

# MICRO-TRANSACTIONS, MASSIVE HEADACHES: INTERNATIONAL REGULATION OF VIDEO GAME LOOT BOXES

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Loot boxes are in-game items that allow video game players to gain rewards contained in the loot boxes through random chance. These rewards vary by game and can give players advantages over others or provide players with rare cosmetic items for video game characters. Depending on the game, loot boxes can either be purchased or earned through leveling up. Due to the random nature of the rewards found in these loot boxes, they have come under scrutiny as gambling devices. Countries like Belgium and China have outlawed loot boxes in major video games, whereas countries like the United Kingdom and the United States still allow the practice. This note analyzes the various approaches and results of five countries' determinations on loot boxes: the gambling statute analysis found in Belgium, the statutory ban found in China, the rejection of regulation in the United Kingdom, the quasi-successful self-regulation utilized by Japanese video game companies, and the case-law murkiness of the United States. The note then suggests an outline of what loot box regulation could, and should, look like in the United States, guided by the outcomes and approaches of each country. While this note focuses a great deal on loot boxes and their flirtation with gambling, it also recognizes the likelihood and practicality of other regulatory methods.

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## I. INTRODUCTION

Video game loot boxes are in-game rewards that allow players to gain in-game items through a random chance.<sup>1</sup> Depending on the game, loot boxes give the player a variety of items, including cosmetic items such as character and gun skins, character emotes, and character sprays.<sup>2</sup> The rewards range from items that are merely cosmetic to items that help the player improve their in-game performance.<sup>3</sup>

Loot boxes are available to players in a variety of ways. Some games, like Activision Blizzard's *Overwatch*, allow players to earn a loot box every time they level up in the game.<sup>4</sup> Other games, however, only provide some free loot boxes for leveling up, and additional loot boxes are only available if they are purchased.<sup>5</sup> Loot boxes in some titles, specifically some made by game developer Valve, such as *DOTA* or *Counter-Strike: Global Offensive* ("CS:GO"), can provide out-of-game benefits as well by way of online markets.<sup>6</sup> These markets exist both on

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1. See Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, TOM'S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

2. See *id.* "Sprays" are designs that players use to cosmetically augment the scenery of a video game. Other players can also see these "sprays." See, e.g., u/rft, *London Spitfire's Spray BM*, REDDIT (Mar. 10, 2018), [https://www.reddit.com/r/Competitiveoverwatch/comments/83bipn/london\\_spitfires\\_spray\\_bm/](https://www.reddit.com/r/Competitiveoverwatch/comments/83bipn/london_spitfires_spray_bm/)).

3. See *id.* For example, games like *Call of Duty*, *FIFA* and *Counter-Strike: Global Offensive* (CS:GO) offer both cosmetic items and items that improve a player's chance of winning games. *Call of Duty* and CS:GO offer different weapons in loot boxes, whereas *FIFA* offers loot boxes cards that let the player add new soccer players to their team in their *FIFA Ultimate Team* (FUT) Game Mode.

4. See Video Game, *OVERWATCH* (Blizzard Entertainment 2016).

5. See Daniel Friedman, *We Spent \$100 on Apex Legends Loot Boxes, but You Shouldn't*, POLYGON (Feb. 12, 2019), <https://www.polygon.com/2019/2/12/18220803/apex-legends-loot-box-economy>.

6. See Michael McWhertor, *Valve Brings Back Steam Trading for Dutch Players, Blocks Them from Opening CS:GO Loot Crates*, POLYGON (July 12, 2018), <https://www.polygon.com/2018/7/12/17565720/csgo-loot-boxes-netherlands-belgium-steam-trading-marketplace>.

Steam and third party marketplaces.<sup>7</sup> Steam is a software produced by Valve that allows gamers to store thousands of games and other applications on the software.<sup>8</sup> These markets allowed players to trade items they earned in loot boxes or even receive real-world money for them.<sup>9</sup>

The issue of loot boxes reached an international boiling point in the pre-release marketing and publicity build-up to Electronic Arts' ("EA") Star Wars Battlefront II. This sequel to the popular first-person shooter game based around Disney's Star Wars franchise allowed players to play as some of the most popular characters (Luke Skywalker and Darth Vader, among others), but locked-out these characters from the base game,<sup>10</sup> making them only available if the player plays the game for thousands of hours or unlocks them with potentially hundreds of dollars' worth of loot boxes.<sup>11</sup> EA's decision to lock characters in the base game resulted in vast blowback across the globe.<sup>12</sup> Notably, EA's defense of this policy on popular internet forum Reddit resulted in the most "down-voted" comment in Reddit's thirteen-year history, receiving an overall score of -683,000, beating out second place (where the user literally asked for down-votes) by a whopping 658,667 down-votes.<sup>13</sup>

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7. See 4 Best Ways to Sell CS:GO Skins: How to Choose Your Skins Marketplace, SKINWALLET (Mar. 14, 2019), [skinwallet.com/csgo/best-places-to-sell-csgo-skins/](https://skinwallet.com/csgo/best-places-to-sell-csgo-skins/).

8. See *id.*; About, STEAM, <https://store.steampowered.com/about/> (last visited Oct. 21, 2019).

9. See McWhertor, *supra* note 6.

10. The base game is the game as it exists without any micro-transactions.

11. See Matt Davidson, *Someone's Estimated How Long It Takes to Unlock Everything in Star Wars: Battlefront 2 (Too Long)*, IGN (Nov. 15, 2017), <https://www.ign.com/articles/2017/11/15/someones-estimated-how-long-it-takes-to-unlock-everything-in-star-wars-battlefront-2-too-long>. It is estimated that it would take over 4,500 hours of play-time or \$2,000 to unlock everything. *Id.*

12. Gene Park, *How a Star Wars Video Game Faced Charges That It Was Promoting Gambling*, WASH. POST, (Nov. 18, 2017), [https://www.washingtonpost.com/news/comic-riffs/wp/2017/11/18/how-a-star-wars-video-game-faced-charges-that-it-was-promoting-gambling/?noredirect=on&utm\\_term=.1e5d1926420a](https://www.washingtonpost.com/news/comic-riffs/wp/2017/11/18/how-a-star-wars-video-game-faced-charges-that-it-was-promoting-gambling/?noredirect=on&utm_term=.1e5d1926420a).

13. EACommunityTeam, Comment to *Seriously? I Paid \$80 to Have Vader Locked?*, REDDIT (Nov. 12, 2017, 2:11 PM), [https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously\\_i\\_paid\\_80\\_to\\_have\\_vader\\_locked/](https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/)

Following this global outrage, many countries considered the issue of loot boxes and whether they qualified as gambling devices, ultimately reaching varying results.<sup>14</sup> In response to these investigations, EA removed loot boxes from *Star Wars Battlefront II*,<sup>15</sup> but many games have continued to utilize loot boxes. In addition to the continued use of loot boxes, some countries, including England, have found definitively that loot boxes are not gambling at all.<sup>16</sup> This note will explore the various legal stances countries take with loot boxes, and the likely stance that will be taken, if any, by the United States.

Section II of this note will provide statistics on microtransactions as well as examples of their effects, particularly on children. Section III of this note will analyze Belgium's stance on loot boxes, as well as the country's history of gambling regulation that led to their decision. Section IV will focus on the United Kingdom Gambling Commission's original finding that loot boxes are not gambling, and how that ruling could change in the future. Section V of this note will analyze China's stance on loot boxes, including background on its gambling regulation and outlook, and how its vague description of gambling led to loot box regulation. Section VI will focus on Japan's loot box-esque kompu (complete) gacha and standard gacha games as well as the industry's attempt at self-regulation of kompu gacha games before the issuance of a government ban. Section VII will focus on the U.S. and the different stances that have been taken on loot boxes across jurisdictions. Section VIII will consider the whole picture, including the findings of the different countries, and analyze whether loot boxes are likely to become regulated in the U.S., whether they should be regulated, and what regulation may look like.

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<https://www.reddit.com/r/ListOfComments/wiki/downvoted>.

*r/ListOfComments*,

REDDIT,

14. For example, China chose to heavily regulate loot boxes, whereas Belgium chose to outright ban them. See *infra* Sections III, V; Tom Gerken, *Video Game Loot Boxes Declared Illegal Under Belgium Gambling Laws*, BBC (Apr. 26, 2018), <https://www.bbc.com/news/technology-43906306>; Chaim Gartenberg, *China's New Law Forces Dota, League of Legends, and Other Games to Reveal Odds of Scoring Good Loot*, THE VERGE (May 2, 2017), <https://www.theverge.com/2017/5/2/15517962/china-new-law-dota-league-of-legends-odds-loot-box-random>.

15. See Park, *supra* note 12.

16. See Gerken, *supra* note 14.

Though gambling statutes vary around the world, gambling has generally been defined to consist of three elements: (1) chance, (2) consideration, and (3) prize.<sup>17</sup> This definition will be used through this paper when a specific definition falls out of the scope of the paper, particularly when referring to U.S. state gambling statutes. It is also important to note that generally this note assumes a prize, by definition, must be something that is something of value, unless otherwise provided (*see infra* Belgium's Definition of a prize).<sup>18</sup>

## II. LOOT BOXES: VIDEO GAME MONEY-MAKERS, OR REAL-LIFE TERRORS?

The popularity of loot boxes boils down to one factor: money. The biggest games (known as AAA games) are extremely expensive to develop, with hundreds of staff working with cutting edge software that requires constant tweaks and bug fixes.<sup>19</sup> While the largest game developers tend to keep the cost of production extremely close to their chests, it has been estimated that the cost of creating a AAA game is about \$10,000 per month, per person working on the game.<sup>20</sup> AAA game franchises such as *Destiny* or *Red Dead Redemption* are estimated to cost at least \$144,000,000 to produce.<sup>21</sup>

Microtransactions, a class of game-related financial transaction inclusive of loot boxes, has been the method used by AAA companies to try and increase their profits.<sup>22</sup> Despite the vocal opposition to loot boxes, the evidence shows that they are heavily consumed by the gaming community. Ubisoft (creator of *Tom Clancy's Rainbow Six Siege* and *Far Cry*), made more money in 2017 from microtransactions (including

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17. See WALTER CHAMPION & NELSON I. ROSE, *GAMING LAW IN A NUTSHELL* 1 (2d ed. 2018).

18. See *id.*; see also *infra* Section III.

19. See Jason Schreier, *Why Do Video Games Cost So Much to Make?*, KOTAKU (Sept. 18, 2017), <https://kotaku.com/why-video-games-cost-so-much-to-make-1818508211>.

20. See *id.*

21. See *id.*

22. See Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, THE VERGE (Feb. 19, 2019), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play>.

downloadable content and loot boxes) than digital game sales.<sup>23</sup> EA, makers of popular sports franchises such as *FIFA* and *Madden NFL*, made \$650 million from their “Ultimate Teams” game mode alone, a mode heavily focused around microtransactions.<sup>24</sup> Activision Blizzard (creator of *Overwatch* and *Call of Duty*), not to be out-done, made \$2 billion from in-game purchases across PC, XBOX One and PlayStation 4 gaming consoles in 2017.<sup>25</sup> Overall, video game companies as a whole made \$30 billion from loot boxes in 2017.<sup>26</sup>

The microtransaction system will not be one that game companies will want to part with easily, with pressure from investors to bring in unprecedented revenue ratcheting up by the day. On February 12, 2019, for example, Activision Blizzard cut nearly 800 employees in response estimates that the company’s revenue would decrease in 2019, despite a 2018 year that saw Activision Blizzard earn record revenue.<sup>27</sup> The internal fears regarding revenue were reflected by the stock market, as Activision Blizzard’s 2019 projections are again below Wall Street’s expectations.<sup>28</sup> Activision Blizzard expects their first-quarter earnings per share (“EPS”) to end up at half the Wall Street estimates, with Activision

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23. See Jasmine Henry, *Ubisoft Makes More from Microtransactions Than Digital Game Sales*, GAMERANT (Nov. 2017), <https://gamerant.com/ubisoft-microtransaction-sales/>. Ubisoft made \$202 million from micro-transactions and \$186 million from digital game sales. *Id.*

24. Matthew Handrahan, *EA’s Ultimate Team Earning Around \$650 Million a Year*, GAMEINDUSTRY.BIZ (Mar. 2, 2016), <https://www.gamesindustry.biz/articles/2016-03-02-eas-ultimate-team-earning-around-usd650-million-a-year>. Ultimate team is where players collect different athletes’ cards, often through loot boxes, in order to build the best team possible for online play. The \$650 million number may include versions of the game that provide bonuses for the Ultimate Team game mode. *Id.*

25. Eddie Makuch, *Activision Blizzard Made \$4 Billion On Microtransactions Last Year*, GAME SPOT (Feb. 8, 2018), <https://www.gamespot.com/articles/Activision-Blizzard-made-4-billion-on-microtransac/1100-6456669/>; Activision-Blizzard includes the entire Call of Duty franchise, Overwatch and World of Warcraft. *Id.*

26. Christina Gough, *Consumer Spending on Gaming Loot Boxes and Skins Worldwide in 2017 and 2022 (in Billion U.S. Dollars)*, STATISTA (May. 3, 2018), <https://www.statista.com/statistics/829395/consumer-spending-loot-boxes-skins/>.

27. Allegra Frank, *Activision Blizzard Cuts Hundreds of Jobs Despite ‘Record Revenue’ Year*, POLYGON (Feb. 12, 2019), <https://www.polygon.com/2019/2/12/18222096/blizzard-layoffs-february-2019>.

28. See Sara Salinas, *Activision Blizzard Gives Weak 2019 Guidance, Says It Will Slash 8% of Workforce*, YAHOO! FINANCE (Feb. 12, 2019), <https://finance.yahoo.com/news/activision-blizzard-gives-weak-2019-211536381.html>.

Blizzard projecting 20 cents per share on 1.18 billion dollars of revenue.<sup>29</sup> This fell well short of the Refinitive Consensus projection of 46 cents of EPS on \$1.45 billion of revenue in the first quarter.<sup>30</sup> Activision Blizzard is not the only game development company to feel the heat: EA also reported a “difficult” third quarter in 2018, failing to meet expectations,<sup>31</sup> though the hot start to *Apex Legends* may help EA going forward.<sup>32</sup>

With the pressure to make record-setting earnings, gaming companies are betting big on microtransactions, including loot boxes. Epic Games’ *Fortnite* provides an example of a free-to-play game that has achieved massive success. *Fortnite* earned a record \$2.4 billion in revenue in 2018, the most revenue earned in a year by any video game ever.<sup>33</sup> *Fortnite* makes its profits exclusively through microtransactions, including the sale of its in-game currency and loot boxes.<sup>34</sup> *Apex Legends*, which reached 2 million concurrent players in its first weekend and beat *Fortnite*’s single-day viewing record on Twitch,<sup>35</sup> launched EA into the free-to-play world with a bang.<sup>36</sup> *Apex Legends*’ financial model is

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29. *Id.*

30. *Id.*

31. *Electronic Arts Reports Q3 FY19 Financial Results*, BUSINESS WIRE (Feb. 5, 2019), <https://www.businesswire.com/news/home/20190205005952/en/Electronic-Arts-Reports-Q3-FY19-Financial-Results>.

32. See Will Healy, *Thanks to Apex Legends, Electronic Arts Stock is Back in the Game*, INVESTORPLACE (Feb. 11, 2019, 11:23 AM), <https://investorplace.com/2019/02/thanks-apex-electronic-arts-stock-back/>.

33. Tom Hoggins, *Fortnite Earned Record \$2.4bn in 2018, the ‘Most Annual Revenue of Any Game in History’*, THE TELEGRAPH (Jan. 17, 2019, 9:56 AM), <https://www.telegraph.co.uk/gaming/news/fortnite-earned-annual-revenue-game-history-2018/>.

34. Alex Matthews-King, *Games Like Fortnite Use “Predatory” Gambling Techniques to Make Children Spend, Experts Warn*, INDEPENDENT (Jun. 28, 2018, 3:43 PM), <https://www.independent.co.uk/news/health/fortnite-loot-llamas-payments-upgrades-items-gambling-addiction-a8421201.html>.

35. Twitch is an online video service that allows for streaming and watching digital video broadcasts, most popularly used to watch streams of video games and e-sports events. See Brad Stephenson, *Twitch: Everything You Need to Know*, LIFEWIRE (July 1, 2019), <https://www.lifewire.com/what-is-twitch-4143337>.

36. Jeff Grubb, *Apex Legends Hits 2 Million Concurrent Players on its First Weekend*, VENTURE BEAT (Feb. 11, 2019, 3:03 PM), <https://venturebeat.com/2019/02/11/apex-legends-hits-2-million-concurrent-players-on-its-first-weekend/>; James Batchelor, *Apex Legends Beats Fortnite Record for Single-Day*

focused on in-game currency, which can be used to buy characters, cosmetic items, or loot boxes.<sup>37</sup> Despite the lack of a pay-wall at the time of download, free-to-play games dominated the video game market in 2018, earning more than triple the revenue of paid games released by major developers.<sup>38</sup> With Fortnite and Apex Legends finding success under major development companies, the free-to-play model might be the strategy used to pull other AAA Developers like Activision Blizzard and Ubisoft<sup>39</sup> through the financial struggle.

While the loot box model has worked wonders for gaming companies, many in the gaming community have suffered at the hands of what they consider gambling. Following EA's response to loot boxes in the Star Wars Battlefront "subreddit," Reddit user /u/Kensgold outlined his struggles with loot boxes and gambling addiction.<sup>40</sup> User /u/Kensgold wrote:

I started spending on in-app purchases, moved to real video games, started on CS:GO skins, then into the gambling scene there. Spent around 10k, that I can prove, in the last two years. Please help microtransactions to be known as a far more dangerous type of purchase than a pack of gum.<sup>41</sup>

User /u/kensgold's experience is far from unique. Elijah Ballard, a high-schooler from St. Louis, spent more than \$8,000 on CS:GO skin

*Twitch Viewing*, GAMESINDUSTRY.BIZ (Feb. 15, 2019), <https://www.gamesindustry.biz/articles/2019-02-15-apex-legends-beats-fortnite-record-for-single-day-twitch-viewing>.

37. Video Game, APEX LEGENDS (Respawn Entertainment 2019).

38. Kevin Webb, "Fortnite" and Other Free Games Raked in More Than \$87 Billion Last Year, and the Rest of the Gaming Industry is Starting to Take Note, BUSINESS INSIDER (Jan. 20, 2019, 9:31 AM), <https://www.businessinsider.com/free-to-play-games-fortnite-earnings-2018-data-2019-1>.

39. Warren Schultz, *What is a AAA Video Game?*, THOUGHTCO (Feb. 20, 2018), <https://www.thoughtco.com/what-is-aaa-game-1393920> ("A triple-A video game (AAA) is generally a title developed by a large studio, funded by a massive budget.").

40. See Park, *supra* note 12; see also /u/Kensgold, *An Open Letter to DICE, EA, and Other Devs: I Am 19, and Addicted to Gambling*, REDDIT (Nov. 16, 2017), [https://www.reddit.com/r/StarWarsBattlefront/comments/7dfogq/an\\_open\\_letter\\_to\\_dice\\_ea\\_and\\_other\\_devs\\_i\\_am\\_19/](https://www.reddit.com/r/StarWarsBattlefront/comments/7dfogq/an_open_letter_to_dice_ea_and_other_devs_i_am_19/).

41. *Id.*

trading when he was thirteen, using his parents' credit cards.<sup>42</sup> Additionally, Reddit user /u/nothing024 described spending \$16,000 in a year gambling on Final Fantasy Exvius, placing massive strains not just on his finances, but his family life as well.<sup>43</sup>

While the individual stories appear to show a connection with loot boxes and gambling addiction, official research on a possible connection has generally been lacking.<sup>44</sup> A study done by David Zendle and Paul Cairns, however, attempted to find a connection with problem gambling and loot boxes.<sup>45</sup> The study included only those who gave their age or gave their age as 18 and over, and after other survey participants were removed for various reasons, the final study focused on 7,422 video game players.<sup>46</sup> Seventy-eight percent of those respondents noted that they had spent real-world money on loot boxes.<sup>47</sup> The report also had the respondents complete a problem gambling test featuring nine questions to determine whether problem gambling existed.<sup>48</sup> The results showed "an important relationship between problem gambling and the use of loot boxes."<sup>49</sup> Importantly, the study found there was a stronger correlation between problem gambling and the purchase of loot boxes than with other commonly associated risk factors such as depression and drug use. The study analogized the relationship between problem gambling and the purchase of loot boxes to alcohol dependency.<sup>50</sup>

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42. Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), [http://www.espn.com/espn/feature/story/\\_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler](http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler).

43. u/nothing024, *A Whale of a Tale*, REDDIT (Dec. 13, 2017), [https://www.reddit.com/r/FFBraveExvius/comments/7jmezv/a\\_whale\\_of\\_a\\_tale/](https://www.reddit.com/r/FFBraveExvius/comments/7jmezv/a_whale_of_a_tale/).

44. See David Zendle & Paul Cairns, *Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-Scale Survey*, PLOS ONE (Nov. 21, 2018), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767>.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

One study found loot boxes to be psychologically wired to manipulate video game players.<sup>51</sup> In a study done at the University of Adelaide, South Australia School of Psychology, Daniel L King & Paul H. Delfabbro write: “In our view, some of these schemes could be considered predatory. Predatory monetization schemes typically involve in-game purchasing systems that disguise or withhold the true long-term cost of the activity until players are already financially and psychologically committed.”<sup>52</sup> King and Delfabbro continue to note that the potential collection of data by game developers could be used to manipulate the system in ways that make players want to purchase more loot boxes.<sup>53</sup> The authors note that this element can be especially dangerous to young players: “Younger players may be particularly less equipped to critically appraise the value proposition of these schemes.”<sup>54</sup>

The amount of empirical data behind loot boxes, unsurprisingly, is lacking. With these mechanisms only recently coming into the public knowledge and game developers keeping player and loot-box purchase data close to their chests, only time will tell if more data can be collected. Despite the lack of over-arching data, the anecdotes of massive loot box spending and early studies suggesting a link between loot boxes and problem gambling provide a tip of what could be an iceberg, or perhaps just ice. As time wears on and loot boxes continue to exist, a clearer picture of their impact may form, and as more information regarding these mechanisms comes to light, clearer regulation may follow. Loot boxes in video games are not just a question of legal definitions, but they are a social issue as well, and some countries have begun to recognize them as such, and regulate accordingly.

### III. BELGIUM: LEADING THE ANTI-LOOT BOX MOVEMENT

In August of 2018, Belgium became the first country to place an outright ban on loot boxes in video games, declaring them criminal gambling, and subjecting game developers to potential criminal and civil

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51. Daniel King & Paul Delfabbro, *Addiction*, SOCIETY FOR THE STUDY OF ADDICTION, at 1967 (June 2018).

52. *Id.*

53. *Id.*

54. *Id.* at 1968.

lawsuits should the items remain in games.<sup>55</sup> Following the ban of loot boxes, Belgian Minister of Justice Koen Geens said, “[i]t is often children who come into contact with such systems and we cannot allow that.”<sup>56</sup> The Belgian Gaming Commission (“Commission”) performed the investigation to determine if the ban would be appropriate and noted a number of reasons for why loot boxes in video games are illegal gambling.<sup>57</sup> After determining that loot boxes in video games are illegal gambling, the commission determined what penalties video game companies should face.<sup>58</sup>

The history of gambling regulation in Belgium is known to have stemmed from the shame and embarrassment of one father.<sup>59</sup> A “well-beloved son of a wealthy and influential citizen of Belgium lost a fortune” gambling, and allegedly as a result of this loss, an anti-gambling bill was introduced to the Belgian Parliament that regulated the practice.<sup>60</sup> At the time of its passage, the bill made Belgium “the only important country in Europe where gambling organizations flourish practically by the authority of the general [g]overnment.”<sup>61</sup>

The Belgian Gaming Commission’s (“Commission”) Report on Loot Boxes provides the most complete overview of the subject from a governmental entity. The findings of the Belgian Gaming Commission were based on Belgian statute named the Gaming Act of May 7, 1999.<sup>62</sup> The Gaming Act of May 7, 1999, places a large importance on age

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55. See Gerken, *supra* note 14.

56. Koen Geens, Minister of Justice, *Loot Boxes in Three Video Games in Violation of Gambling Legislation*, KOEN GEENS (Apr. 25, 2018), <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>.

57. See *id.* Some of those reasons include emotional profit forecast, confusion of fiction and reality, use of own coin system, and others. *Id.*

58. See *id.* Operators run the risk of a five-year prison sentence or an \$800,000 fine. *Id.*

59. See George Babbitt, *Licensed Gambling in Belgium*, 32 THE FORUM 481, 481 (1901).

60. *Id.*

61. *Id.* Monaco was the only exception, though determined non-material by the author. *Id.*

62. See generally *Kansspelwet 7 Mei 1999* (Gaming Act of May 7 1999), FPS JUSTICE GAMING COMMISSION, (Last accessed Oct. 19, 2018), [https://www.gamingcommission.be/opencms/opencms/jhksweb\\_en/law/law/](https://www.gamingcommission.be/opencms/opencms/jhksweb_en/law/law/) [hereinafter *Belgian Gaming Statute*].

restrictions which vary depending on the type of gambling in question.<sup>63</sup> Article 2 of the Gaming Act of May 7 of 1999, defines gambling as a game of chance, with a game of chance being:

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 favor of at least one of the players.... and in which chance is a factor, albeit ancillary, for the conduct of the game, determination of the winner or fixing of the gain.<sup>64</sup>

In simpler terms, under the Belgian Gaming Act, gambling is: (1) a game; (2) that involves “a stake of any kind,” (3) results “in a loss or a gain,” and (4) involves “at least a minimal degree of chance in the outcome.”<sup>65</sup>

While Belgium did not specifically regulate online gambling until 2011, when they did begin regulating the industry, Belgium broadened the definition of online gambling to include all gambling “through an instrument of the information society.”<sup>66</sup> This broad definition of “online,” which may seem unorthodox, allows Belgium to create further legislation and regulate many kinds of digital gambling.<sup>67</sup>

Before getting into the specifics of the Commission’s report on loot boxes, it is helpful to provide background on Europe’s Self-Regulating video game body, Pan European Game Information (“PEGI”) and the body’s stance on loot boxes. PEGI is a European game content system that provides age ratings for video games, with age ratings including 3+, 7+, 12+, and 18+.<sup>68</sup> Gaming companies voluntarily choose to join PEGI, with the developers filling out a questionnaire to help PEGI assign the game an appropriate age rating via a computer program, then PEGI administrators themselves thoroughly review the game to confirm the

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63. Pieter Paepe, *Gaming in Belgium: Overview*, THOMSON REUTERS, [https://uk.practicallaw.thomsonreuters.com/6-635-9928?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/6-635-9928?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) (last visited Oct. 28, 2019).

64. See Belgian Gaming Statute, *supra* note 62.

65. See Paepe, *supra* note 63.

66. *Id.*

67. *Id.*

68. LARS KNOZACK, *ENCYCLOPEDIA OF VIDEO GAMES: THE CULTURE, TECHNOLOGY AND ART OF GAMING*, 475 (Mark J.P. Wolf ed., 2012).

computerized rating.<sup>69</sup> PEGI is made up of various boards that, among other things, adjust the questionnaire based on advances in technology or the development of new laws in the thirty European nations where PEGI is active.<sup>70</sup> In terms of loot boxes, in an October 2017 statement given to WCCFTech, PEGI's Operations Director Dirk Bosmans stated: "[W]e cannot define what constitutes gambling. That is the responsibility of a national gambling commission . . . . If a gambling commission would state that loot boxes are a form of gambling, then we would have to adjust our criteria to that."<sup>71</sup> With this statement, PEGI showed that when it comes to loot boxes, their role will be solely reactionary as opposed to proactive when it comes to regulation.

The Commission's April 2018 report on loot boxes gave PEGI what they were looking for. The opening sections of the Commission's report focus on the self-regulating nature of the video game industry, as well as provide some public policy background to the Gaming and Betting Act of May 7, 1999.<sup>72</sup> Those public policy reasons include the protection of vulnerable players, with that protection coming in the form of "maximum average hourly loss, exclusion of certain categories of people, various prevention measures and importantly, age limits."<sup>73</sup> This emphasis on the protection of vulnerable players, especially children, was a major factor in the Commission's finding that loot boxes constituted gambling.<sup>74</sup> In Belgium, minors are restricted from all gambling, with "strict exceptions"; those who are eighteen or older can participate in lotteries and bets, and those who are twenty-one and older can participate in casino games.<sup>75</sup> The Commission mentioned the PEGI ratings of the four games the commission analyzed, noting that the age

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69. *How We Rate Games*, PEGI, <https://pegi.info/page/how-we-rate-games> (last visited Feb. 17, 2020).

70. KNOZACK, *supra* note 68, at 475.

71. Alessio Palumbo, *PEGI on Loot Boxes: We Can't Define What's Gambling, Only a Gambling Commission Can*, WCCFTECH (Oct. 12, 2017), <https://wccftech.com/pegi-loot-boxes-cant-define-gambling/>.

72. *See Research Report on Loot Boxes*, FPS JUSTICE GAMING COMMISSION, at 2–4, (Apr. 2018), [https://www.gamingcommission.be/openems/export/sites/default/jhkswb\\_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf](https://www.gamingcommission.be/openems/export/sites/default/jhkswb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf) [hereinafter BELGIAN REPORT].

73. *See id.* at 3.

74. *See id.* at 4.

75. *Id.* (citing Belgian Gaming Statute, *supra* note 62).

range for the four games that all included loot boxes, were all eighteen or under, and CS:GO garnered an 18+ rating because of violence, not gambling.<sup>76</sup> The Belgian Gaming Commission went on to note that for each game, payments were accepted from players aged thirteen and up.<sup>77</sup>

The Commission went on to analyze the different types of techniques video game companies used to entice their players to utilize loot boxes and explained how they see these techniques as deceptive and deserving of regulation. First, the Commission pointed to a patent applied for by Activision in the U.S. that first has Activision analyze what loot box rewards a player is interested in, then match that player with a higher ranked player who already has that item.<sup>78</sup> The Commission goes on to establish that certain items in CS:GO and Overwatch are very rare and can become “an online status symbol.”<sup>79</sup> The Commission concludes this section by noting that the data system used for loot boxes is “vast and unfathomable” and the random number generator, the program that determines what rewards are contained in a loot box, lacks transparency, giving users no information on their chances of winning certain items.<sup>80</sup>

The fifth section of the Commission’s finding, however, begins to analyze how loot boxes interact with the Gaming and Betting Act of May 7, 1999.<sup>81</sup> The Commission noted that to be considered a game of chance within the Gaming and Betting Act of May 7, 1999:

[A] game of chance is any game whereby a bet of any kind that is placed leads to the loss of this bet by at least one of the players, or a win of any kind for at least one of the players or organisers of the game, and whereby chance may even be a secondary element in the

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76. BELGIAN REPORT, *supra* note 72, at 4–5.

77. *Id.* at 5.

78. *Id.* at 6; see also Alex Osborn, *Activision Files Patent for Microtransaction-Minded Matchmaking System*, IGN (Oct. 17, 2017, 8:23 PM), <https://www.ign.com/articles/2017/10/17/activision-files-patent-for-microtransaction-minded-matchmaking-system> (including an Activision statement that the patent, filed in 2015 and granted in 2017, was “exploratory” and never implemented into their games).

79. BELGIAN REPORT, *supra* note 72, at 7.

80. *Id.* at 7–8.

81. *See id.* at 8.

course of the game, indication of the winner or determination of the size of the winnings.<sup>82</sup>

The Commission then dissolved this definition into four factors to analyze whether loot boxes violated the Gaming and Betting Act: (1) game element, (2) wagers, (3) chance of wins, and (4) chance.<sup>83</sup>

The Commission first analyzed whether loot boxes constituted a game to decide on the game element of the definition.<sup>84</sup> The Commission found that loot boxes meet this definition.<sup>85</sup> The Commission used “a game activity” to define loot boxes as a game when it comes to gambling, stating that a game activity occurs during both a competition between multiple players or the achievement of a specific result by a single player, including playing against machines.<sup>86</sup> Using this analysis, the Commission finds that loot boxes meet the game element of the “game of chance” definition.<sup>87</sup>

The next factor considered was whether there is a wager, which the Commission easily decided is met.<sup>88</sup> The Commission does not directly define a wager, and in fact neither does the Gambling and Betting Act of May 7, 1999.<sup>89</sup> Instead, the wager factor stems from the statutory language of whether a “stake of any kind is committed” to a game.<sup>90</sup> The Commission goes on to rule that anything that is paid for with real money, including virtual currency, that is then used towards loot boxes, is a wager under the Gaming and Betting Act of May 7, 1999.<sup>91</sup> The Commission so ruled because an asset value is brought to the game that serves as a participation fee/compensation fee for the loot box.<sup>92</sup> The Commission concluded by noting that loot boxes purchased solely

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82. *Id.*; See also Belgian Gaming Statute, *supra* note 62.

83. See BELGIAN REPORT, *supra* note 72, at 9–12.

84. See *id.* at 9.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 9–10 (conceding that in-game currency that cannot be purchased does not constitute a wager).

89. See generally also Belgian Gaming Statute, *supra* note 62.

90. See *id.* art. 2.

91. BELGIAN REPORT, *supra* note 72, at 9.

92. See *id.*

through earned in-game currency rather than purchased in-game currency is not a wager.<sup>93</sup>

The Commission then went on to the “prize” element (chance for win and loss). The Commission analyzed this factor through the question: “[D]oes the player receive value for his money or is the item obtained from the loot box of lower value (loss) or higher value (win) than the money that the player paid for this box?”<sup>94</sup> The Commission, citing to an unpublished Belgian case, noted the broadness of the Gaming and Betting Act, which requires a “win of any type” for at least one participant, either the player or the organizer.<sup>95</sup> The Commission then ruled that the purchase of loot boxes can result in losses, noting that losing a wager qualifies as a loss, and a loss can be of any type.<sup>96</sup> A player loses when the value of the item is less than the wager placed on the loot box, with the subjective value of the item assigned by the player.<sup>97</sup> Importantly, the commission noted that the item received in the loot box does not have to be able to be converted into money to be considered a win.<sup>98</sup>

The Commission then analyzed the chance factor, which requires some element of chance in a game to be considered gambling.<sup>99</sup> The Commission again interpreted the Gaming and Betting Act broadly, noting that the chance element is met even if chance is just a “*secondary element*” in the loot box.<sup>100</sup> Chance, in the Commission’s view, is defined as “the occurrence of an indeterministic event, situation or outcome, so when the chance of a specific event, situation or outcome is not equal to one.”<sup>101</sup> The Commission continued to note the hidden nature of the random number generator, emphasizing that the chance might not exist

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93. *See id.* at 9–10 (using the example of how Overwatch currency that cannot be purchased, but can be used to buy items, is not by itself a wager).

94. *Id.* at 10–11; *citing* Judgement no. 232,752, Council of State, dated 29 October 2015 (unpublished).

95. *See id.*

96. *See id.* at 11.

97. *See id.* at 10–11

98. *See id.* at 11.

99. *See id.* (“[C]hance may be present when opening loot boxes.”).

100. *Id.*

101. *Id.*, *citing* K. Andries, N. Carette en N. Hoekz, *Kansspel in Recht en Onderneming* (Game of Chance in Law and Business) DIE KEURE 5, 475 (2006) (Dutch language).

for the developer, but the player has no way of knowing what kind of odds exist for each type of item in the loot boxes.<sup>102</sup>

In concluding, the Commission found that paid loot boxes in *Overwatch*, *FIFA 18*, and *CS:GO* violate the Gaming and Betting Act because they fit the description of a game of chance.<sup>103</sup> The Commission ruled that the loot boxes must be removed from the games entirely or risk criminal action.<sup>104</sup> That criminal liability included “a prison sentence of up to five years and fines of up to EUR 800,000 for a first violation.”<sup>105</sup> Those penalties could double if the loot box opener is a player under the age of eighteen.<sup>106</sup>

In finding that the loot boxes in the three games violated the Gaming and Betting Act, the Commission ruled that criminal penalties should be brought first against game operators (development companies), who do not remove loot boxes from their games, and then “against those involved in operating the illegal game.”<sup>107</sup> They also make several requirements for game developers who choose to include loot boxes in games.<sup>108</sup>

The video game developer’s response to the Commission’s ruling varied: *Overwatch* and *CS:GO* removed their loot boxes for games in Belgium. While EA removed *Destiny 2* loot boxes in Belgium, but they originally left loot boxes in the newest FIFA release, *FIFA 19*.<sup>109</sup> EA’s decision to leave loot boxes in *FIFA 19* led to a criminal investigation in Belgium in October of 2018.<sup>110</sup> EA changed its tune in January 2018 and removed loot boxes from its popular soccer video game, but made no

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102. See BELGIAN REPORT, *supra* note 72, at 11.

103. See *id.* at 16.

104. See *id.*

105. *Id.*

106. See *id.*

107. *Id.* at 17. This is extremely broad, and no litigation on the matter has occurred, but given how developers responded, it seems like they do not want to take the chance of finding out who could be liable under this.

108. *Id.* at 18. These requirements include publication of the chances of winning specific items, complete control of random number generators by the Gaming Commission, a financial ceiling, and a ‘gambling’ game symbol. *Id.*

109. Gerken, *supra* note 14.

110. Matt Wales, *EA Reportedly Under Criminal Investigation in Belgium Due to FIFA’s Loot Boxes*, EUROGAMER, <https://www.eurogamer.net/articles/2018-09-10-ea-reportedly-under-criminal-investigation-in-belgium-due-to-fifas-loot-boxes> (last updated Sept. 11, 2018).

changes to its Ultimate Team game mode mechanics, meaning players will have to spend even more time to unlock rare players for the Ultimate Team game mode.<sup>111</sup> Activision Blizzard was surprised by the Belgian Gambling Commission's finding, but Belgian players now have no other options but to earn loot boxes through leveling up, as the options to purchase loot boxes were removed.<sup>112</sup>

Belgium has been the prime example of loot box regulation, becoming the only country in the world to ban the process outright for games that do not even allow for players to sell items found in loot boxes in an online market. The finding is enabled by an extremely liberal definition of not only gambling, but also of a prize and a "win." As time passes and new games are released, Belgium will be the prime example of how such regulation affects game developers, gamers, parents, consumers, and countries where these loot boxes exist.

#### IV. THE UNITED KINGDOM: (SOME) LOOT BOXES AREN'T GAMBLING (YET)

The United Kingdom ("U.K.") has investigated loot boxes since 2017 and has maintained that loot boxes in video games do not constitute gambling unless they have outside value.<sup>113</sup> The U.K. Gambling

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111. See Ryan Whitwam, *EA Agrees to Remove FIFA Loot Boxes in Belgium*, EXTREMETECH (Jan. 31, 2019), <https://www.extremetech.com/gaming/284808-ea-agrees-to-remove-fifa-loot-boxes-in-belgium>; @FutWatch, TWITTER (Feb. 22, 2019, 10:35 AM), <https://twitter.com/FutWatch/status/1099014913287168000> (noting that in order to unlock a specific card during a FIFA event, a player would have to have to purchase an average of 677 packs, which would cost 1.3 million FIFA points or \$11,000, or, if the player were to earn the coins by playing, earning average of 100,000 coins a week, it would take nearly 3 years to get the necessary coins).

112. Vaneras, *Paid Loot Boxes and Loot Chests Disabled for Players in Belgium*, BLIZZARD FORUMS (Aug. 27, 2018), <https://eu.forums.blizzard.com/en/overwatch/t/paid-loot-boxes-and-loot-chests-disabled-for-players-in-belgium/8139> ("While we at Blizzard were surprised by this conclusion and do not share the same opinion, we have decided to comply with their interpretation of Belgian law. As a result, we have no choice but to implement measures that will prevent Overwatch and Heroes of the Storm players located in Belgium from purchasing in-game loot boxes and loot chests with real money and gems.").

113. U.K. GAMBLING COMMISSION, VIRTUAL CURRENCIES, ESPORTS AND SOCIAL CASINO GAMING – POSITION PAPER 5, § 3 (2017),

Commission (“Gambling Commission”) released a report in 2017 where it found that loot boxes with contents that had outside value could be considered gambling.<sup>114</sup> In November of 2018, the U.K. Gambling Commission released a report titled “Young People & Gambling,” leading many to equate the findings of the report to the belief that the U.K. Gambling Commission considered loot boxes to be gambling.<sup>115</sup> The U.K. Gambling Commission denied these reports, saying that it did not consider loot boxes gambling or a gateway to gambling.<sup>116</sup> Before a detailed look into the Commission’s findings, an analysis of the U.K.’s regulation of gambling over the years can provide a background that will be useful in fully analyzing their loot box findings.

U.K. gambling regulation began in 1853, when gaming houses were made illegal.<sup>117</sup> The Street Betting Act, passed in 1906, banned street betting, leading to massive public upheaval, but the regulation stayed in place until the Betting and Gaming Act of 1960.<sup>118</sup> The Betting and Gaming Act of 1960 legalized all gambling, including casinos and gambling machines in a wide range of venues.<sup>119</sup> While gambling was widely legal and generally accepted, gambling was not encouraged; casinos could not serve food or drink, and the interior could not be visible from the street.<sup>120</sup> However, gambling did not become widespread during this era, and most proposals for new casinos or bingo clubs were denied, and casinos were only allowed in fifty-two “permitted areas.”<sup>121</sup>

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<https://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf> [hereinafter 2017 POSITION PAPER].

114. *Id.*

115. U.K. GAMBLING COMMISSION, YOUNG PEOPLE & GAMBLING 2018: A RESEARCH STUDY AMONG 11-16 YEAR OLD’S IN GREAT BRITAIN (2018), <https://www.gamblingcommission.gov.uk/PDF/survey-data/Young-People-and-Gambling-2018-Report.pdf> [hereinafter GREAT BRITAIN STUDY].

116. *See also* Haydn Taylor, *UK Gambling Commission: No Link Between Loot Boxes and Exposure to Gambling*, GAMESINDUSTRY.BIZ (Nov. 22, 2018), <https://www.gamesindustry.biz/articles/2018-11-22-uk-gambling-commission-weve-not-in-anyway-referred-to-loot-boxes-as-exposure-to-gambling>.

117. Jim Orford, *Gambling in Britain: The Application of Restraint Erosion Theory*, 107 ADDICTION, 2082, 2082 (Dec. 12, 2012).

118. *Id.* at 2082–83. The regulation was disliked by both the public and the police, and most bettors went unpunished anyway. *Id.* at 2082.

119. *Id.* at 2083.

120. *Id.*

121. *Id.*

Britain entered into an era of gambling liberalization in 1993 with the passing of the National Lottery Act.<sup>122</sup> This led to gambling “ratcheting-up” in England, including easing restrictions on memberships for patrons and opening times for casinos, increases in types of gambling machines, a reduction in the minimum age for football (soccer) pools and a wider range of games.<sup>123</sup> In the 21<sup>st</sup> Century, the U.K. had the largest gross revenues in the EU from gambling<sup>124</sup> and created new methods for gambling along with different gambling avenues.<sup>125</sup> In addition to the expansion of traditional gaming avenues, the 2005 Gambling Act legalized online gambling.<sup>126</sup>

The 2005 Gambling Act defines gambling in the gaming and game of chance section.<sup>127</sup> That section defines “gaming” as playing a game of chance for a prize.<sup>128</sup> A person plays a game of chance for a prize “whether or not he risks losing anything at the game.”<sup>129</sup> Under the 2005 Gambling Act, “prize . . . means money or money’s worth, and . . . includes both a prize provided by a person organizing gaming and winnings of money staked.”<sup>130</sup>

In the U.K. Gaming Commission’s report on loot boxes in 2017, this definition of prize was a major determinative factor in deciding whether or not loot boxes are gambling.<sup>131</sup> The U.K. Gambling Commission analyzed the legal definition of gambling set by Parliament, and if it deems loot boxes to fall under that definition, Parliament would “take robust action.”<sup>132</sup> In 2017, however, the Gambling Commission took no action, ruling that loot boxes that contained items that did not have value outside of the game are not gambling under U.K. law: “[w]here there are readily accessible opportunities to cash in or exchange those awarded in-

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122. *Id.*

123. *Id.* at 2084.

124. *Id.* The U.K. reported 11 billion pounds in gross gambling revenues. *Id.*

125. *Id.*

126. *See* Gambling Act 2005, c. 19, § 67 (U.K.).

127. §§ 3, 6

128. § 6.

129. § 6(4).

130. § 6(5).

131. U.K. Gambling Commission, *Loot Boxes Within Video Games*, GAMING COMMISSION (Nov. 24, 2017), <https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx>.

132. *Id.*

game items for money or money's worth those elements of the game are likely to be considered licensable gambling activities."<sup>133</sup> Despite the Gambling Commission mentioning that loot boxes containing items with outside value would fall under the gambling statute, no game has been banned in the U.K. using this rationale.

The U.K. Gambling Commission mentioned loot boxes again in November of 2018 but refused to back down from its finding that loot boxes did not constitute a form of gambling.<sup>134</sup> The U.K. Gambling Commission returned to video games in a portion of their research report on Great Britain eleven to sixteen-year-old kids and gambling, titled "Young People & Gambling 2018."<sup>135</sup> The Commission found that 14% of eleven to sixteen-year-old kids had spent their own money on gambling within the past week.<sup>136</sup> Of the roughly 450,000 people that spent their own money, the average weekly amount spent on gambling bets was sixteen pounds out of an average of twenty-eight pounds per week income.<sup>137</sup> In terms of video games, the U.K. Gambling Commission asked participants if they were aware of various ways to utilize in-game purchases, with 54% of those surveyed noting that they knew of loot boxes to gain in-game items and 31% of participants noting that they had purchased and used loot boxes by either paying for them directly or paying for them with in-game currency<sup>138</sup> The Commission then asked about surveyors' knowledge of secondary marketplaces where they could sell items in loot boxes, with 15% being aware they could bet items on these marketplaces, and 3% admitting to having done this.<sup>139</sup>

Following these findings, the U.K. Gambling Commission walked back assertions that it had equated loot boxes with gambling. As one article stated, "several news outlets extrapolated the connection" that the report found children's use of loot boxes made them to mean that loot boxes were gambling.<sup>140</sup> A Gambling Commission spokeswoman stated: "We've not in anyway, in the survey, referred to it as exposure to

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133. 2017 POSITION PAPER, *supra* note 113, §§ 3.17, 3.18.

134. *See generally* GREAT BRITAIN STUDY, *supra* note 115.

135. *See id.*

136. *Id.* at 4.

137. *Id.* at 5.

138. *Id.* at 29.

139. *Id.*

140. *See* Taylor, *supra* note 116.

gambling . . . . [I]t's a very popular subject matter and we want to try and make sure that we have as much information and data around it as possible."<sup>141</sup> The spokeswoman ruled that the U.K. Gaming Commission was "more aligned [with] the Netherlands," a country that banned loot boxes in FIFA 18, DOTA 2, PlayerUnknown's Battlegrounds, and Rocket League earlier in 2018 (all games in which the players could "cash out" their loot box earnings, either through secondary markets or account selling).<sup>142</sup> This statement reflects the general regulation of loot boxes in the U.K.: many words condemning them, but a lack of commitment to regulation.

The U.K. Gaming Commission's siding with the Netherlands in an official statement could well mean that regulation is coming to England. In September of 2018, two months prior to the Young People & Gambling report and subsequent statements, the U.K. Gambling Commission announced that it was going to investigate the "blurring of lines" between video game loot boxes and gambling.<sup>143</sup> The statement was signed by delegates of fifteen other countries, including Spain, Portugal, the Czech Republic, and the state of Washington (U.S.).<sup>144</sup>

Of all the countries analyzed in this note, the U.K. is perhaps the most likely to provide widespread loot box regulation in the near future. Though no regulation has come of yet, the Gaming Commission has expressed, on multiple occasions, that loot boxes with items that can be cashed out for real money are likely gambling. With the inclusion of the U.K. on the sixteen-country list investigating loot boxes, more regulation is quite possible, though the timeline of such regulation is unclear.

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141. *Id.*

142. *Id.*; Wesley Yin-Poole, *The Netherlands Declares Some Loot Boxes are Gambling*, EUROGAMER (Apr. 19, 2018), <https://www.eurogamer.net/articles/2018-04-19-the-netherlands-declares-some-loot-boxes-are-gambling>; Netherlands Gambling Authority, *Onderzoek Naar Loot Boxes; Een Buit of een Last? [Study Into Loot Boxes: A Treasure or a Burden?]* (Apr. 19, 2018) (Neth.).

143. U.K. GAMBLING COMMISSION, DECLARATION OF GAMBLING REGULATORS ON THEIR CONCERNS RELATED TO THE BLURRING OF LINES BETWEEN GAMBLING AND GAMING 1 (2018), <https://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>.

144. *Id.* at 2.

## V. CHINA: A LOOT BOX MIDDLE GROUND.

Like Belgium, China also recently regulated loot boxes.<sup>145</sup> Unlike its European counterparts, however, China first required multiple games to publish the odds of receiving certain items in loot boxes, and, notably, all items that could be obtained in loot boxes must also be available in other ways, such as through virtual currency or real money.<sup>146</sup> Blizzard and Overwatch was, again, the first company to move towards compliance with the regulation, allowing Chinese players to purchase Overwatch currency instead of loot boxes.<sup>147</sup> Unlike the other countries discussed in this note, China has banned gambling activities except in Macao (or Macau, from Portuguese origin), Hong Kong, and Taiwan.<sup>148</sup> The so-called outright ban still is seen as “a social problem from which [China] cannot escape.”<sup>149</sup> Macao, for example, reports gambling as its leading industry and has surpassed Las Vegas as the world’s capital for gambling.<sup>150</sup> The number of people gambling, however, is comparable

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145. See Tracey Tang, *A Middle-Ground Approach: How China Regulates Loot Boxes and Gambling Features in Online Games*, MONDAQ (May 16, 2018), <http://www.mondaq.com/china/x/672860/Gaming/A+MiddleGround+Approach+How+China+Regulates+Loot+Boxes+and+Gambling+Features+in+Online+Games>.

146. See *id.*

147. See Matthew Handrahan, *Blizzard Avoids China’s Loot Laws by Selling Overwatch In-game Currency*, GAMESINDUSTRY.BIZ (Jun. 6, 2017), <https://www.gamesindustry.biz/articles/2017-06-06-blizzard-avoids-chinas-loot-box-laws-by-selling-in-game-currency>.

148. See Yap Wai-Ming & Cindy Pan, *Gaming in China: Overview*, THOMSON REUTERS, [https://uk.practicallaw.thomsonreuters.com/5-635-](https://uk.practicallaw.thomsonreuters.com/5-635-9387?comp=pluk&transitionType=Default&contextData=%28sc.Default%29)

9387?comp=pluk&transitionType=Default&contextData=%28sc.Default%29 (last visited Oct. 28, 2019). Though just 9 square miles, Macao is home to over 30 million people (more than the population of Texas), with many others visiting; *Macao Territory Profile*, BBC (Jan. 9, 2018), <https://www.bbc.com/news/world-asia-pacific-16599919>; see also *Texas Population 2020*, POPULATION USA, <https://www.usapopulation.org/texas-population/> (last visited Jan. 11, 2020).

149. TIJE CHENG & ZHANG YUNGLING, *THE SOCIOLOGY OF GAMBLING IN CHINA* 1 (2011).

150. See *id.* at 2.

between Hong Kong and countries like England and Canada.<sup>151</sup> The amount won by casinos in the less than twelve-square-mile region of Macao is greater than all of the privately-owned U.S. casinos.<sup>152</sup>

Though gambling is legal in Macao, that does not mean that mainland Chinese citizens can enjoy gambling free from regulation.<sup>153</sup> In fact, the maximum anyone from the mainland can take out of Macao is 20,000 yuan renminbi (around \$3,150 U.S.), an amount which is less than the usual bet in Macao high-stakes rooms.<sup>154</sup> This restriction leads to widespread smuggling, spurred on by the fact that gambling debts are not enforced on the mainland.<sup>155</sup>

Along with traditional gambling methods in Macao, China has become the biggest market for e-sports, and as a result, has seen a rise in e-sports gambling.<sup>156</sup> Video games as a whole have been questioned by Chinese culture, with a 2000 study showing that 50% of parents believed their children's school performance was negatively impacted by video games.<sup>157</sup> In response, the government passed a ban on the sale of video game equipment and accessories.<sup>158</sup> As the twenty-first century wore on, video games became even more popular, and the problems associated boomed as well.<sup>159</sup>

In December 2016, China's Ministry of Culture ("Ministry"), a government organization that regulates the internet and other online

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151. *See id.* at 57 (explaining that in a survey of 16-65 year olds in England, 72% had gambled within the last year, and in Canada, with 18-65 year olds, 75% had gambled within one year, and in Hong Kong 78% had reported gambling within one year).

152. I. Nelson Rose, *China's Gambling Problem*, 17 GAMING L. REV. & ECON. 171, 171 (2013).

153. *See id.*

154. *Id.*

155. *See id.*

156. *See* Zhouxiang Lu, *From E-Heroine to E-Sports: The Development of Competitive Gaming in China*, 33 INT'L J. HIST. SPORT 2186, 2187 (2016).

157. *See id.* at 2190.

158. *See id.* at 2191 (noting that manufacturers mostly produced video game consoles in China, and the consoles would have to be smuggled in to be sold to the Chinese market). With the ban on consoles lasting until 2015, PC gaming boomed in China. Josh Ye, *Why the Impact of China's Console Ban Still Lingers Today*, ABACUS (Nov. 23, 2018), <https://www.abacusnews.com/who-what/why-impact-chinas-15-year-console-ban-still-lingers-today/article/2174710>.

159. Lu, *supra* note 156, at 2200.

matters, issued a report on loot boxes in video games.<sup>160</sup> The report begins with the Ministry noting that China's online game industry has grown rapidly, but there are also issues "in business operators of online games . . . such as unclear division of operational responsibilities, using covert means to induce consumption, ineffective protection of user rights and interests, etc."<sup>161</sup> The report and ruling discussed the standardization of services for distributing "virtual props," or loot boxes.<sup>162</sup> The ruling stated that any props or in-game objects that are distributed through loot boxes shall be available to be bought directly with legal tender through the use of in-game currency.<sup>163</sup> If loot boxes still exist, they cannot be purchased with either legal tender nor with in-game currency.<sup>164</sup> In terms of any loot boxes that can still exist under those parameters, the chances of receiving certain goods must be published in the game or on the game's online website.<sup>165</sup>

The new regulation on loot boxes does not include defining them as gambling, though loot boxes could possibly meet the definition of gambling anyway.<sup>166</sup> Article 303 of the Criminal Law of the People's Republic of China provides that "[w]hoever, for the purpose of reaping profits, gathers people to engage in gambling, runs a gambling house or makes gambling his profession shall be sentenced to a fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also be fined."<sup>167</sup> Online gambling is included in this definition, though no official definition of online gambling exists.<sup>168</sup> The vague definition of gambling makes China a less than ideal country

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160. Notice of the Ministry of Culture on Regulating the Operations of Online Games and Strengthening Interim and Ex Post Regulation (promulgated by the Ministry of Culture, May 01, 2017) (China).

161. *Id.*

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. Criminal Law (promulgated by Order No.83 of the President of the People's Republic of China, Mar. 14, 1997, rev'd Mar. 14, 1997, effective July 1, 1979), Art. 303, 1979 P.R.C. LAWS (China).

168. Yap Wai-Ming & Cindy Pan, *Gaming in China: Overview*, THOMSON REUTERS PRAC. L., [https://uk.practicallaw.thomsonreuters.com/5-635-9387?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/5-635-9387?transitionType=Default&contextData=(sc.Default)) (last updated Oct. 1, 2019).

for comparison in law, though the method of solution can provide an interesting example.

With the Ministry of Culture's ruling that loot boxes cannot be bought with either real or virtual money, one might expect to see loot boxes disappear. However, thanks to Overwatch coming up with a loophole to still provide loot boxes to the China market, that is not the case.<sup>169</sup> In the Chinese version of Overwatch, instead of buying loot boxes directly, players can now buy in-game currency, which comes with "free" loot boxes.<sup>170</sup>

Overall, loot box regulation in China benefits from an incredibly vague (more so non-existent) definition of gambling and a powerful government.<sup>171</sup> However, the writing of the solution to the loot box problem provides for a loop-hole that continues to allow game developers to provide loot boxes to consumers, including the children China wants to protect.

## VI. JAPAN: LEARNING FROM FAILED SELF-REGULATION

Japan's governmental clampdown on kompu gacha games shows that failure to self-regulate can have dire consequences for game developers. Japan's history with loot boxes is perhaps more storied than any other country, with its game developers seen as "pioneers" of the loot box model.<sup>172</sup> That model comes in the form of gacha games, which allow players to unlock new characters by "rolling" for them in a loot box-like mechanic using an in-game currency that both generates (slowly) through the game itself and can be purchased by the player using real-world money.<sup>173</sup> For use in this note, kompu gacha, also known as complete gacha, is a system where a player that wants item "E" would

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169. See Handrahan, *surpa* note 147.

170. *Id.*

171. See Zhou Hanhua, *China's Regulatory Reform: Experiences, Challenges and Prospects*, 13 U. PA. ASIAN L. REV. 1, 15 (2018).

172. Yuji Nakamura, *The Good Times are Over for Japan's Loot-Box-Style Gaming Bonanza*, BLOOMBERG (Nov. 5, 2018), <https://www.bloomberg.com/news/articles/2018-11-05/the-good-times-are-over-for-japan-s-loot-box-style-gaming-bonanza>.

173. Jessica Famularo, *'Fire Emblem Heroes' Is a Gacha Game – Here's What That Means*, INVERSE (Feb. 2, 2017), <https://www.inverse.com/article/27267-what-are-gacha-games-fire-emblem-heroes>.

need to obtain items “A” “B” “C” and “D” from a random electronic draw.<sup>174</sup> Standard gacha is the process of obtaining just one item in an electronic draw.<sup>175</sup> “Gacha” will be used in this note to refer to the type of game as a whole, while kompu gacha and standard gacha will be used as needed to distinguish. In Japan, gacha proved to be lucrative and ground-breaking, with gacha game *Puzzles and Dragons* became the first mobile game in history to earn \$1 billion in revenue.<sup>176</sup>

These gacha games, first created in 2007, operated without a hitch until around 2011 or 2012.<sup>177</sup> That hitch came in December of 2011, where the top-ranked Japanese Mobile social game *Tanken Driland*, which generated \$26 million per month in virtual item sales alone, had a glitch that users could exploit to duplicate items in loot boxes.<sup>178</sup> Following a public outcry about the game’s secondary market serving as a “shadow economy,” *Tanken Driland* enabled a slew of self-regulatory measures.<sup>179</sup> Those measures included the creation of an internal task force to investigate the extent of trading loot box items for money, a change to the terms of service to prohibit selling loot box items for money, and an agreement to work with third parties to stop future secondary markets.<sup>180</sup> Later on, Japan’s six largest gaming companies created a council that aimed to self-regulate kompu gacha<sup>181</sup> systems, but the self-regulation came too late, and Japan’s gambling regulation

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174. Dr. Serkan Toto, “Kompu Gacha” *Social Game Mechanics is History, Here’s How it All Went Down*, KANTAN GAMES (May 9, 2012), <https://www.serkantoto.com/2012/05/09/kompu-gacha-dena-gree-history/> (cited in Sebastian Schwidessen, *Loot Boxes in Japan: Legal Analysis and Kompu Gacha Explained*, LEXOLOGY (Aug. 2, 2018), <https://s3.amazonaws.com/documents.lexology.com/a2abc5ef-26b8-4f16-ace4-884bc988fc29.pdf>).

175. *Id.*

176. Jon Jordan, *It’s Official: Puzzle & Dragons is the First Mobile Game to \$1 Billion in Revenue*, POCKET GAMER (Feb. 4, 2014), <https://www.pocketgamer.biz/asia/news/57076/its-official-puzzle-and-dragons-is-the-first-mobile-game-to-1-billion-in-revenue/>.

177. Schwidessen, *supra* note 174.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Kompu gacha* is multi-leveled gacha, where players would have to win and combine several items earned from standard gacha to get a rarer item. *Id.*

agency, the National Consumer Affairs Agency (CAA) announced that it would regulate kompu gacha systems.<sup>182</sup>

With kompu gacha regulated by both the “Big 6” council and the CAA, Japan’s self-regulatory council turned towards protecting standard gacha. In regulating standard gacha, the “Big 6” announced three major changes in how standard gacha would work.<sup>183</sup> Those self-regulations included requirements to report the exact probabilities of winning items in gacha, to eventually eliminate real money trading for the virtual items, and even to outlaw mechanics similar to kompu gacha.<sup>184</sup> The self-regulation has been effective, and as of 2018, it is still recommended for game developers entering into the Japanese market to include monthly payment caps for young players, measures against real money trading, warnings, probability disclosures, and a limit on estimate price to obtain a rare item.<sup>185</sup>

While Japan’s ban of kompu gacha was not based upon their legal definition of gambling (and is unlikely to meet that definition),<sup>186</sup> Article 185 of Japan’s Criminal Code criminalizes gambling, stating: “A person who gambles shall be punished by a fine of not more than 500,000 yen or a petty fine; provided, however, that the same shall not apply to a person who bets a thing which is provided for momentary entertainment.”<sup>187</sup> The Penal Code itself does not provide a definition for gambling in Japan, but case law defines gambling as: “an act where more than two persons bet on an outcome of a contest of chance to contend for a prize in the form of property or asset.”<sup>188</sup> A contest of chance is one where any chance is

182. *Id.*

183. See Dr. Serkan Toto, *Japan’s Social Gaming Industry Announces New Set of Self-Regulatory Measures*, KANTANGAMES (June 27, 2012), <https://www.serkantoto.com/2012/06/27/social-gaming-japan-self-regulation/> (cited in Schwidessen, *supra* note 174).

184. *Id.* (In regard to the third regulation, the author theorizes: “this guideline is supposed to be a bow to regulators and to warn 3rd-party developers trying to be clever and come up with complete gacha equivalents.”).

185. See Schwidessen, *supra* note 174.

186. See *infra* Section VII.

187. KEIHŌ [Pen. C.] [Crimes Related to Gambling and Lotteries] Law No. 45 of 1907, art. 185, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&re=02&vm=04> (Japan) (cited in Schwidessen, *supra* note 174).

188. Hitoshi Ishihara, *Japan*, 2 GAMBLING L. REV. 164, 164 (2017) (cited in Schwidessen, *supra* note 174).

involved, even if the outcome also depends on the skills of the contestants.<sup>189</sup> The next factor in the definition is “bet to contend for a prize in the form of property or asset.”<sup>190</sup> This means that if none of the contestants lose their property, then it is not betting, and therefore not gambling.<sup>191</sup>

The prize element in Japan is one with a fascinating history, loopholes, and exceptions. Under Japanese Gambling/ Criminal law, a prize occurs when a player can win a “thing of value.”<sup>192</sup> “Thing of value” is defined as “money, its equivalent, real and personal property, receivables, or a stake.”<sup>193</sup> Some experts in Japanese law warn that if virtual currency can be purchased for real money, any items purchased with that currency could be considered things of value because the value of the items could be seen as equivalent to the price within the in-game store.<sup>194</sup>

There’s also the question of the impact of secondary markets on the value question, with Japan’s popular Pachinko games providing an interesting example of how Japan’s regulates (or does not regulate) a mechanism that seems very similar to loot boxes.<sup>195</sup> Pachinko is a game where players insert money to pay for small balls, which the players then shoot out by turning a handle on the pachinko machine. The balls then go through a maze toward an open slot, and players try and “‘guide’ as many balls as possible into open slots.”<sup>196</sup> In the end, the player aims to have trays full of the pachinko balls.<sup>197</sup> Players turn these in and are issued a receipt for the total value of the win, and this receipt can then be

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189. *Id.*

190. *Id.* at 165.

191. *Id.*

192. Ko Hanamizu, Anderson Mori & Tomotsune, *Gaming in Japan: Overview*, THOMSON REUTERS PRAC. L., [https://uk.practicallaw.thomsonreuters.com/9-636-6994?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/9-636-6994?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) (last updated Dec. 1, 2016) (cited in Schwidlessen, *supra* note 174).

193. *Id.*

194. *Id.*

195. Schwidlessen, *supra* note 174, §§ 5(b)(cc)(2), 5(b)(cc)(2)(a).

196. Graham Brooks et al., *Pachinko: A Japanese Addiction?* 8 INT’L GAMBLING STUD. 193, 194 (2018).

197. *Id.*

exchanged for a prize with little to no value to the outside world.<sup>198</sup> This prize can be taken to a third party office (which are oftentimes connected to the Japanese Yakuza gang) and exchanged for cash, while the office then sells back the prize to the pachinko facility.<sup>199</sup> This secondary market system has been compared to the gacha system, suggesting that because online versions of pachinko are thought to be illegal, so too should gacha.<sup>200</sup> However, the exception included in Art. 185 of the Japanese Penal Code provides an exception for “a person bets a thing which is provided for momentary entertainment” is thought to be relevant to the exclusion of pachinko from Japanese Gambling regulation.<sup>201</sup>

Overall, the self-regulation found in Japan shows that it can work if implemented in a timely manner, but failing to self-regulate in time can result in the government regulation that could be much harsher.<sup>202</sup> Additionally, the lack of regulation in Pachinko also provides an example of the gap found between what may constitute gambling under the laws of a country, and what is actually regulated as gambling in practice.

## VII. THE UNITED STATES: THE WILD, WILD WEST OF LOOT BOXES

Neither the United States Federal government nor its individual states have passed official legislation declaring loot boxes as gambling. This might change, however, with the Federal Trade Commission FTC announcing in November of 2018 that it would investigate loot boxes in video games to determine if action needs to be taken.<sup>203</sup> Like the U.K.,

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198. *Id.* (using the example of a player receiving a specific pack of washing powder as a reward for pachinko balls).

199. *Id.* at 195; *see also* Schwiddessen, *supra* note 174, § 5(b)(cc)(2)(a).

200. Brooks, *supra* note 196, at 194.

201. *See* KEIHŌ [Pen. C.] [Crimes Related to Gambling and Lotteries] Law No. 45 of 1907, art. 185, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&re=02&vm=04> (Japan) (cited in Schwiddessen, *supra* note 174, §§ 5(b)(cc)(2)(a), 5(b)(cc)(2)(b)).

202. *See generally* Schwiddessen, *supra* note 174.

203. Brian Fung, *U.S. Consumer Watchdog to Investigate Video Game Loot Boxes*, WASH. POST (Nov. 28, 2018),

the main hang-up in the regulation of loot boxes in the U.S. appears to be the lack of “outside value” of the items available in loot boxes.<sup>204</sup>

While gambling is mainly regulated by the states, with an analysis of every state’s gambling law falling outside of this paper’s scope, an analysis of federal gambling law can provide an overview of gambling law in the U.S. as a whole, and the complication of regulation on a mass scale. The statute worth analyzing due to the varying number of interpretations is the Wire Act, passed in 1961.<sup>205</sup> The relevant provision in this statute states that:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . shall be fined under this title or imprisoned not more than two years, or both.<sup>206</sup>

While this provision could be seen as a factor for restricting online gambling devices, federal courts have ruled the Wire Act applies only to sporting events.<sup>207</sup> There are state courts, however, that have found that the Wire Act covers more than just sports.<sup>208</sup> Additionally, in the groundbreaking *Murphy v. NCAA* decision, the Supreme Court implied that the use of the Wire Act requires violating underlying state law.<sup>209</sup> Despite a great deal of case law interpreting that the Wire Act applies only to sporting events, and a 2011 Department of Justice Memo echoing

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[https://www.washingtonpost.com/technology/2018/11/28/us-consumer-watchdog-investigate-video-game-loot-boxes/?noredirect=on&utm\\_term=.ec4e2a1b7f51](https://www.washingtonpost.com/technology/2018/11/28/us-consumer-watchdog-investigate-video-game-loot-boxes/?noredirect=on&utm_term=.ec4e2a1b7f51).

204. Oliver Rudgewick, *Loot Boxes – Is It Time to Regulate?*, GAMBLING INSIDER (Nov. 1, 2018), <https://www.gamblinginsider.com/in-depth/6198/loot-boxes-is-it-time-to-regulate>.

205. Transmission of Wagering Information; Penalties, 18 U.S.C. § 1084 (1961).

206. *Id.* § 1084(a)

207. *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *see also In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002).

208. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007).

209. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1483–84 (2018).

the case law,<sup>210</sup> the DOJ backed off their own 2011 memo in 2018, ruling that the Wire Act could apply to more than just sports.<sup>211</sup>

Another federal statute worth mentioning is the Uniform Internet Gambling Enforcement Act (“UIGEA”). This Act focuses on preventing the use of payment instruments for use on unlawful internet gambling.<sup>212</sup> This was meant to allow for more efficient enforcement of internet gambling, specifically when the gambling crosses state lines or even international boundaries.<sup>213</sup> The Act defines gambling according to state law and states that the placement of a bet or wager would be illegal under UIGEA if it would be illegal under state law.<sup>214</sup> Because an analysis of individual state laws is beyond the scope of this paper, UIGEA will not be analyzed in detail when it comes to loot boxes, but it is a potential enforcement option were loot boxes to fall under a state statute for gambling.

While state gambling varies widely, and an analysis of every variation of state law falls outside the scope of this note, an overview of the general principals of state law provides background and understanding for the relevant case law discussed later. In most states, in order to be classified as gambling, three elements must be met: (1) something of value is wagered (consideration), (2) the opportunity to receive something of value in return for the wager (prize), and (3) there must be an element of chance.<sup>215</sup> The wide variety of definitions and the vagueness of many definitions leads to questions about whether certain activities are considered gambling in one state and not gambling in

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210. Virginia A. Seitz, Assistant Attorney General, *Whether Proposals by Illinois and New York Internet and Out of State Transactions Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 32 Op. Att’y Gen. (Sept. 20, 2011).

211. Steven A. Engel, Assistant Attorney General, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, Slip Opinion (unpublished), Op. Att’y Gen. (Nov. 2, 2018).

212. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5366.

213. § 5361(a)(4).

214. § 5362(10)(a).

215. Marie-Cecile O. Tidwell et al., *Gambling Modes and State Gambling Laws: Changes from 1999-2011 and Beyond*, 19 GAMING L. REV. & ECON. 13, 14 (Feb. 1, 2015). It is worth noting that the definition of gambling differs between states, including what constitutes chance and game of chance. *Id.*

another state.<sup>216</sup> Due to the problematic nature of these definitions, an analysis of case law is required to determine what kind of activities are gambling and which are not.<sup>217</sup>

The U.S., unlike the other countries discussed in this note, provides a number of cases relevant to the question of whether loot boxes are gambling, with courts failing to provide a definitive answer. Despite the relatively large number of cases compared to other countries, the strength of the decisions is low, with most of the cases that do exist focusing on the question of whether loot box items provide “something of value” pursuant to most states’ gambling statutes definition of a prize.<sup>218</sup>

*Soto v. Sky Union* specifically addresses the prize element, analyzing relevant gambling statutes from California.<sup>219</sup> The court in *Soto*, rejects all of the plaintiff’s claims because the items won in the in-app games do not constitute things of value because unlike items won in a casino game, the skins themselves cannot be sold and therefore are not considered something of value.<sup>220</sup> The court, in this case, notes that the value a player receives from selling their account does not correlate or reflect upon the value of items in loot boxes.<sup>221</sup>

The case that shook up the loot box analysis has to do with a virtual fishing game that provides virtual chips to players, and one where a court found virtual items to be something of value for the first time in American Common law. In *Kater v. Churchill Downs Inc.*, the Ninth Circuit Court of Appeals decided whether the virtual game platform “Big Fish Casino” constituted illegal gambling.<sup>222</sup> The Ninth Circuit Court of Appeals found that it does constitute illegal gambling despite the game developers surprise: “Churchill Downs, like Captain Renault in *Casablanca*, purports to be shocked-shocked!- to find that Big Fish

216. See *id.*; see also Martin D. Owens Jr., *The Bold and the Necessary: Advance of State-Licensed I-Gaming Highlights the Need for Overhauling State Gambling Laws*, 15 GAMING L. REV. & ECON. 89, 89–90 (2011).

217. See Tidwell et al., *supra* note 215.

218. Ryan Morrison & Austin Hoffman, *Are Loot Boxes Gambling*, ROBOT CONGRESS (Oct. 24, 2017), <https://headgum.com/robot-congress/robot-congress-52-are-loot-boxes-gambling-ft-marc-whipple>.

219. *Soto v. Sky Union*, 159 F. Supp. 3d 871, 880–881 (N.D. Ill. 2016).

220. *Id.* at 881.

221. *Id.*

222. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018).

Casino could constitute illegal gambling. We are not.”<sup>223</sup> The crux of the decision rested on the fact that the Ninth Circuit found that Big Fish Casino’s virtual chips are a “thing of value.”<sup>224</sup> Big Fish Casino allows players to play various electronic casino games.<sup>225</sup> Players are given free coins to start with and may purchase additional chips to extend gameplay, and players can also win these coins during the games.<sup>226</sup> The court ruled that because the user could take advantage of Big Fish Casino’s method of being able to transfer coins to other players by selling the coins on a nebulous, hypothetical black market, Big Fish Casino’s owner, Churchill Downs profits from the transfer.<sup>227</sup> The Court ruled that there was a profit because of a transfer fee applied to the transaction in Big Fish Casino leads Churchill Downs to benefit from it, despite the being against the Terms of Use.<sup>228</sup> The court then found that the coins were things of value under Washington gambling law because the relevant statute included devices that extend gameplay as a thing of value.<sup>229</sup> Importantly, the court rejected the plaintiff’s argument that she could sell the coins on the black market as such sales would be against Big Fish Casino’s Terms of Use, and therefore “[t]he virtual coins cannot constitute a ‘thing of value’ based on this prohibited use.”<sup>230</sup>

Addressing loot boxes in a judicial context also reaches a procedural snag in failing to state a claim under certain state statutes that require a loss. For example, the Maryland criminal loss statute prevented a case involving virtual currency to go to trial. In *Mason v. Machine Zone Inc.*, the plaintiff argued that they lost money playing an unregulated gambling game within an app “Game of War: Fire Age.”<sup>231</sup> In this game, players try and conquer the world, and to do this faster, they can purchase in-game gold.<sup>232</sup> Most notably, this gold could be used to purchase chips for use in a virtual casino, and therefore the plaintiff

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 786.

228. *Id.* at 786–87 (the game’s terms of use states that the virtual chips received in Big Fish Casino cannot be exchanged for cash or anything of value).

229. *Id.* at 787.

230. *Id.* at 788, n. 2.

231. *Mason v. Machine Zone, Inc.*, 851 F.3d 315, 316–17 (4th Cir. 2017).

232. *Id.* at 317.

argued that the chips constituted a wager, and she lost money playing an unregulated gambling device.<sup>233</sup> The court rejected this argument, saying that the purchase was of the gold.<sup>234</sup> Because she used money to get the gold and received the gold, the court ruled that she did not lose money but instead got what she paid for.<sup>235</sup> Because the court analyzed the initial purchase of the gold at face value instead of considering what the plaintiff used the gold for (the virtual casino) and thus held that the plaintiff did not state a claim under Maryland's loss recovery statute.<sup>236</sup> That statute notes that "[a] person who loses money at a [prohibited] gaming device . . . may recover the money as if it were a common debt."<sup>237</sup> Notably, the court rejected the plaintiff's argument that the possibility of her selling her account could constitute "money" because the player purchasing the account would also be buying the previous player's progress in the game.<sup>238</sup> It is unclear whether an account with no in-game progress could possibly meet Maryland's gambling loss statute; but, notably, the court also notes that the player could not sell their account because it is against Machine Zone's Terms of Service.<sup>239</sup>

Another state's loss statute is addressed in Illinois case *Phillips v. Double Down Interactive*. In *Phillips*, the court ruled that the plaintiff did not assert a complaint in which relief could be sought because of Section 28-8 of the Illinois Loss Recovery Act.<sup>240</sup> Section 28-8 stipulates: "[a]ny person who by gambling . . . lose[s] to any other person, any sum of money or thing of value, amounting to \$50 or more . . . may sue for and recover the money or other thing of value[] so lost."<sup>241</sup> The court goes on to rule that there is no loser or in this scenario; Double Down is the game developer and therefore for all intents and purposes the dealer does not lose because they keep the money regardless of whether the player wins a rare item or a common item, and Phillips does not lose because by

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233. *Id.* at 317–18.

234. *Id.* at 319.

235. *Id.* at 319–20.

236. *Id.*

237. *Mason*, 851 F.3d at 319 (citing Md. Code Ann., Crim. Law § 12-110(a)).

238. *Id.* at 320.

239. *Id.* at 320, n. 3.

240. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016).

241. *Id.* at 737.

purchasing the chips, she bought the right to continue playing the games.<sup>242</sup>

Like Europe's PEGI, the U.S. has its own self-regulation entity to help parents decide whether video games are appropriate for their children called the Entertainment Software Rating Board ("ESRB"). The ESRB is a self-regulatory body that assigns ratings for video games and apps, with the rating system encompassing guidance about age-appropriateness, content, and interactive elements.<sup>243</sup> The ESRB has not passed an official report on loot boxes, but has made statements noting that they do not consider the mechanics to be gambling: "ESRB does not consider loot boxes gambling...while there's an element of chance in these mechanics, the player is *always* guaranteed to receive in-game content" even if players are trying to get one item and end up getting items they already have.<sup>244</sup> The ESRB did add a new label that signifies whether a video game allows players to spend money on additional content within the game, but the label includes games with loot boxes and games that only feature other microtransactions, including Downloadable Content ("DLC") that adds additional gameplay features to the game.<sup>245</sup>

The Entertainment Software Association ("ESA") also rejects any kind of government regulation of loot boxes. The ESA is an association that lobbies for and protects companies that publish video games, and also owns and operates E3, a world-wide "trade show for video games and related products."<sup>246</sup> ESA President Mike Gallagher specifically addressed loot boxes and potential regulation during his speech at the Nordic Game Conference.<sup>247</sup> Gallagher emphasized the importance of

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242. *Id.* at 741–42.

243. *About ESRB*, ESRB, <http://www.esrb.org/about/> (last visited Feb. 23, 2019).

244. Jason Schreier, *ESRB Says it Doesn't See "Loot Boxes" as Gambling*, KOTAKU (Oct. 10, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>.

245. Owen S. Good, *ESRB Introducing 'In-Game Purchases' Label in Response to Loot Box Controversy*, POLYGON (Feb. 27, 2018), <https://www.polygon.com/2018/2/27/17057978/esrb-loot-crate-box-in-game-purchases-label>

246. ESA, *Who We Are*, THEESA.COM, <https://www.theesa.com/about-esa> (last visited Feb. 23, 2019).

247. Matthew Handrahan, *ESA: We Can't Go to the "Lowest Common Denominator of Government" on Loot Boxes*, GAMESINDUSTRY.BIZ (May 25, 2018),

loot boxes in the video game business model, how they are “quite different” from gambling definitions around the world, and also how the industry needs to continue to self-regulate.<sup>248</sup>

That need to self-regulate may come quickly for game developers. In November of 2018, the Federal Trade Commission (FTC), at the request of New Hampshire Senator Maggie Hassan, opened an investigation into loot boxes.<sup>249</sup> That investigation will continue later this year when the FTC holds a “public workshop” to analyze loot boxes.<sup>250</sup> Additionally, U.S. Senator Josh Hawley introduced an “Anti-Loot Box Bill” that aims to eliminate all pay to win microtransactions from video games.<sup>251</sup>

## VIII. LEVEL UP: HOW LOOT BOXES SHOULD BE REGULATED IN THE UNITED STATES

My analysis will focus on the comparison of the different stances on loot boxes: the outright ban found in Belgium, the administrative denial of the U.K., the non-gambling regulation found in China, the attempt at self-regulation in Japan or the current case-law rejection of loot boxes as gambling in the U.S.

### A. Analyzing Each Country’s Determination

First, I will address the outright ban of loot boxes as gambling found in Belgium. The ban of loot boxes in Belgium focused entirely around

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<https://www.gamesindustry.biz/articles/2018-05-25-esa-we-cant-go-to-the-lowest-common-denominator-of-government-on-loot-boxes>.

248. *Id.*

249. Benjamin Pu, *What are Loot Boxes? FTC will Investigate \$30B Video Game Industry*, NBC NEWS (Nov. 28, 2018), <https://www.nbcnews.com/tech/tech-news/loot-boxes-gambling-video-games-ftc-look-it-n941256>.

250. Makena Kelly, *FTC to Hold a Public Workshop on Loot Box Concerns this Year*, VERGE (Feb. 22, 2019), <https://www.theverge.com/2019/2/22/18236352/loot-box-video-game-ftc-workshop-hassan-congress> (quoting FTC Chairman Joe Simons:

A workshop could provide a forum for stakeholders representing wide-ranging perspectives, including consumer advocacy organizations, parent groups and industry members. It also could help elicit information to guide subsequent consumer outreach, which could include consumer alert.)

251. A Bill To Regulate Certain Pay-To-Win Microtransactions and Sales of Loot Boxes in Interactive Digital Entertainment Products, and for Other Purposes, S. 1629, 116th Cong. (2019) [hereinafter Anti-Loot Box Bill].

the Belgian Gaming Commission's Report on loot boxes and led to every game company mentioned in the report to remove the loot box systems in its games.<sup>252</sup> The Belgian Gaming Commission rested its finding that loot boxes met the definition of gambling found in the relevant gaming statute,<sup>253</sup> including finding that the items won in loot boxes constituted items of value in terms of their prize element.<sup>254</sup> The Commission emphasizes the "win of any type" language found in the Betting and Gaming Act of May 7, 1999, and ran with it, stating that it is not relevant that "a 'skin' in *Overwatch*, *FIFA 18* or *C[S]: GO* is merely of aesthetic value. What is important is that the players attach value to it."<sup>255</sup> This decision is one that benefits from one of the broadest definitions of gambling, as well as a liberal reading of the definition, to rule that the mere appearance of the items in the boxes provides value. The inclusion of the word "or" in the definition of gambling allowed the Commission to punt on determining whether there can ever be a loss in a loot box, something which is far from settled.

The U.K. Gambling Commission found that loot boxes that included items that could not be sold did not constitute gambling because the items in the loot boxes were not items of value. The Gambling Commission's 2016 discussion paper and subsequent 2017 position paper analyze the Gambling Act 2005 and whether loot boxes in video games meet the definition found in Article 6 of the Act.<sup>256</sup> Notably, that

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252. Tom Hoggins, *Gambling Fears over Loot Boxes Prompt EA to Stop Sale of FIFA In-Game Currency in Belgium*, TELEGRAPH (Jan. 29, 2019, 4:24 PM), <https://www.telegraph.co.uk/gaming/news/child-gambling-concerns-prompt-ea-remove-fifa-loot-boxes-belgian/>; Wales, *supra* note 110.

253. Philippe Vlaeminck & Robbe Verbeke, *Belgium*, 2 GAMBLING L. REV. 62, 62-63 (2018) ("[A]ny 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, even if only ancillary, for the conduct of the game, or for determining the winner or his or her gains.").

254. See BELGIAN REPORT, *supra* note 72, § 5.1.3.

255. *Id.*

256. 2017 POSITION PAPER, *supra* note 113, at 1, 5, 7, 9; see also U.K. GAMBLING COMMISSION, VIRTUAL CURRENCIES, ESPORTS AND SOCIAL CASINO GAMING – DISCUSSION PAPER 1-5, 11 (2016) [hereinafter DISCUSSION PAPER], <https://www.gamblingcommission.gov.uk/PDF/consultations/Virtual-currencies-eSports-and-social-gaming-discussion-paper-August-2016.pdf>; Gambling Act 2005, c. 19, § 6 (U.K.).

definition defines gaming as playing a game of chance for a prize, with prize meaning “money or money’s worth.”<sup>257</sup> The Commission’s discussion paper never specifically names loot boxes, but states that “[w]here ‘skins’ are traded or are tradeable and can, therefore, act as a de facto virtual currency and facilities for gambling with those items are being offered, we consider that a license is required.”<sup>258</sup> The position paper does not mention loot boxes by name and notes that “those awarded in-game items for money or money’s worth those elements of the game are likely to be considered licensable gambling activities.”<sup>259</sup> The most notable thing absent from this is the concept of account selling. If a player sells their account with all of their skins and items they have unlocked from loot boxes, that is surely converting the items won in loot boxes for money or money’s worth. The process is lucrative, with Apex accounts reaching \$450 on e-bay,<sup>260</sup> FIFA 19 accounts reaching \$1,500<sup>261</sup> and Fortnite accounts reaching \$2,325 with an incredible eighty-three bids as of the time of this paper.<sup>262</sup> While this is against a game’s terms of service, it is still a relevant consideration of whether this makes loot boxes gambling: consider the possibility of someone, even a minor, spending hundreds or even thousands of dollars purchasing loot boxes in the hopes of eventually selling the account. This possibility may have been what led a UK Gambling Commission spokesperson to later say: “[t]he greater the availability, scale and sophistication of secondary markets where the in-game items can be sold the stronger the case

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257. Gambling Act 2005, c. 19, § 6(5)(a) (U.K.)

258. DISCUSSION PAPER, *supra* note 246, § 3.6.

259. 2017 POSITION PAPER, *supra* note 113, § 3.17.

260. psygpsyg0, *Apex Legend 427 Account Level PC*, EBAY, <https://www.ebay.com/itm/Apex-legend-427-account-level-PC/362633143702?hash=item546e9ea596:g:eXAAAOSwsQNcwwXT> (last visited Oct. 5, 2019).

261. Carolinalightning, *Fifa 19 XBOX ACCOUNT*, EBAY, <https://www.ebay.com/itm/Fifa-19-XBOX-ACCOUNT-RONALDO-MESSI-TOTW-MODRIC-RAMOS-DE-GEA-V-DIJK/233139071577?hash=item36482bea59:g:SOwAAOSwAPxcbDxx:rk:l:pf:0> (last visited Oct. 5, 2019).

262. theo.j\_62, *OG Fortnite Account Ghoul Trooper*, EBAY, <https://www.ebay.com/itm/OG-Fortnite-account-Ghoul-Trooper/193136506308?hash=item2cf7d535c4:g:ERUAAOSwk-BdlIHDG> (last visited Oct. 5, 2019).

becomes that the in-game items are articles of money or money's worth."<sup>263</sup>

The Chinese model is based on legislation as opposed to utilizing a definition of gambling and therefore limits the legal analysis that can be done regarding the method, but the results of the process can be analyzed for their potential practicality. China now requires game developers to publish the chances of earning loot and prohibits the purchase of loot boxes with legal tender or in-game currency.<sup>264</sup> This method, however, provides a massive loophole that Blizzard is taking advantage of, where Chinese players can purchase in-game currency with loot boxes included "for free."<sup>265</sup> If the interest is to protect players (especially children) from loot boxes, this is perhaps the most ineffective method to do so, as players still have access to loot boxes, but have to spend much more to gain the same amount of the boxes.<sup>266</sup>

The banning of kompu gacha methods in Japan serves a warning of what can happen if self-regulation comes too late, but in the same turn, also serves as an example of the benefits of self-regulation. The Japanese "Big 6" Council of gacha companies attempted regulating kompu (complete) gacha, only to have Japan's gambling regulation agency, the CAA, ban the mechanic.<sup>267</sup> The "Big 6" Council then managed to limit the damage through successful self-regulation of standard gacha devices.<sup>268</sup> This regulation was all done without the use of the gambling statute, and there's a significant question about whether loot boxes would meet the gambling statute if they were to be investigated.<sup>269</sup> In his comprehensive overview of loot boxes in Japan, Schwidlessen does not believe loot boxes will meet the definition of gambling, and further, argues they are even less likely to be regulated under the gambling

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263. Tom Hoggins, *Gambling Commission to Investigate "Blurred Lines" Between Video-Games and Gambling*, TELEGRAPH (Sept. 17, 2018, 5:21 PM), <https://www.telegraph.co.uk/technology/2018/09/17/loot-boxes-blur-lines-gambling-gaming-regulators-warn/>.

264. Notice of the Ministry of Culture on Regulating the Operations of Online Games and Strengthening Interim and Ex Post Regulation (promulgated by the Ministry of Culture, Dec. 1, 2016, effective May 1, 2017), Wen Shi Fa No. 32, at §2(4-8) (China).

265. See Handrahan, *supra* note 147.

266. *Id.*

267. See *supra* Section VI.

268. See Handrahan, *supra* note 147.

269. See Schwidlessen, *supra* note 174, § 5.

statute.<sup>270</sup> While the chances of actual regulation via the Japanese Penal Code's definition of gambling are low,<sup>271</sup> that does not negate the possibility that the process may meet the gambling definition. The gambling definition requires that prizes be things of value that are worth money, and also be more than momentary entertainment.<sup>272</sup> Schwidlessen suggests that loot boxes would fit into the momentary entertainment category, much like the "prizes" given as a result of Pachinko.<sup>273</sup> On the other side of this however, it is worth noting that prizes in loot boxes may not be like for like comparable to the prizes in pachinko (i.e. a pack of a specific cleaning product) as pachinko prizes are virtually worthless on their face, whereas prizes in gacha are *virtually* worthwhile, and can provide much more than momentary entertainment, and as Schwidlessen notes, online versions of Pachinko may be considered illegal.<sup>274</sup> Additionally, items in loot boxes could provide items of value, as the consideration of account selling on secondary markets is a legitimate consideration that would need to be dealt with to determine whether or not items in loot boxes can be deemed things of value. While issues are likely to arise in enforcing loot boxes as gambling under a theory that account selling meets the prize element,<sup>275</sup> the possibility that they meet the definition on its face is quite possible.

That leads to an analysis of the U.S.'s case against loot boxes thus far: a common-law rejection of defining them as gambling without extremely precise facts. The only case where a judge had ruled that a loot box-esque system has been declared gambling came when the game in question allowed the virtual currency to be used to re-spin the item, and the state's gambling statute explicitly defined this method as something

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270. *Id.* (Noting, however, that there is a "medium" risk for loot boxes that can be traded between players).

271. *See* Schwidlessen, *supra* note 174, § 5(1)(b)(cc)(2)(b).

272. *See supra* Section VI.

273. *See* Schwidlessen, *supra* note 174.

274. *See* Schwidlessen, *supra* note 174, § 5(1)(b)(cc)(2); Brooks, *supra* note 196; Famularo, *supra* note 173. Gacha games revolve around collecting rare items that players deem valuable, therefore some consideration for their differences from pachinko prizes may be necessary to fully compare the two processes to loot boxes.

275. U.S. Courts have by-and-large rejected to enforce loot box like systems under the account selling issue because such sales are against terms of use. *See* Kater v. Churchill Downs Inc., 886 F.3d 784, 785 (9th Cir. 2018); Mason v. Machine Zone Inc., 851 F.3d 315 (4th Cir. 2017).

of value.<sup>276</sup> Any actual implementation of the bans would be difficult, if not impossible, with game developers needing to separate the types of games into the specific jurisdictions that had banned them.

The ESRB's stance on the game leaves a lot to be desired as well. Their emphasis on the fact that loot boxes do not have losses is not a factor in the definition of gambling seen in the relevant U.S. cases; loss is only relevant to specific states loss statutes.<sup>277</sup> Additionally, the ESRB's self-regulation of adding a label for games with in-game purchases does little to notify parents or game purchasers in general of the game's contents. A game based solely on loot box purchases will receive the same label as games with DLC that adds hours of content onto the base game.<sup>278</sup>

While the determination of whether loot boxes are gambling or gambling devices will come down differently based on the specific state statutes, the common law in the cases that do exist, suggest a number of issues in finding that loot boxes are gambling. One of the primary issues that is relevant to many statutes is the prize element or a loss statute that requires the loss of money or something of value, with the court in *Machine Zone* finding that selling an account does not constitute "money lost" because of the player's progress in the game.<sup>279</sup>

The reasoning deployed in denying a prize element in *Soto v Sky Union* also addresses the possibility of account selling, but the court's finding that it is not gambling is perhaps even less grounded in case law. The court rules that "the amount a player can get from selling his account to another player says little about the value of the individual items (Heroes, Talents, etc.) contained within that account."<sup>280</sup> This assertion is hardly grounded, in fact, an account including many rare items will surely be worth more than an account with few rare items. The court even fails to note, as seen in *Kater* and *Mason*, that such a sale would be against the terms of service.<sup>281</sup>

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276. See *Kater*, 886 F.3d at 786.

277. See *supra* Section VI.

278. See Schreier, *supra* note 244.

279. See *Mason*, 851 F.3d at 320 (noting also that such a sale would be against the terms of use).

280. *Soto v. Sky Union*, 159 F. Supp. 3d 871, 879 (N.D. Ill. 2016).

281. See *id.*; *Kater*, 886 F.3d at 787; *Mason*, 851 F.3d at 318.

Courts and the law around the world, in general, seem to lag behind technology and the ways technology is utilized by consumers and companies alike. The U.K. Gambling Commission, the Entertainment Software Ratings Board, and courts around the U.S. all fail to consider and truly dismiss the potential of selling accounts as the basis for not considering them as things of value rests on common law ground in two decisions.<sup>282</sup> The courts are also unlikely to analyze account selling's nature as money's worth unless a case arises where such sale somehow does not violate the terms of service, the plaintiff has a level one game, not advanced at all, but tries to sell the account based on purchased loot boxes.<sup>283</sup>

If account selling is considered, on a strictly common law definition of gambling (chance consideration and prize), loot boxes will almost certainly meet this definition. The contents are determined by chance, players could pay consideration (though the consideration element varies greatly in every jurisdiction), and they can receive a prize that can be something of value in the way of second-hand markets. Even though loot boxes may meet the common-law definition of gambling on face value, that does not mean loot boxes should be regulated by the courts.<sup>284</sup>

### B. Suggestion for Loot Box Regulation

The best option for all parties, considering the nature and legal status of loot boxes, is for the video game industry to self-regulate these mechanisms.

The conclusion reached in the last section, that loot boxes can meet the common law definition of gambling, does not conclude that the courts should or even could regulate the practice. First, addressing the question of whether they could regulate the practice, courts have the power to interpret a statute in a way that would create criminal liability for certain mechanisms, which would therefore essentially force regulation of said mechanisms. The issue with loot boxes, however, is the fact that plaintiffs bringing suit need to show that they suffered a

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282. See *Mason*, 851 F.3d at 318; *Soto*, 159 F. Supp. 3d at 879.

283. See *Mason*, 851 F.3d at 318; *Soto*, 159 F. Supp. 3d at 879.

284. See *supra* Section VII (B).

harm or loss,<sup>285</sup> and, barring a broad statutory definition of prize and a broad statutory definition of loss as seen in *Kater*, plaintiffs will have a tough time showing that either side is a loser.<sup>286</sup> The game developer will almost never be considered a loser, as they do not lose money if a user gets all rare items in a loot box, and contrarily they do not win or gain anything if the player only gets common items in a loot box. The case of the buyer's loss, however, is missing a key factorial analysis in the common law: what happens when the player directly purchases the items deemed as gambling devices?<sup>287</sup> The common law has only analyzed games where the gambling devices in question are purchased or used by an in-game currency that can have multiple uses, and therefore courts rule that players are not purchasing a gaming device, but they are purchasing this currency and get what they pay for by being able to play the games that utilize the coins.<sup>288</sup> Additionally, *Kater* and *Mason* both state that transactions that go against the terms of service (such as selling your account or selling virtual coins on a black market) cannot be considered prizes.<sup>289</sup> In terms of comparison to an international jurisdiction, the U.S. does not interpret gambling on a federal level as seen in Belgium, and enforcement cannot be achieved through one opinion paper based on the federal statutory definition of gambling.<sup>290</sup>

Though there could be a case to be made that state gambling statutes need a major overhaul to bring them into the twenty-first century, particularly with online gambling,<sup>291</sup> the court system is not the best way to regulate the devices for parties on either side of the loot box debate. For one, plaintiffs will have to bring suits in every jurisdiction, a tall, if not impossible task. Moreover, even in the unbelievable case of loot boxes being declared illegal in every state statute, game developers would have to eliminate the process altogether. A slightly more realistic

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285. See *Phillips v. Double Down Interactive*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016); see also *Mason*, 851 F.3d at 318; *Kater*, 886 F.3d at 788.

286. See *Kater*, 886 F.3d at 787.

287. For example, what would happen if a player directly buys a loot box? This practice is seen in games like *Overwatch*.

288. See *Mason*, 851 F.3d at 319.

289. See *id.*; *Kater*, 886 F.3d at 786.

290. The back and forth analysis of the Wire Act serves as an example of just how difficult federal gambling regulation is in the United States. See *supra* Section VII.

291. See generally *Owens Jr.*, *supra* note 216, at 90–91.

scenario would be that the loot boxes could then be legal in some states while illegal in others. The game developer will then have to decide whether to patch out the process in just the relevant states, requiring work and time to accomplish that, or they could decide to remove the practice altogether, again a process that they will not want.

The best practice for loot box regulation is self-regulation. This self-regulation, as seen in Japan, must come before potential government regulation of the product, or gaming companies risk losing out on a business model.<sup>292</sup> The self-regulation of Japan's standard gacha games, largely comparable to loot box mechanics, could serve as a method to heed off potential regulation, particularly by the FTC. Publishing the odds of receiving certain items, setting monthly spending limits and a self-regulated ban on certain loot box mechanics (i.e. kompu gacha, that requires multiple combinations of loot box wins) are all methods seen in Japan that could provide useful protection for consumers while protecting the practice for game developers. Implementation of other devices seen in the traditional gambling industry has also been suggested.<sup>293</sup>

The Anti-Loot Box/Anti Pay-to-Win Bill put on the table by Senator Hawley<sup>294</sup> still has the entire congressional process to go through before any kind of change is implemented. Some analysts believe the bill could push the industry towards self-regulation while others see it as completely dead in the water, with one even calling the attempt to regulate pay to win mechanics “[t]oo dumb to comment on.”<sup>295</sup> This avenue is not ideal for anyone involved, as the consumers will have to wait a long time and rely on congress to take action, and of course it would not be ideal for the game developers, as any kind of loot box mechanic or pay to win mechanic will be lost, eliminating a major source of content and revenue.

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292. See *supra* Section VI.

293. See Aaron Drummond, et al., *Lot Box Limit-Setting: A Potential Policy to Protect Game Users with Gambling Problems?*, 114 *ADDICTION* 935, 935 (2019).

294. See Anti-Loot Box Bill, *supra* note 251.

295. Giancarlo Valdes, *'Zero' Chances It Passes: Game Analysts Break Down Senator's Anti-Loot Box Limit*, *VENTUREBEAT* (May 13, 2019), <https://venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill/>.

Game industry self-regulation remains the best option for all involved parties and a potential self-regulation model has already been implemented in perhaps the most culturally-relevant game of all time.<sup>296</sup> On January 28, 2019, Epic Games self-regulated the loot box system in their cross-culture, international smash hit video game Fortnite.<sup>297</sup> With this change, Fortnite players will be able to see the exact contents of the “loot llamas” before they are purchased.<sup>298</sup> The loot box devices now do not offer duplicates, and the items found in the loot boxes are reset every day.<sup>299</sup> This model will allow players to know exactly what they are purchasing before they purchase the loot boxes, and will, therefore, take the boxes out of any kind of gambling definition. While revealing exactly what is in loot boxes before they are purchased may limit the amount of sales of loot boxes, this self-regulation will provide a guarantee of their inclusion in the game, without any kind of worry of complete government shutdown of loot box mechanics as a whole.

Loot boxes are not trading cards, and as such, should not go unregulated. At first glance, the two collection devices appear similar: a consumer buys a “pack” and that pack contains random items; many common, few rare. In terms of differences between the two mechanisms that twitter loves comparing,<sup>300</sup> trading card games often publish what kinds of cards are given in each box. For example, *Magic: The Gathering* publishes percentages of a player’s chances of receiving each type of card in certain packs.<sup>301</sup> Loot boxes, on the other hand, have only had to

296. *Antoine Griezmann Celebrates World Cup Final Goal with ‘Disgusting’ Fortnite Dance*, TELEGRAPH (Jul. 15, 2018), <https://www.telegraph.co.uk/world-cup/2018/07/15/antoine-griezmann-celebrates-world-cup-final-goal-disgusting/> (discussing the cultural relevance of the Fortnite dance and its use after France’s second goal in the 2018 FIFA World Cup Final).

297. *Fortnite Loot Box Llamas Go “See Through”*, BBC (Jan. 28, 2019), <https://www.bbc.com/news/technology-47028992>.

298. *See id.*

299. *Id.*

300. *Search: Comparisons of loot boxes and trading cards*, TWITTER, <https://twitter.com/search?q=loot%20boxes%20trading%20cards&src=typd&lang=en> (last visited Oct. 10, 2019).

301. Larz70, *Booster Pack Rates Explained*, UPPER DECK (Aug. 2018), <https://forums.d3go.com/discussion/74695/booster-pack-rates-explained>; *Listing of Magic: The Gathering Core Set 2019 Booster Box (36 Booster Packs)*, AMAZON (last visited Feb. 26, 2019) (“Core Set 2019 booster box contains 36 booster packs. Each pack contains 1 rare or mythic rare card, 3

publish their rates in China if at all, with no way of knowing if the rates in China match those from the rest of the world. The process of getting each item is vastly different as well; loot boxes provide instant gratification, with just a few clicks required and allowing a credit card to be connected with your game account. This is particularly dangerous for young players, who have a limited sense of financial responsibility, because there's seemingly no protection on the amount of purchases they can make at the click of a button. Trading cards, on the other hand, do not provide the instant gratification of a loot box; consumers have to go to a store, find the packs, go through the action of paying for them, and then physically open the cards and look at them, or wait for them to be delivered if ordered online. The lack of supervision with loot boxes is also notable, with parents much more likely to know if their child is at the store buying trading card packs vs. buying loot boxes on a video game console they regularly spend time on.

The response from video game companies has been slow and reluctant, but a major announcement occurred in 2019. In August, 2019, the FTC held a "loot box workshop" in order to "take a closer look at loot boxes."<sup>302</sup> During this workshop, the FTC heard opinions from the public as well as industry professionals, including Omeed Dariani, CEO of a group that represents, among other entertainers, video game streamers,<sup>303</sup> who said:

The community mostly thinks loot boxes are gambling...[o]f the feedback I got, there was a wide variety, but over and over we had people coming back to this idea that if it's not gambling, it feels like gambling. Even though we can pretty clearly say loot boxes are not

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uncommon cards, 10 common cards, and 1 basic land card. Core Set 2019 contains destructive goblin mischief, diabolical dragon supervillainy, and epic planeswalkers." See also, e.g., *2016–17 MVP Hockey*, UPPER DECK (last visited Feb. 26, 2019), <http://www.upperdeck.com/Products/Sports/2016-17-MVP-Hockey.aspx>.

302. *Game On: FTC Loot Box Workshop Set to Start*, FEDERAL TRADE COMMISSION (Aug. 7, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/08/game-ftc-loot-box-workshop-set-start>.

303. Video game streamers are those that play video games for an audience, perhaps most notably Tyler "Ninja" Blevins. Kevin Webb, *This 28-Year-Old Makes \$500,000 Every Month Playing 'Fortnite'— Here's How He Does It*, BUSINESSINSIDER (Aug. 13, 2019), <https://www.businessinsider.com/ninja-tyler-blevins-twitch-subscribers-fortnite-drake-youtube-2018-3>.

exactly the same thing as entering the lottery or sitting in front of a slot machine, they do have some of the same feelings that gambling does.<sup>304</sup>

Directly following the workshop, major software companies like Nintendo, Microsoft, and Sony agreed to require video game producers to publish the odds of earning items in loot boxes in order for the games to be used on their respective consoles.<sup>305</sup> These three companies all produce video game consoles whose sole purposes are for video games, but this agreement does not cover or involve PC games.<sup>306</sup> Also notably, there is no specific timeline for implementing this agreement with the companies “targeting” sometime in 2020 to begin enforcing this agreement.<sup>307</sup> While this step is a significant development in self-regulation, it may still not be enough, as seen in Japan, where self-regulation was too little too late, and government regulation soon followed.<sup>308</sup>

In general, apart from the fact that loot boxes may meet the definition of gambling in some jurisdictions, the process should be regulated because they are readily accessible by children, they provide instant gratification, and both research studies and anecdotes show a connection between loot boxes and problem gambling.<sup>309</sup> The harm that is caused or could be caused by these mechanics justifies regulation of some sort, whether that includes spending caps, rate publications, adjusting the model towards the Fortnite model, or some combination of regulation efforts. The video game industry should look to Japan’s regulation of kompu gacha as an example of what can happen if self-regulation comes too late or does not do enough the combat the perceived issue.

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304. Brendon Sinclair, *What Did the FTC Hear in its Loot Box Workshop?*, GAMESINDUSTRY.BIZ (Aug. 7, 2019), <https://www.gamesindustry.biz/articles/2019-08-07-what-did-the-ftc-hear-in-its-loot-box-workshop>.

305. Kris Holt, *Sony, Microsoft and Nintendo Agree to Disclose Loot Box Odds*, ENGADGET (Aug. 7, 2019), <https://www.engadget.com/2019/08/07/sony-microsoft-nintendo-loot-box-odds/>.

306. *Id.*

307. Dave Thier, *Under Threat of Legislation, Sony, Microsoft and Nintendo Agree to Force Loot Box Odds Disclosure*, FORBES (Aug. 7, 2019), <https://www.forbes.com/sites/davidthier/2019/08/07/under-threat-of-legislation-sony-microsoft-and-nintendo-agree-to-force-loot-box-odds-disclosure/#6f98a1ca449e>.

308. See *supra* Section VI.

309. See *supra* Section II.

## IX. CONCLUSION

Though loot boxes are unlikely to be regulated in the U.S. via state court's interpretations of state gambling statutes, the connection between loot box use and problem gambling shown in early research, the easily accessible nature of the products without any regulation suggest that some actions need to be taken to protect consumers. These actions are best handled from within the video game industry themselves, before the government steps in. Self-regulation models for similar devices have proven useful in Japan, and games like Fortnite have already implemented changes in their loot box systems that take them out of the realm of gambling. With mutually agreeable self-regulation in place, consumers and the government can then afford to wait for further research and data surrounding loot boxes to be collected, and a clearer view of their impact can be realized. Though there is a handshake-type deal for console manufacturers to publish loot box odds in future titles, it does not apply to games played on a PC and is yet to be implemented. As seen in Japan, failure to sufficiently self-regulate such a system in a timely manner will not prevent the government from usurping that self-regulation.