ As such, the loot boxes in the FIFA games cannot be deemed as a separate game, which is capable of being separately assessed as to whether they independently constitute a ‘game of chance’ under article 1 of the Gaming and Betting Act, because the vast majority of players engage with the loot boxes only as a part of the broader skill-based FUT mode (which itself remains a ‘game of skill’) and that this majority of players do not treat engaging

¹³ *Electronic Arts Inc & Electronic Arts Swiss Särl v Kansspelautoriteit* (2020) Rechtbank Den Haag [District Court of The Hague] (15 October 2020) ECLI:NL:RBDHA:2020:10428 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:10428>> accessed 11 March 2021.

¹⁴ Uitspraak [Ruling] 202005769/1/A3 (2022) Afdeling Bestuursrechtspraak Raad van State [Administrative Jurisdiction Division of the Council of State (The Netherlands)] (9 March 2022) ECLI:NL:RVS:2022:690 (hereinafter, the ‘Ruling’), para 9 <<https://www.raadvanstate.nl/actueel/nieuws/@130150/202005769-1-a3/>> accessed 10 March 2022.

¹⁵ *ibid* paras. 7.4 and 8.3

¹⁶ *ibid* para. 8.5. Note that within the FIFA games, there are several (single player) game modes aside from the FUT mode, such as Kick-Off or Career Mode. The FUT mode is perceived as the multiplayer aspect of the FIFA games, and the player packs (*i.e.*, loot boxes) are only available inside the FUT mode.

with the loot boxes in these games as a standalone game.¹⁷ Accordingly, because the FUT mode is predominantly a ‘game of skill,’ Electronic Arts has not contravened Dutch gambling law. Notably, this Dutch Ruling of the Council of State is the final interpretation on this matter in the Netherlands as it cannot be further appealed.

The video game loot box issue continues to develop globally, perhaps taking surprising turns at times. How other countries will regulate this mechanic (if at all) remains to be seen. Laws might be changing. Cases might also be brought in other jurisdictions on the same points of law. Recognising that the laws of different countries will differ on how these questions are to be determined, this case note seeks to critique the logic that the Dutch Council of State has adopted and to identify how the gambling laws of other countries may not necessarily come to the same conclusion. Specifically, it is argued that the gambling authorities of other countries (*e.g.*, the UK and Denmark) that previously determined paid loot boxes containing rewards with transferable real-world monetary value to constitute gambling did so correctly and should continue to maintain that interpretation,¹⁸ even if the Dutch law position might now have seemingly changed.

2. Not considering loot boxes in the abstract *in all cases*: a unique interpretation

Importantly, and unlike previous assessments made by policymakers,¹⁹ national gambling authorities,²⁰ and the substantial academic literature that has developed surrounding this issue,²¹ the Dutch Council of State has determined potential contravention of gambling law based on the overarching video game and not based on the loot box in the abstract as a standalone mechanic or ‘game’ in and of itself²² (although it recognised the possibility that certain loot boxes that are very distanced from the video game could in theory be deemed as a standalone game of chance²³). Merely

¹⁷ *ibid* para. 8.5

¹⁸ See UK Gambling Commission (n 6); Spillemyndigheden [Danish Gambling Authority] (n 6).

¹⁹ For example, Digital, Culture, Media and Sport Committee of the House of Commons (UK) (n 5); Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK) (n 5).

²⁰ For example, UK Gambling Commission (n 6); Kansspelautoriteit [The Netherlands Gambling Authority] (n 10); Belgische Kansspelcommissie [Belgian Gaming Commission] (n 6); Spillemyndigheden [Danish Gambling Authority] (n 6).

²¹ See Andrew Moshirnia, ‘Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling’ (2018) 20 *Minnesota Journal of Law, Science & Technology* 77; Peter Honer, ‘Limiting the Loot Box: Overview and Difficulties of a Common EU Response’ (2021) 4 *Interactive Entertainment Law Review* 63; Sebastian Schwidessen and Philipp Karius, ‘Watch Your Loot Boxes! – Recent Developments and Legal Assessment in Selected Key Jurisdictions From a Gambling Law Perspective’ (2018) 1 *Interactive Entertainment Law Review* 17; Stephanie Derrington, Shaun Star and Sarah J Kelly, ‘The Case for Uniform Loot Box Regulation: A New Classification Typology and Reform Agenda’ (2021) 46 *Journal of Gambling Issues* 302

²² Ruling (n 14) para. 8.5.

²³ *ibid* paras 8.3 and 8.5.

entertaining the possibility that *some* (and, following the interpretation given by the Dutch Council of State, *most*) loot boxes potentially do not constitute a separate game from the video game and that the video game (rather than the loot box mechanic itself) should be scrutinised as to whether it constitutes a game of chance is a unique interpretation of loot boxes in the video game environment and might be seen as a paradigm shift in loot box regulation. However, this was the first instance of any competent body adopting such an interpretation, and the approach taken by the Council of State (which differs from the intended interpretation evident in the Dutch legislature's preparatory works²⁴ and the Netherlands Gambling Authority's interpretation that was previously approved by the District Court of The Hague,²⁵ both of which recognise loot boxes as a separate game of chance from the video game in all cases) might not necessarily be (and, as this case note argues, should not be) adopted by other countries.

This view that specific loot box elements of the video game cannot be scrutinised on its own *in all cases* is incongruent with how other aspects of video game regulation have approached individual problematic elements. For example, in the context of the content moderation of sexual and violent content and the provision of appropriate age ratings (which is presently industry self-regulation in North America and Europe by the Electronic Software Rating Board (ESRB) and Pan-European Game Information (PEGI), respectively), the assessment is made precisely on the basis of specific problematic elements. The inclusion of *any* problematic content would render the entire game subject to the highest age rating that the most problematic content would attract. An example illustrating this point is *Grand Theft Auto: San Andreas* (Rockstar Games, 2004), which contained explicit sex scenes that were present within the game's files but were *disabled* by the developers (after realising that they would receive too high an age rating as a result of their inclusion) and therefore inaccessible by the player unless the game was then modified using third-party software.²⁶ Despite this, upon discovery, the game's rating was changed from 'Mature' to 'Adults Only' by the ESRB to reflect the inclusion of the explicit sexual content in the game files, which no players can access through regular gameplay and most players could not easily access.²⁷ This change in age ratings caused many major US retailers to stop selling the game until a new version was produced following a product recall.²⁸

²⁴ Eerste Kamer der Staten-Generaal [First Chamber of the States-General], Kamerstuk Vergaderjaar 2017-2018, 33 996 G (13 September 2018), 72 <<https://zoek.officielebekendmakingen.nl/kst-33996-G.html>> accessed 22 April 2022.

²⁵ *Electronic Arts* (n 13) para 7.5.

²⁶ Simon Parkin, 'Who Spilled Hot Coffee?' (*Eurogamer*, 2 December 2012) <<https://www.eurogamer.net/articles/2012-11-30-who-spilled-hot-coffee>> accessed 15 March 2022.

²⁷ Tor Thorsen, 'San Andreas Rated AO, Take-Two Suspends Production' (*GameSpot*, 14 December 2005) <<https://www.gamespot.com/articles/san-andreas-rated-ao-take-two-suspends-production/1100-6129500/>> accessed 15 March 2022.

²⁸ Parkin (n 26).

If other elements of video games can be singled out for (self-)regulatory scrutiny, then loot boxes should also be so treated as a standalone element in all circumstances. Indeed, both the ESRB and PEGI recognise loot boxes (or ‘in-game purchases (includes random items)’ using ESRB’s and PEGI’s terminology²⁹) as a specific element of the video game that deserves being individually identified and highlighted when *every* game is given an age rating and content descriptors.

Accordingly, it should follow that specific aspects of video games can be judged in the abstract, and therefore the question that policymakers, regulators, and courts should be asking is whether ‘loot boxes, as a monetisation method, are problematic and deserve to be regulated,’ rather than necessarily whether ‘the overarching video game, including the loot boxes, broadly considered is problematic’ (as the latter approach potentially underplays the impact that loot boxes might have on the assessment by viewing loot boxes only as minor elements of gameplay, when they are potentially far more important to players (especially, highly dedicated players³⁰) in practice). Examining loot boxes in the abstract *in all cases* has been the position that policymakers and gambling authorities have hitherto taken, and it should be the position that is continually maintained.

Further support for this proposition can be identified in how video games and loot boxes are purchased as separate ‘products’ in practice (taking the FUT mode as an example): the loot boxes are bought *after* the video game has already been bought. The two transactions rest on two different contracts: the player is specifically purchasing loot boxes with the latter contract (albeit that they are technically purchasing an amount of virtual currency that is then spent in exchange for loot boxes in most cases, which is a technical point that should not influence how the transaction is perceived and understood).³¹ It is that latter contract of selling and purchasing loot boxes that potentially represents the provision of ‘gambling.’³² The player is not exercising any ‘skill’ in relation to purchasing and opening paid loot boxes even if the overarching game is deemed as a ‘game of skill.’ Therefore, logically, that behaviour of selling loot boxes in exchange for real-world money should be subject to an assessment as to whether it constitutes the provision of gambling on its own *in all cases*. The overarching video game and how ‘the majority of players’ engage with it are, and should be, irrelevant.³³

²⁹ Leon Y Xiao, ‘ESRB’s and PEGI’s Self-Regulatory “Includes Random Items” Labels Fail to Ensure Consumer Protection’ (2021) 19 *International Journal of Mental Health and Addiction* 2358.

³⁰ James Close and others, ‘Secondary Analysis of Loot Box Data: Are High-Spending “Whales” Wealthy Gamers or Problem Gamblers?’ (2021) 117 *Addictive Behaviors* 106851.

³¹ Joke Baeck and Ignace Claeys, ‘Restitution of Money Spent on Loot Boxes in Video Games?’ (2021) 41 *Computer Law & Security Review* 105566.

³² *ibid.*

³³ Ruling (n 14) para. 8.5. The judgment however deems the paid loot boxes irrelevant because the majority of the packs is obtained through gameplay and used for gameplay.

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

When coming to the conclusion that loot boxes in the FUT game mode do not represent a standalone game, the Dutch Council of State decided that this should depend on ‘how the game is played by the majority of gamers.’³⁴ This unique interpretation and its underlying argumentation deserve specific attention. The Council of State found that ‘the practice is that gamers only open the packs with a view to playing virtual football matches,’³⁵ and therefore the loot box purchasing and opening process is not treated by players as a separate game in and of itself. Indeed, the Council of State decided that it is necessary for players to treat the loot box purchasing and opening process as its own game ‘on a large scale,’³⁶ before the Netherlands Gambling Authority would be justified to intervene.

Notably, the Ruling used the terms ‘average player,’³⁷ ‘vast majority,’³⁸ ‘the majority of gamers,’³⁹ and ‘a large scale’⁴⁰ without defining what they mean. These criteria were evidently crucially important for the Council of State in determining when a loot box may be treated as its own separate game and when a loot box in the abstract (rather than the overarching video game) may be assessed as to whether it legally constitutes a ‘game of chance.’ Following the Ruling, the Netherlands Gambling Authority would need to use these criteria to decide whether and when to take enforcement actions. Companies that want to market their video games in the Netherlands would also need this information so that they can self-assess the loot box mechanics that they are designing or have already implemented in order to comply with the law. Finally, players (and parents of child players and other interested parties) would also benefit from knowing this information so that they can report potentially non-compliant games for sanction by the gambling regulator. However, despite these obvious justifications, the Ruling has left all of these terms undefined. Without further elaboration, it cannot be known who the ‘average player’ is (is this based on all registered users (*i.e.*, including inactive players) or only monthly active users?); what percentage would represent the ‘majority’ of players (as this can potentially range from 51% to 90% or even higher) or, in contrast, a ‘vast majority’ specifically; and what would constitute ‘on a large scale’ (given that, *e.g.*, 30% of players might in theory satisfy this condition, although the Council of State could potentially have thought that this also needed to be a ‘majority,’ *i.e.*, over 50%) and upon what or whom would this ‘scale’ be determined (*e.g.*, based on the number of monthly active users or on the amount of revenue

³⁴ *ibid* para 8.4.

³⁵ *ibid* para 8.5.

³⁶ *ibid*.

³⁷ *ibid* para 8.4.

³⁸ *ibid*.

³⁹ *ibid*.

⁴⁰ *ibid* para 8.5.

generated). Leaving these important criteria undefined and unquantified meant that the Ruling regrettably failed to provide legal certainty for future cases.

Regardless, this hurdle that the ‘majority’ of players (assuming this means over 50%) need to treat the loot box opening and purchasing process as its own game and effectively decide to ignore and not to engage with the overarching video game, before gambling law is allowed to intervene, is incredibly high and appears illogical in light of the commercial realities of video game production. It is difficult to imagine a hypothetical loot box in a video game that would satisfy this hurdle because the majority of players must collectively decide that the actual video game’s gameplay is ‘uninteresting’ (and decide not to engage with that aspect) but that they are still somehow interested in purchasing and opening loot boxes in that game. Loot boxes generally are bought by players because of their content’s (perceived) value inside that video game (*e.g.*, allowing the player character’s cosmetic appearance to change or unlocking additional gameplay content);⁴¹ it is therefore illogical to suggest that players would desire to purchase loot boxes in a video game that they, and most other players, would not want to play. There is only one exception: effectively, for the hurdle to be satisfied (*i.e.*, for the loot boxes to be deemed as a separate game) and also for the loot box mechanic to then potentially be found to legally constitute gambling, the majority of players must only ‘play’ this one part of the video game in order to participate in *actual gambling*. The company effectively has to offer traditional gambling in the guise of being a part of a video game before the law will bite. According to the Dutch Council of State’s interpretation of the law, the company would be permitted to introduce gambling-like mechanics into its video games as long as the majority of players use the content obtained through these gambling-like mechanics as part of the video game’s regular gameplay. Following this line of reasoning, it seems that a loot box would only be classified as a separate game if the video game in which the loot box is integrated was intentionally designed to be unappealing to the majority of players (and it later factually transpired that the video game was indeed uninteresting to the majority of players). No video game company operating in good faith would intentionally design a video game that is uninteresting or loot boxes that are not linked to the gameplay of the video game in which the loot boxes are incorporated, as doing either would be contrary to their commercial interests. This legal test is therefore illogical and contrary to the promotion of better consumer protection for players: the more integrated into the video game the gambling-like mechanics are, the less likely those gambling-like mechanics can be regulated under gambling law. This counterproductively encourages the ‘blurring of lines’ between video gaming and gambling that gives rise to significant consumer protection and gambling harm-related concerns, particularly in relation to children who might struggle to distinguish between the two activities, as previously recognised by many gambling authorities as an

⁴¹ Laura Louise Nicklin and others, “‘It’s the Attraction of Winning That Draws You in’—A Qualitative Investigation of Reasons and Facilitators for Videogame Loot Box Engagement in UK Gamers’ (2021) 10 *Journal of Clinical Medicine* 2103.

important issue that needs addressing.⁴² By interpreting Dutch law thusly, the Council of State has significantly weakened the applicability of Dutch gambling law to this novel phenomenon of the convergence of video gaming and gambling that requires being promptly addressed. If the Dutch Council of State's interpretation of the law is taken to its logical end, no loot box designed in good faith to complement a video game would ever justify intervention by the Netherlands Gambling Authority. Only a 'loot box' designed to be traditional gambling and provided in an effectively dummy video game that is not intended to be played could be subject to potential enforcement actions.

Furthermore, the Dutch Council of State's preoccupation with the 'majority' of players reflects a lack of understanding of how video games are monetised at present, particularly when so-called 'free-to-play' (F2P) games⁴³ and games that monetise both through the sale of the software and through in-game microtransactions, such as loot boxes, (e.g., the FIFA games) are considered. Unlike in the past when every player would have only spent largely similar amounts of money to purchase a copy of the software, many games are now reliant on a small minority of high-spending players (often referred to as 'whales'⁴⁴) to monetise. A substantial proportion of players (potentially more than half (*i.e.*, a 'majority') in some games) spend no money on loot boxes (and, by implication, are unlikely to ever be 'harmed' by loot boxes). Research suggests that 5% of the highest-spending players contributed more than half of all loot box revenue.⁴⁵ One FIFA player reportedly spent over US\$10,000 on loot boxes in the FUT game mode in two years.⁴⁶ It is those highest-spending players who are most obviously at risk of experiencing potential financial harms from loot boxes. However, their experiences are not reflected, and their consumer protection and gambling harm-related concerns are not adequately addressed if the court decides only to focus on and consider how the so-called 'majority' of players experience the video game. Effectively, the Dutch Council of State's interpretation of the law has actively chosen to ignore the most vulnerable consumers, who spend large amounts of money on loot boxes but who represent only a small minority of all players.

⁴² See UK Gambling Commission and others, *Declaration of Gambling Regulators on Their Concerns Related to the Blurring of Lines Between Gambling and Gaming* (2018) <<https://web.archive.org/web/20210528215648/http://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>> accessed 29 June 2021.

⁴³ Alha Kati and others, 'Free-to-Play Games: Professionals' Perspectives', *DiGRA Nordic 2014: Proceedings of the 2014 International DiGRA Nordic Conference* (DiGRA 2014) <http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014_submission_8.pdf>; Janne Paavilainen and others, 'Social Network Games: Players' Perspectives' (2013) 44 *Simulation & Gaming* 794.

⁴⁴ Close and others (n 30).

⁴⁵ *ibid.*

⁴⁶ Wesley Yin-Poole, 'FIFA Player Uses GDPR to Find out Everything EA Has on Him, Realises He's Spent over \$10,000 in Two Years on Ultimate Team' (*Eurogamer*, 25 July 2018) <<https://www.eurogamer.net/articles/2018-07-23-fifa-player-uses-gdpr-to-find-out-everything-ea-has-on-him-realises-hes-spent-over-usd10-000-in-two-years-on-ultimate-team>> accessed 3 August 2020.

3.1. Overreliance on the presence of non-paid loot boxes

Further, with regard to assessing how the ‘majority’ of player experience the FUT game mode, the Council of State has too readily accepted Electronic Arts’ arguments at face value without sufficient further scrutiny. Specifically, reliance was placed by the Council of State on Electronic Arts’ assertion that ‘92 percent of packs are obtained through game engagement [and are not purchased using real-world money].’⁴⁷ It is not known what other evidence was available to the Council of State; however, that assertion must be challenged. Firstly, reliance on the 8% out of context is misleading: although only 8% of loot boxes are bought with real-world money and this percentage appears comparatively small, these loot boxes generated an incredible amount of revenue for the company. Electronic Arts’ 2021 annual report revealed that: ‘Net revenue from Ultimate Team represented 29 percent of our total net revenue during fiscal year 2021, a substantial portion of which was derived from FIFA Ultimate Team.’⁴⁸ Electronic Arts’ 2021 net revenue was stated to be ‘[US]\$5.629 billion’ in the same report.⁴⁹ Therefore, Ultimate Team (*i.e.*, loot boxes in various Electronic Arts sports games, including but not limited to FIFA games) generated over US\$1.6 billion. A business model that is capable of generating such a huge amount of revenue for just one company through gambling-like mechanics is surely deserving of regulatory scrutiny. The fact that ‘paid’ loot boxes reportedly only represent 8% of all ‘loot boxes’ obtained by players is not relevant in the broader commercial context.

Secondly, that assertion made by Electronic Arts misrepresents all loot boxes as being identical to each other and equally ‘desirable’ by players. The Council of State took the percentages presented by Electronic Arts at face value and seemingly assumed that the 8% of paid loot boxes are therefore unimportant for the assessment of whether the loot boxes represent a separate game.⁵⁰ However, the fact that 92% of loot boxes were non-paid and obtained through gameplay but that players were still willing to purchase the other 8% of loot boxes precisely demonstrates the importance of paid loot boxes in these games: players are generally unable to obtain all desirable loot box content purely through gameplay without purchasing paid loot boxes because of the extensive amount of time they must spend on the game in order to obtain sufficient numbers of non-paid loot boxes.⁵¹ Further, the

⁴⁷ Ruling (n 14) para 8.5.

⁴⁸ Electronic Arts, ‘Notice of 2021 Annual Meeting and Proxy Statement’ (26 May 2021) app 1, p 4 <[https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-\(2021\).pdf](https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-(2021).pdf)> accessed 27 September 2021.

⁴⁹ *ibid* 4.

⁵⁰ Ruling (n 14) para. 8.5

⁵¹ Wesley Yin-Poole, ‘Putting EA’s Claim “You Can Acquire All Items without Spending Money” in FIFA Ultimate Team to the Test’ (*Eurogamer*, 22 March 2021) <<https://www.eurogamer.net/putting-eas-claim-you-can-acquire-all-items-without-spending-money-in-fifa-ultimate-team-to-the-test>> accessed 19 April 2022.

paid loot boxes and the non-paid, ‘free’ loot boxes in these games often contain different items: some desirable loot box content that provides the best competitive advantage often appears *exclusively* in, or has a higher probability of being obtained from, paid loot boxes. Electronic Arts also places restrictions on how loot box content obtained from non-paid loot boxes may be used: specifically, loot box content obtained from paid loot boxes are generally tradable to other players on the games’ internal marketplace and therefore has more utility and desirability, whilst loot box content from non-paid loot boxes is not always similarly tradable. The Council of State failed to recognise these important technical distinctions between paid and non-paid loot boxes and how fundamental purchasing paid loot boxes is to the experience of the average FUT mode players who want to play somewhat competitively and, particularly, to the experience of those highly engaged, highly competitive players who are arguably most at risk of potential harms. Further evidence should have been received by the Council of State on what percentage of the most valuable, or most frequently used in competitive play, in-game items were obtained through paid and non-paid loot boxes, respectively: this would have revealed that the vast majority of the higher-value, desirable items were derived from paid loot boxes. By not challenging Electronic Arts’ assertion, the Ruling overvalued the importance of non-paid loot boxes, whilst undervaluing how intrinsic paid loot boxes are to the gameplay experience of the average player trying to obtain all desired loot box content without spending unrealistic amounts of time on repetitive gameplay (*i.e.*, ‘grinding’⁵²). Indeed, it has been suggested that, players cannot realistically expect to obtain all valuable loot box content in the FUT game mode through grinding only using a reasonable amount of time without spending real-world money.⁵³

More generally for loot box regulation, the fact that a video game offers players countless ‘free’ loot boxes through gameplay alone should not dissuade regulatory scrutiny because those ‘free’ loot boxes might in fact mostly provide only less valuable or even contextually worthless rewards. The fact that players continue to be willing to purchase loot boxes, despite being offered many other free loot boxes, supports the case that paid loot boxes, specifically, are an important aspect of video games that deserves legal scrutiny on their own. The Council of State should not have deemed paid loot boxes to be irrelevant for the assessment of a ‘separate game’ simply because they only constitute a minority of all ‘loot boxes.’⁵⁴ Paid loot boxes specifically are most akin to gambling and, as such, should be scrutinised on their own, without the assessment being distracted by the presence or apparent ‘dominance’ of non-paid loot boxes. One final point to note is that these ‘free’ loot boxes derived

⁵² Orlando Woods, ‘The Economy of Time, the Rationalisation of Resources: Discipline, Desire and Deferred Value in the Playing of Gacha Games’ [2022] *Games and Culture* 1555412022107728.

⁵³ See Yin-Poole (n 51).

⁵⁴ Ruling (n 14) para 8.5.

from gameplay often require players to complete repetitive in-game tasks to obtain: this may lead to excessive engagement with video games in terms of time spent ('gaming disorder' as defined by the World Health Organization⁵⁵), rather than money spent.⁵⁶ This may also be an additional cause for concern that policymakers and regulators should be conscious of.

4. Miscellaneous Points

Firstly, although the case did not turn on this point (because the Netherlands Gambling Authority did not dispute it), the Dutch Council of State decided that the FUT game mode should be deemed to be a game of skill, despite it involving an element of chance (*i.e.*, the loot boxes).⁵⁷ Reliance was placed on previous case law (specifically, the *Saturne* (1965)⁵⁸ and *Golden Ten* (1991)⁵⁹ judgments), which enunciated the legal principle that a game of chance remains a game of chance, even if a small minority of players might be able to influence their chances of winning through an element of skill, because the majority of players continue to play it as a game of chance.⁶⁰ It was stated in these two cases that an element of skill in a game of chance does not necessarily change the game of chance into a game of skill. However, the converse should not automatically be assumed to be true, as the Council of State has given the impression that it does under Dutch law. An element of chance (however small) introduced by the rules of the game itself, rather than arising purely from external factors (*e.g.*, changing wind directions in golf),⁶¹ in a game of skill arguably could potentially change the game of skill into a game of chance: this position is taken, for example, in the UK, whose simple definition of a 'game of chance' includes 'a game that involves both an element of chance and an element of skill'.⁶² In comparison, the legal principle in *Saturne* and *Golden Ten* seems present instead in how UK law deems 'a game that involves an element of chance that can be eliminated by superlative skill' to still be a game of chance,⁶³ given that a 'superlative' skill, by definition, could only be exercised by

⁵⁵ Hee Sun Kim and others, 'Prevalence of Gaming Disorder: A Meta-Analysis' (2022) 126 Addictive Behaviors 107183.

⁵⁶ Leon Y Xiao, 'Which Implementations of Loot Boxes Constitute Gambling? A UK Legal Perspective on the Potential Harms of Random Reward Mechanisms' (2022) 20 International Journal of Mental Health and Addiction 437.

⁵⁷ Ruling (n 14) para 8.5.

⁵⁸ *Saturnespel* [*Saturne game*] (1965) Hoge Raad [Supreme Court of the Netherlands] (21 December 1965) ECLI:NL:PHR:1965:AB5541, NJ 1966, 364 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1965:AB5541>> accessed 19 April 2022.

⁵⁹ *Golden Ten* (1991) Hoge Raad [Supreme Court of the Netherlands] (25 June 1991) ECLI:NL:PHR:1991:AD1447, NJ 1991, 808 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1991:AD1447>> accessed 19 April 2022.

⁶⁰ Ruling (n 14) para 8.4.

⁶¹ For the similar Canadian law position, see Michael D Lipton, Morden C Lazarus and Kevin J Weber, 'Games of Skill and Chance in Canada' (2005) 9 Gaming Law Review 10, 13.

⁶² Gambling Act 2005, s 6(2)(a)(i).

⁶³ *ibid*, s 6(2)(a)(ii).

a small minority and not by the majority of players. This again reflects that the Dutch decision is restricted to an interpretation of the application of Dutch gambling law. Other countries might come to a different view as to the legality of different types of video game loot boxes depending on their applicable gambling laws.⁶⁴

Secondly, as a procedural point, the Council of State excluded from its consideration and thereby disregarded a ‘very extensive,’⁶⁵ ‘voluminous’⁶⁶ further document that was submitted by the Netherlands Gambling Authority very late into the appeal process for violation of due process because Electronic Arts was ‘unable to respond adequately’ to it due to the unfairly short notice its legal team was thereby given.⁶⁷ It is not known what was contained in that document and what arguments were omitted and disregarded. It is possible that how the loot box content of player packs within the FUT game mode can be transferred to other players in exchange for real-world money (the existence of the so-called ‘black market,’ upon which the illegality of this type of loot boxes under Dutch law entirely turns⁶⁸) was not given substantial consideration by the Council of State, as the Ruling made only passing remarks to this point.⁶⁹ Therefore, it must be queried whether the Netherlands Gambling Authority presented its case as strongly as it could have been. Given that this case is such an important decision for the video game industry and for video game players in the Netherlands, and considering that this case might also influence policymaking in other countries, this state of affairs is disappointing. This final interpretation of Dutch gambling regulation on loot boxes failed to provide a comprehensive analysis because it did not engage with the most controversial question with loot box regulation using gambling law: whether the *de facto* real-world economic value of loot box content gained through the use of the ‘black market’ satisfy the ‘prize’ (or equivalent) criterion of gambling law, despite the company explicitly prohibiting players from selling loot box content in exchange for real-world money (*i.e.*, participating in black market trading) and thereby granting them real-world economic value.⁷⁰ In other words, if paid loot boxes are implemented, must the company be forced to terminate all potential player-to-player trading facilities in the game to be compliant with the law (as some companies have previously done in the Netherlands following the Netherlands Gambling

⁶⁴ Xiao, ‘Which Implementations of Loot Boxes Constitute Gambling?’ (n 56).

⁶⁵ Ruling (n 14) para 5.

⁶⁶ *ibid* para 5.2.

⁶⁷ *ibid*.

⁶⁸ Xiao, ‘Which Implementations of Loot Boxes Constitute Gambling?’ (n 56).

⁶⁹ Ruling (n 14) para 8.5.

⁷⁰ Xiao, ‘Which Implementations of Loot Boxes Constitute Gambling?’ (n 56).

Authority's since overruled interpretation of the law⁷¹)⁷² The Council of State had an opportunity to clarify this important point of law, but it did not do so as it was instead preoccupied with the preliminary question of whether loot boxes represent a separate game.

5. Conclusion

Loot boxes, as a potentially problematic element of video games, should continue to be examined in the abstract on their own as to whether they would legally constitute gambling. The Dutch Council of State has taken a unique interpretation that generally only the overarching video game should be scrutinised: this approach differed from how the issue has hitherto been examined and underplayed the consumer protection and gambling harm-related concerns surrounding loot boxes specifically. The Dutch Council of State's overreliance on what it referred to as how the 'majority' of players engage with the game has been critiqued: insufficient attention was given to the respective importance of both paid and non-paid loot boxes and their differing impact on the gameplay experience within the FUT mode. Particularly, this approach failed to specifically consider how the highest spending and most vulnerable consumers experience loot boxes and might potentially be harmed by them. Indeed, the interpretation of Dutch gambling regulation adopted by the Council of State would *de facto* cause loot boxes in video games to never be seen as games of chance, except in extreme examples where actual gambling has been implemented in the guise of a video game.

When compared to the gambling regulations of other countries (*e.g.*, the UK, Belgium, and Denmark), Dutch law, as interpreted by the Council of State, takes into account a unique legal criterion (whether the loot boxes represent a 'separate game') that is not present in the laws of other countries and which arguably renders gambling regulation toothless in relation to gambling-like mechanisms in video games, due to the convergence (or blurring of lines) of gaming and gambling. Policymakers and regulators in other countries are therefore well-advised to consider the shortcomings of emulating the Dutch Council of State's approach to loot boxes. Importantly, Dutch policymakers should also consider whether this narrow interpretation of gambling law by the Council of State, whose implication is that very few, if any, (paid) loot boxes in video games could be regulated, is what the legislature originally intended (considering that preparatory documents to the gambling legislation suggest that their intention was contrarily that 'games offering loot boxes containing prizes with monetary value cannot be offered'⁷³) and continues to intend, given both consumer protection and

⁷¹ For example, 2K Games, 'Statement Netherlands' (2K Games Official Website, 2018) <<https://www.2k.com/myteaminfo/nl/>> accessed 12 March 2021.

⁷² Leon Y Xiao, 'Regulating Loot Boxes as Gambling? Towards a Combined Legal and Self-Regulatory Consumer Protection Approach' (2021) 4 Interactive Entertainment Law Review 27, 43–44.

⁷³ See Eerste Kamer der Staten-Generaal [First Chamber of the States-General], Kamerstuk Vergaderjaar 2018-2019, 33 996, I (14 December 2018) 9 <<https://zoek.officielebekendmakingen.nl/kst-33996-I.html>> accessed 21 April 2022.

gambling prevention concerns. There appears to be some uncomfortable discrepancy between the intentions of the legislature in drafting the law (which the Netherlands Gambling Authority attempted to more closely follow) and how the law has been judicially applied in practice by the Council of State. If wider and more effective regulation of loot boxes is deemed appropriate and intended by the legislature, then changes to Dutch law should be brought to override the Council of State's restrictive interpretation.

Author Contribution Statement

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

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