

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

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Abstract

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

Keywords:

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

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14 game constitutes a 'game of chance' or a 'game of skill.' This paper argues that the Council of State's
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16 underplayed the importance of paid loot boxes as a monetisation method in contemporary video games.
17 The Council of State unsatisfyingly built its main argument on the supposed 'importance' of non-paid
18 loot boxes. Further, the Council of State's overreliance on how the so-called 'majority' of players
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20 high-spending players who are most at risk of potential harms and in need of consumer protection. The
21 Council of State's interpretation of Dutch gambling law should not necessarily be relied on by other
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29 **1. Introduction**

30 Paid loot boxes are virtual products in video games that can be purchased by players with real-world
31 money to obtain randomised rewards.¹ Other loot boxes can be obtained by players without paying
32 real-world money (so-called ‘non-paid loot boxes’). The distinction between ‘paid’ and ‘non-paid’
33 loot boxes often becomes blurred because the virtual currency, with which some loot boxes can be
34 obtained, can itself both be obtained through gameplay or direct purchase with real-world money.
35 References below to ‘loot boxes’ refer exclusively to ‘paid loot boxes’ that players must spend real-
36 world on money to buy directly or indirectly (*e.g.*, through a so-called intermediary ‘premium’ virtual
37 currency), unless otherwise specified. Loot boxes are conceptually similar to gambling,² but are
38 presently widely available for purchase by both adults and children without regulatory restrictions in
39 most countries across the world.³ Empirical psychology research has consistently established a link
40 between loot boxes and gambling: particularly, a positive correlation has been found between loot box
41 expenditure and self-reported problem gambling severity.⁴ Importantly, very recently, the first peer-
42 reviewed longitudinal study has found that loot box engagement/expenditure is linked to traditional
43 gambling in terms of “both a binary measure reflecting self-identified gambling initiation and a
44 continuous measure of gambling spend.”⁵

45

46 Although empirical research is still in its developing phase and needs further refining⁶, the
47 preliminary results and findings have caused policymakers to raise concerns regarding the prevention
48 of potential gambling harms related to loot boxes, including direct financial harm through
49 overspending.⁷ Accordingly, policymakers and gambling authorities around the world have

¹ Leon Y Xiao and others, ‘Loot Boxes, Gambling-Like Mechanics in Video Games’ in Newton Lee (ed), *Encyclopedia of Computer Graphics and Games* (Springer 2021) <https://doi.org/10.1007/978-3-319-08234-9_459-1> accessed 3 July 2022. Leon Y Xiao, ‘Loot Boxes’ in Paweł Grabarczyk and others (eds), *Encyclopedia of Ludic Terms* (IT University of Copenhagen 2022) <<https://eolt.org/articles/loot-boxes>> accessed 25 April 2022.

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

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

⁴ David Zendle and Paul Cairns, ‘Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey’ (2018) 13 *PLOS ONE* e0206767; Stuart Gordon Spicer and others, ‘Loot Boxes, Problem Gambling and Problem Video Gaming: A Systematic Review and Meta-Synthesis’ [2021] *New Media & Society* 14614448211027176; Shaun Stephen Garea and others, ‘Meta-Analysis of the Relationship between Problem Gambling, Excessive Gaming and Loot Box Spending’ (2021) 21 *International Gambling Studies* 460.

⁵ Gabriel A Brooks and Luke Clark, ‘The Gamblers of the Future? Migration from Loot Boxes to Gambling in a Longitudinal Study of Young Adults’ [2022] *Computers in Human Behavior* 107605, 7.

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

⁷ Digital, Culture, Media and Sport Committee of the House of Commons (UK), ‘Immersive and Addictive Technologies: Fifteenth Report of Session 2017–19’ (2019) HC 1846

50 considered whether loot boxes might legally constitute gambling.⁸ For example, the Belgian Gaming
51 Commission, after analysing four video games, has already opined that all loot boxes that require
52 purchase using real-world money are prohibited under Belgian gambling regulation.⁹ Some countries
53 have also considered amending existing gambling law to potentially include loot boxes: the UK
54 Government decided *not* to do so yet following a dedicated public consultation¹⁰ on loot boxes and
55 potential law reform but has plans to review that decision in the future.¹¹ Spain and Singapore have
56 also recently consulted on law reform regarding loot boxes,¹² and the Spanish Ministry of Consumer
57 Affairs has since published a draft law intending to establish an ad hoc regulatory regime for loot

<<https://web.archive.org/web/20210609191037/https://publications.parliament.uk/pa/cm201719/cmselect/cmecu/meds/1846/1846.pdf>> accessed 20 June 2021; Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK), ‘Report of Session 2019–21: Gambling Harm— Time for Action’ (2020) HL Paper 79

<<https://web.archive.org/web/20200702195336/https://publications.parliament.uk/pa/ld5801/ldselect/ldgamb/79/79.pdf>> accessed 2 July 2020.

⁸ For example, in the UK, Belgium and Denmark, see UK Gambling Commission, ‘Virtual Currencies, ESports and Social Gaming — Position Paper’ (2017)

<<https://web.archive.org/web/20210111075348/http://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>> accessed 10 March 2022; Belgische Kansspelcommissie [Belgian Gaming Commission], ‘Onderzoeksrapport loot boxen [Research Report on Loot Boxes]’ (2018) <https://web.archive.org/web/20200414184710/https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-final-publicatie.pdf> accessed 14 April 2020; Spillemyndigheden [Danish Gambling Authority], ‘Statement about Loot Boxes / Loot Crates’ (29 November 2017) <<https://www.spillemyndigheden.dk/en/news/statement-about-loot-boxes-loot-crates>> accessed 3 March 2021.

⁹ Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8). However, note that the enforcement and the effectiveness of this loot box ‘ban’ has been poor, see Leon Y Xiao, ‘Breaking Ban: Belgium’s Ineffective Gambling Law Regulation of Video Game Loot Boxes’ [2023] *Collabra: Psychology* <<https://osf.io/hnd7w/>> accessed 29 July 2022..

¹⁰ Department for Digital, Culture, Media & Sport (UK), ‘Loot Boxes in Video Games: Call for Evidence’ (2020)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920393/Loot_Box_Call_for_Evidence_Document_.pdf> accessed 15 March 2022.

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

¹² Dirección General de Ordenación del Juego (Directorate General for the Regulation of Gambling), ‘Proceso Participativo Sobre Los Mecanismos Aleatorios de Recompensa (Cajas Botín)’ (19 February 2021)

<<https://www.ordenacionjuego.es/en/Noticia-Cajas-Botin>> accessed 21 March 2021; Ministry of Home Affairs (Singapore), ‘Public Consultation on Proposed Amendments to Laws Governing Gambling Activities’ (12 July 2021) <<https://web.archive.org/web/20210712113340/https://www.mha.gov.sg/docs/default-source/media-room-doc/public-consultation-on-proposed-amendments-to-laws-governing-gambling-activities.pdf>> accessed 25 July 2021.

58 boxes that closely resembles the existing gambling regulatory regime in Spain.¹³ A Finnish Bill¹⁴ and
59 a Brazilian Bill¹⁵ intending to regulate loot boxes as gambling are both undergoing the legislative
60 process. Detailed analysis of the comparative law aspects of loot box regulation in some countries has
61 been conducted elsewhere.¹⁶ This article focuses instead specifically on the state of regulation in the
62 Netherlands, which has recently been changed by a remarkable final appeal decision: *Electronic Arts*
63 *v Kansspelautoriteit* (2022).¹⁷

64 65 **1.1. Historical background on loot box regulation in the Netherlands**

66 In 2018, the Netherlands Gambling Authority [Dutch: *Kansspelautoriteit*] opined that both paid and
67 non-paid loot boxes (i) whose results are determined through a random process and (ii) whose
68 randomised content possessed ‘market value’ or real-world monetary value legally constitute a ‘game
69 of chance’ under Article 1 of the Betting and Gaming Act [Dutch: *Wet op de kansspelen*] and
70 therefore contravene Dutch gambling law if offered without appropriate licencing.¹⁸ In addition, the
71 Netherlands Gambling Authority explained that there is a blanket prohibition for such loot boxes

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

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

¹⁵ Projeto de Lei n° 2628, de 2022 [Bill 2628 of 2022], art 8 (Brazil) <<https://www25.senado.leg.br/web/atividade/materias/-/materia/154901>> accessed 11 January 2023.

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

¹⁷ Uitspraak [Ruling] 202005769/1/A3 (2022) Afdeling Bestuursrechtspraak Raad van State [Administrative Jurisdiction Division of the Council of State (The Netherlands)] (9 March 2022) ECLI:NL:RVS:2022:690 (hereinafter, the ‘Ruling’) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2022:690>> accessed 20 November 2022.

¹⁸ A game of chance [Dutch: *Kansspel*] is defined in Article 1 of the Betting and Gaming Act [Dutch: *Wet op de Kansspelen*] as “competing for a prize whereby the winner is decided by any form of chance, over the result of which participants generally do not have substantive control, see *Kansspelautoriteit* [The Netherlands Gambling Authority], ‘Onderzoek naar loot boxes: Een buit of een last? [Study into Loot Boxes: A Treasure or a Burden?]’ (2018) <https://web.archive.org/web/20190503232356/https://kansspelautoriteit.nl/publish/library/6/onderzoek_naar_loot_boxes_-_een_buit_of_een_last_-_nl.pdf> accessed 10 March 2022.

72 because it is not empowered to grant gambling licences to video game companies for offering loot
73 boxes.¹⁹ The UK Gambling Commission, the Danish Gambling Authority, and other gambling
74 authorities came to similar conclusions in relation to their gambling laws for paid loot boxes
75 containing rewards with transferable real-world monetary value.²⁰ Notably, non-paid loot boxes
76 containing the same are generally *not* deemed as constituting gambling in other countries because an
77 additional ‘stake’ legal element—dictating that the player must have spent real-world money to
78 participate (which is not present in Dutch gambling law)—is generally present in other countries.
79 However, these other countries’ gambling authorities have reportedly not taken any enforcement
80 actions, unlike the Netherlands Gambling Authority as detailed below.

81

82 In 2019, the Netherlands Gambling Authority then enforced the law according to its interpretation by
83 imposing a financial penalty on Electronic Arts for its allegedly illegal loot box implementations in
84 the widely popular FIFA video games.²¹ In 2020, on appeal by Electronic Arts against the financial
85 penalty imposed in 2019, the District Court of The Hague upheld the Netherlands Gambling
86 Authority’s interpretation of Dutch law and opined that the loot boxes do indeed constitute a ‘game of
87 chance’ and that consequently Electronic Arts’ inclusion of loot boxes in the FIFA games violated
88 Dutch gambling law, as the company did not (and cannot) possess a gambling licence.²²

89

90 **1.2. The present final appeal: *Electronic Arts v Kansspelautoriteit* (2022)**

91 However, Electronic Arts then successfully appealed to the highest administrative court in the
92 Netherlands, the Administrative Jurisdiction Division of the Council of State [Dutch: *Afdeling*
93 *Bestuursrechtspraak Raad van State*], whose ‘Ruling [Dutch: *Uitspraak*]’ was handed down on 9
94 March 2022: the Netherlands Gambling Authority was wrong to have determined that the loot boxes
95 are a separate ‘game of chance’ without considering the wider video game that contains them.²³ The
96 Council of State decided that, before evaluating whether any loot boxes potentially constitute a ‘game
97 of chance’ under Article 1 of the Betting and Gaming Act, a preliminary question that must be posed
98 (and answered in the affirmative, for the enforcement action to proceed lawfully) is whether those loot

¹⁹ *ibid* 4.

²⁰ UK Gambling Commission (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

²¹ Kansspelautoriteit [The Netherlands Gambling Authority], ‘Imposition of an Order Subject to a Penalty on Electronic Arts for FIFA Video Game’ (29 October 2020) <<https://web.archive.org/web/20201127222346/https://kansspelautoriteit.nl/nieuws/nieuwsberichten/2020/oktober/imposition-an-order/>> accessed 11 March 2021.

²² *Electronic Arts Inc & Electronic Arts Swiss Sàrl v Kansspelautoriteit* (2020) Rechtbank Den Haag [District Court of The Hague] (15 October 2020) ECLI:NL:RBDHA:2020:10428 (hereinafter, the ‘District Court Decision’) <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:10428>> accessed 11 March 2021.

²³ Ruling (n 17) para 9.

99 boxes constitute a sufficiently separate ‘game’ that is capable of being assessed as to whether it is a
100 ‘game of chance,’ or whether those loot boxes are merely part of a broader video game, which should
101 be holistically assessed instead as to whether that overarching video game constitutes a ‘game of
102 chance.’²⁴ As such, the Council of State interpreted Dutch gambling regulation in such a way that the
103 overarching video game containing the loot boxes must constitute a ‘game of chance’ separate from
104 the video game before gambling regulation can be applied, barring extreme examples as discussed
105 below.

106
107 The Council of State then decided that, taking into account the gameplay experience of the so-called
108 ‘majority’ of players, the FIFA Ultimate Team (FUT) mode of the FIFA games, holistically
109 considered, is a ‘game of skill’ involving the playing of virtual soccer matches, wherein the player
110 packs (*i.e.*, the loot boxes) only added an element of chance and did not fundamentally alter the
111 overarching video game into a ‘game of chance.’²⁵ Therefore, the loot boxes in the FIFA games
112 cannot be deemed as a separate game, which is capable of being separately assessed as to whether it
113 independently constitutes a ‘game of chance’ under Article 1 of the Betting and Gaming Act, because
114 the ‘vast majority’ of players engage with the loot boxes only as a part of the broader skill-based FUT
115 mode (which itself remains a ‘game of skill’) and that this majority of players do not treat engaging
116 with the loot boxes in these games as a separate game.²⁶ Accordingly, because the FUT mode is
117 predominantly a ‘game of skill,’ Electronic Arts has not contravened Dutch gambling law by
118 implementing loot boxes in the FIFA video games. Notably, this Dutch Ruling of the Council of State
119 is the final interpretation in this particular case on loot boxes in the Netherlands as it cannot be further
120 appealed.

121
122 The video game loot box issue continues to develop globally, perhaps taking surprising turns at times.
123 How other countries will regulate this mechanic (if at all) remains to be seen. Laws might be
124 changing. Cases might also be brought in other jurisdictions on the same points of law. Recognising
125 that the laws of different countries will differ on how these questions are to be determined, this article
126 seeks to evaluate the logic that the Dutch Council of State has adopted and to identify how the
127 gambling laws of other countries may not necessarily come to the same conclusion, particularly with
128 regard to *paid* loot boxes. Section 1 introduced the factual background and summarised the Dutch
129 Ruling. Section 2 argues that, rather than examining whether the whole video game constitutes a
130 ‘game of chance,’ paid loot boxes (as a separate, potentially problematic element of video games)

²⁴ *ibid* paras. 7.4 and 8.3

²⁵ *ibid* para. 8.5. Note that within the FIFA games, there are several (single player) game modes aside from the FUT mode, such as Kick-Off or Career Mode. The FUT mode is perceived as the multiplayer aspect of the FIFA games, and the player packs (*i.e.*, loot boxes) are only available inside the FUT mode.

²⁶ *ibid* para. 8.5

131 should be scrutinised on their own as to whether they constitute a ‘game of chance.’ Section 3
132 highlights that various elements of the newly invented legal test of ‘how the majority of players play
133 the video game’ were not adequately defined by the Council of State and failed to duly account for the
134 minority experience of the most vulnerable players, who spend the highest amount of money on loot
135 boxes and are most in need of protection. Finally, this paper concludes that an argument can be made
136 for paid loot boxes containing rewards with transferable real-world monetary value to constitute
137 gambling, as the gambling authorities of other countries (e.g., the UK and Denmark) have previously
138 determined.²⁷

139

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

141 Importantly, and unlike previous assessments made by policymakers,²⁸ national gambling
142 authorities,²⁹ and the substantial academic literature that has developed surrounding this issue,³⁰ the
143 Dutch Council of State has determined potential contravention of gambling law based on the
144 overarching video game and not based on the loot boxes as a separate mechanic or ‘game,’³¹ although
145 it did recognise the possibility that certain loot boxes that are not related to the video game’s
146 gameplay could in theory be deemed as a separate ‘game of chance.’³² The interpretation given by the
147 Dutch Council of State whereby *some* (in reality *most*) loot boxes do not constitute a separate game,
148 and whereby the video game as a whole (rather than the loot box mechanic itself) is assessed, is a
149 unique interpretation which might appear to be a paradigm shift in loot box regulation. This was the
150 first instance of any competent body adopting such an interpretation. The approach taken by the
151 Council of State also differs from the interpretation intended by the Dutch legislature as shown in the
152 preparatory works³³ and the Netherlands Gambling Authority’s interpretation that was previously

²⁷ See UK Gambling Commission (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

²⁸ For example, Digital, Culture, Media and Sport Committee of the House of Commons (UK) (n 7); Select Committee on the Social and Economic Impact of the Gambling Industry of the House of Lords (UK) (n 7).

²⁹ For example, UK Gambling Commission (n 8); Kansspelautoriteit [The Netherlands Gambling Authority] (n 17); Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8); Spillemyndigheden [Danish Gambling Authority] (n 8).

³⁰ See Andrew Moshirnia, ‘Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling’ (2018) 20 *Minnesota Journal of Law, Science & Technology* 77; Peter Honer, ‘Limiting the Loot Box: Overview and Difficulties of a Common EU Response’ (2021) 4 *Interactive Entertainment Law Review* 63; Sebastian Schwidessen and Philipp Karius, ‘Watch Your Loot Boxes! – Recent Developments and Legal Assessment in Selected Key Jurisdictions From a Gambling Law Perspective’ (2018) 1 *Interactive Entertainment Law Review* 17; Stephanie Derrington, Shaun Star and Sarah J Kelly, ‘The Case for Uniform Loot Box Regulation: A New Classification Typology and Reform Agenda’ (2021) 46 *Journal of Gambling Issues* 302

³¹ Ruling (n 17) para. 8.5.

³² *ibid* paras 8.3 and 8.5.

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

153 approved by the District Court of The Hague.³⁴ Previously, loot boxes were classified as separate
154 gambling activities offered in video games: specifically, a type that the Dutch legislators entitled
155 ‘mixed games of chance’ [Dutch: *gemengde kansspelen*].³⁵ This paper prefers the previous positions
156 and argues that, at least in relation to *paid* loot boxes specifically, other countries should not follow
157 the Dutch Council of State’s approach.

158

159 **2.1. Paid loot boxes should be considered separately**

160 In the video game environment, elements that may be harmful to the audience have been singled out
161 for (regulatory) scrutiny in the past, such as violent conduct or sexual content. Similarly, both the
162 ESRB and PEGI recognise ‘In-Game Purchases (Includes Random Items)’ (*i.e.*, loot boxes and
163 similar paid in-game mechanics involving randomisation) as a specific element of video games that
164 deserves being individually identified and highlighted to consumers and parents.³⁶ The debate
165 surrounding, and the industry’s stance on, whether loot boxes are gambling is visible on the websites
166 of these self-regulatory bodies: PEGI does not include loot boxes under the scope of its ‘gambling’
167 content descriptor, and the ESRB also does not use its ‘simulated gambling’ or ‘real gambling’
168 content descriptor for games with loot boxes. Despite that, video game companies are specifically
169 required to self-declare the presence of loot boxes as part of the rating process for both
170 organisations.³⁷ The interpretations by self-regulatory bodies are not necessarily representative of the
171 accepted regulatory standard, but it is important to recognise that these organisations play an
172 important role in regulating the video game industry.³⁸ Accordingly, their decision to recognise loot
173 boxes as a specific aspect of video games that should be recognised as a separate element could be
174 relied upon by policymakers (even if policymakers disagree with the ESRB’s and PEGI’s non-
175 recognition of loot boxes as ‘gambling’). The alternative approach of not considering loot boxes
176 separately, and only assessing whether the overarching video game in which they are included is

³⁴ The District Court Decision (n 22) para 7.5.

³⁵ The legislator clearly distinguishes between mixed games of chance (where the game of chance is surrounded by other aspects of the video game which do not influence the outcome of the game of chance but do influence the outcome of the game) and games of chance with an element of skill (such as poker), see Eerste Kamer der Staten Generaal, Preparatory works (‘Kamerstukken’) 2017/18, 33996, G, 71-72.

³⁶ Entertainment Software Rating Board (ESRB), ‘Introducing a New Interactive Element: In-Game Purchases (Includes Random Items)’ (*ESRB Official Website*, 13 April 2020) <<https://www.esrb.org/blog/in-game-purchases-includes-random-items/>> accessed 13 April 2020; Pan European Game Information (PEGI), ‘PEGI Introduces Notice To Inform About Presence of Paid Random Items’ (*PEGI Official Website*, 13 April 2020) <<https://pegi.info/news/pegi-introduces-feature-notice>> accessed 14 April 2020; see also Leon Y Xiao, ‘ESRB’s and PEGI’s Self-Regulatory “Includes Random Items” Labels Fail to Ensure Consumer Protection’ (2021) 19 *International Journal of Mental Health and Addiction* 2358.

³⁷ Entertainment Software Rating Board (ESRB), ‘Ratings Process’ (*ESRB Official Website*, 2022) <<https://www.esrb.org/ratings/ratings-process/>> accessed 26 July 2022; Pan European Game Information (PEGI), ‘How We Rate Games’ (*PEGI Official Website*, 2022) <<https://pegi.info/page/how-we-rate-games>> accessed 26 July 2022.

³⁸ See *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011), 803 (Scalia J).

177 problematic, potentially underplays the impact that loot boxes might have on the assessment of the
178 video game. When only considering the overarching game, loot boxes are viewed only as a minor
179 element of gameplay, when in practice they are potentially more important to players, particularly
180 those highly dedicated and high-spending players,³⁹ who are arguably also most in need of protection.
181 In any event, in the current legislative landscape, many policymakers and gambling authorities have
182 adopted an approach where loot boxes are examined separately and not as a part of the video game
183 they are integrated in, contrary to the Dutch Council of State's interpretation.

184

185 Further support for this proposition that paid loot boxes should be scrutinised separately can be
186 identified in how video games and loot boxes are purchased as separate 'products' in practice. Taking
187 the FUT mode as an example: the loot boxes are bought *after* the video game has already been
188 bought. Loot boxes are a form of video game 'microtransaction:' an additional purchase that is made
189 after the player has already bought or started playing the game.⁴⁰ Extended discussion on private law
190 aspects of video game contracts in general and loot box contracts specifically falls outside the scope
191 of this paper; however, the assertion that the loot box purchase contract is a separate contract which
192 exists alongside other contracts relevant to the video game, such as the terms of use, is unlikely to be
193 disputed.⁴¹ It is this contract of purchasing loot boxes—or of purchasing virtual currency that is then
194 spent in exchange for loot boxes—that potentially represents the provision of 'gambling'. With free-
195 to-play (F2P) video games that can be downloaded and played without monetary purchase (as
196 opposed to FIFA),⁴² the in-game loot box purchasing transaction might be the only time that money is
197 transferred from the player to the video game company. Therefore, offering the possibility to purchase
198 loot boxes with real-world money should be subjected to a separate assessment of whether doing so
199 constitutes gambling under national legislation, which the Ruling failed to make.⁴³

200

201 **2.2. Some appreciable difficulties with differentiating between paid and non-paid loot boxes**

³⁹ James Close and others, 'Secondary Analysis of Loot Box Data: Are High-Spending "Whales" Wealthy Gamers or Problem Gamblers?' (2021) 117 *Addictive Behaviors* 106851.

⁴⁰ Erica L Neely, 'Come for the Game, Stay for the Cash Grab: The Ethics of Loot Boxes, Microtransactions, and Freemium Games' [2019] *Games and Culture* 1555412019887658.

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

⁴² Alha Kati and others, 'Free-to-Play Games: Professionals' Perspectives', *DiGRA Nordic 2014: Proceedings of the 2014 International DiGRA Nordic Conference* (DiGRA 2014) <http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014_submission_8.pdf>.

⁴³ Ruling (n 17) para. 8.5.

202 A potential explanation as to why the Ruling did not specifically identify and distinguish *paid* loot
203 boxes as an element to be assessed separately is that Dutch gambling law, specifically, Article 1 of the
204 Betting and Gaming Act, does not actually distinguish between games of chance that the player must
205 pay for to participate in (*e.g.*, *paid* loot boxes) and those that do not need payment (*e.g.*, *non-paid* loot
206 boxes). Whether or not a ‘stake’ was paid to participate in the activity (which is a legal element of
207 gambling in other jurisdictions, *e.g.*, Belgium⁴⁴ and Denmark⁴⁵) is not a criterion under Dutch law.
208 Therefore, this might explain why the Ruling proceeded by considering paid and non-paid loot boxes
209 together as one issue. It is also worth recognising that non-paid loot boxes are generally more difficult
210 to single out than paid loot boxes, because it can be difficult to label only some randomised
211 mechanics in video games as ‘non-paid loot boxes’, but not others.

212

213 For example, when there is no distinction between the premium currency that the player earns through
214 gameplay and the currency purchased with real-world money: are all purchases of loot boxes
215 thereafter ‘paid loot boxes’ or should the player be assumed to always be spending all ‘paid’ premium
216 currency first to buy ‘paid loot boxes’ and after which only spending ‘earned’ premium currency to
217 buy ‘non-paid loot boxes’? If the player has 50 ‘paid’ premium currency and 50 ‘earned’ premium
218 currency (but both are mixed into one pot of 100 indistinguishable ‘generic’ premium currency) and
219 each loot box costs 50 premium currency, when the player buys two loot boxes: are they (a) buying
220 two paid loot boxes (spending 25 ‘paid’ and 25 ‘earned’ premium currencies) or (b) buying one paid
221 loot box (spending 50 ‘paid’ premium currency) and one non-paid loot box (spending 50 ‘earned’
222 premium currency)?

223

224 Indeed, concerns of overregulation and overextension of gambling law arise when all video game
225 elements including a randomised aspect (*e.g.*, obtaining random loot, such as stronger weapons, from
226 defeating enemies without spending any real-world money) would constitute gambling. Policymakers
227 should therefore be cautious when considering the potential regulation of non-paid loot boxes, in
228 order to avoid capturing everyday products that are generally viewed as harmless under their
229 gambling laws.⁴⁶ It is important to note that the empirical psychology literature has focused on paid
230 loot boxes and identified their potential harms specifically (whilst the potential harms of non-paid loot
231 boxes are much less established and understood). Hence, the Dutch Council of State could have
232 considered focusing on paid loot boxes specifically and separately as a video game element capable of
233 constituting a ‘game of chance’ on its own under Article 1 of the Betting and Gaming Act.

⁴⁴ Belgische Kansspelcommissie [Belgian Gaming Commission] (n 8) 8–9.

⁴⁵ Spillemyndigheden [Danish Gambling Authority] (n 8).

⁴⁶ Which is something the UK Government specifically identified. See Department for Digital, Culture, Media & Sport (UK) (n 11) paras 246–247.

234

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

236 When coming to the conclusion that loot boxes in the FUT game mode do not represent a separate
237 game, the Dutch Council of State decided that this should depend on ‘how the game is played by the
238 majority of gamers.’⁴⁷ This unique interpretation and its underlying argumentation must be
239 scrutinised. The Council of State found that ‘the practice is that gamers only open the packs with a
240 view to playing virtual football matches,’⁴⁸ and that therefore the loot box purchasing and opening
241 process is not treated by players as a separate game. Indeed, the Council of State decided that it is
242 necessary for players to treat the loot box purchasing and opening process as its own game ‘on a large
243 scale,’⁴⁹ before the Netherlands Gambling Authority would be justified to intervene.

244

245 **3.1. Failure to define and clarify the criterion**

246 Notably, the Ruling used the terms ‘average player [Dutch: *gemiddelde speler*];’⁵⁰ ‘vast majority
247 [Dutch: *grote meerderheid*];’⁵¹ ‘the majority of gamers [Dutch: *de meerderheid van spelers*];’⁵² and ‘a
248 large scale [Dutch: *een grote schaal*];’⁵³ without defining what they mean. These criteria were clearly
249 important for the Council of State in determining when a loot box may be treated as its own separate
250 game and when a loot box (rather than the overarching video game) may be separately assessed as to
251 whether it legally constitutes a ‘game of chance.’ Following the Ruling, the Netherlands Gambling
252 Authority would need to use these criteria to decide whether and when to take enforcement actions.
253 Companies that want to market their video games in the Netherlands would also need this information
254 so that they can self-assess the loot box mechanics that they are designing or have already
255 implemented in order to comply with the law. Finally, players (and parents of child players and other
256 interested parties) would also benefit from knowing this information so that they can report
257 potentially non-compliant games to be sanctioned by the gambling regulator. However, despite these
258 obvious justifications, the Ruling has left all of these terms undefined. Without further elaboration, it
259 cannot be known who the ‘average player’ is. Several questions arise, for example, is said ‘average
260 player’ the ‘average’ amongst all registered users including inactive players or amongst only monthly
261 active players? What percentage would represent the ‘majority’ of players (as this can potentially
262 range from 51% to 90% or even higher) or, in contrast, a ‘vast majority’ specifically? What would

⁴⁷ *ibid* para 8.4.

⁴⁸ *ibid* para 8.5.

⁴⁹ *ibid*.

⁵⁰ *ibid* para 8.4.

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ *ibid* para 8.5.

263 constitute ‘on a large scale’ and upon what or whom would this ‘scale’ be determined (*e.g.*, based on
264 the number of monthly active users or on the amount of revenue generated)? Leaving these important
265 criteria undefined and unquantified meant that the Ruling failed to provide legal certainty for future
266 cases.

267

268 **3.2. The criterion is highly difficult to satisfy and fails to adequately protect players**

269 Regardless, the Council of State’s ruling that it is a prerequisite for gambling law to apply that the
270 ‘majority’ of players must treat the loot box opening and purchasing process as a separate game and
271 as such decide not to engage with the overarching video game’s gameplay, may prove troublesome in
272 the future: specifically, if further research into the potential harms of loot boxes more clearly
273 establishes causes for concern (as longitudinal research has done since the Ruling⁵⁴). This prerequisite
274 is a very difficult, if not impossible, hurdle to overcome, given the commercial realities of video game
275 production. It is difficult to imagine a hypothetical loot box in a video game that would satisfy this
276 prerequisite because the majority of players must collectively decide not to engage with the gameplay
277 of the video game itself, but still somehow want to purchase and open loot boxes in that game. Loot
278 boxes are generally bought by players because of their content’s (perceived) value inside that video
279 game (*e.g.*, allowing the player character’s cosmetic appearance to change or unlocking additional
280 gameplay content).⁵⁵ It would therefore seem improbable that players would desire to purchase loot
281 boxes in a video game that they, and most other players, would not want to play, as this would be
282 contrary to the video game company’s commercial interests. The only exception where loot boxes
283 will constitute a separate game following this logic is when the majority of players only engage with
284 the loot box aspect of the video game in order to participate in actual gambling (*e.g.*, participate in
285 ‘skin betting’⁵⁶ without playing the game). In other words, the company effectively has to offer or
286 facilitate traditional gambling in the guise of being a part of a video game before gambling law
287 applies.

288

289 According to the Dutch Council of State’s interpretation of the law, the company would be permitted
290 to introduce gambling-like mechanics into its video games as long as the majority of players use the
291 content obtained through these gambling-like mechanics as part of the video game’s regular
292 gameplay. This legal test seems contrary to the principle of providing better protection for vulnerable

⁵⁴ Brooks and Clark (n 5).

⁵⁵ Laura Louise Nicklin and others, “‘It’s the Attraction of Winning That Draws You in’—A Qualitative Investigation of Reasons and Facilitators for Videogame Loot Box Engagement in UK Gamers’ (2021) 10 *Journal of Clinical Medicine* 2103.

⁵⁶ Skin betting is an activity where cosmetic virtual items are wagered for money or for other, higher valued cosmetic items; Heather Wardle and Sarah Tipping, ‘The Relationship between Problematic Gambling Severity and Engagement with Gambling Products: Longitudinal Analysis of the Emerging Adults Gambling Survey’ *n/a Addiction* <<https://doi.org/10.1111/add.16125>> accessed 10 January 2023.

293 players: the more integrated into the video game the gambling-like mechanics are, the less likely those
294 gambling-like mechanics can be regulated under gambling law. This counterproductively encourages
295 the ‘blurring of lines’ between video gaming and gambling that gives rise to significant consumer
296 protection and gambling harm prevention concerns, particularly in relation to children who might
297 struggle to distinguish between the two activities, as previously recognised by many gambling
298 authorities as an important issue that needs addressing.⁵⁷ The legislative purposes of the Dutch Betting
299 and Gaming Act include protecting vulnerable consumers (including underage players), preventing
300 addiction, and reducing harm.⁵⁸ Should further research shed more light on the harmful characteristics
301 of loot boxes (as has been done since the Ruling⁵⁹), the interpretation by the Council of State limits
302 the applicability of Dutch gambling law to this novel phenomenon of the convergence of video
303 gaming and gambling. This interpretation, therefore, arguably fails to accord with the original
304 legislative purposes. Under the Council of State’s interpretation of the law, it would be near
305 impossible for the Netherlands Gambling Authority to ever justify an intervention against loot boxes.
306 Only purported ‘loot boxes’ (that are not actually loot boxes) designed as traditional gambling in a
307 video game, which itself is not intended to be played by the majority of players, would potentially be
308 subject to enforcement actions.

309

310 **3.3. Focusing on the ‘majority’ of players ignores the highest-spending and most vulnerable** 311 **players**

312 Moreover, the Council of State’s focus on the ‘majority of players’ fails to account for the
313 experiences of a small minority of vulnerable players. Video game monetisation has changed: where
314 revenues used to be predominantly generated by the sale of the game itself, players now can make
315 purchases (microtransactions) after purchasing the game (*e.g.*, in FIFA) or after downloading the
316 game for free (*e.g.*, in ‘free-to-play games’⁶⁰). Unlike in the past when every player spent largely
317 similar amounts of money to purchase a copy of the software, many games are now reliant on a small
318 minority of high-spending players (often referred to as ‘whales’⁶¹) to generate revenue. A substantial
319 number of players (potentially more than half—in other words, a ‘majority’—in many games) spend
320 *no* or very little money on loot boxes and, by implication, are unlikely to ever be ‘harmed’ by loot

⁵⁷ See UK Gambling Commission and others, *Declaration of Gambling Regulators on Their Concerns Related to the Blurring of Lines Between Gambling and Gaming* (2018) <<https://web.archive.org/web/20210528215648/http://www.gamblingcommission.gov.uk/PDF/International-gaming-and-gambling-declaration-2018.pdf>> accessed 29 June 2021.

⁵⁸ Kansspelautoriteit [The Netherlands Gambling Authority] (n 18) 14, para 4.1.

⁵⁹ Brooks and Clark (n 5).

⁶⁰ Kati and others (n 42); Janne Paavilainen and others, ‘Social Network Games: Players’ Perspectives’ (2013) 44 *Simulation & Gaming* 794.

⁶¹ Close and others (n 39).

321 boxes.⁶² Research suggests that 5% of the highest-spending players contributed more than half of all
322 loot box revenue.⁶³ One FIFA player reportedly spent over US\$10,000 on loot boxes in the FUT game
323 mode in two years.⁶⁴ Those highest-spending players are arguably most at risk of experiencing
324 potential financial harms from loot boxes. However, their experiences are not reflected, and their
325 concerns are not adequately addressed if the court decides only to focus on and consider how the so-
326 called ‘majority’ of (non-spending or low spending) players experience the video game. The Council
327 of State’s interpretation fails to account for the interests and the experiences of the most vulnerable
328 consumers (*i.e.*, the whales⁶⁵) when it is this minority of players that are arguably the main intended
329 beneficiary of gambling regulation.

330

331 **3.4. Overreliance on the presence of non-paid loot boxes**

332 Further, the Council of State appears to have classified paid loot boxes as unimportant because they
333 only represent a small minority of all loot boxes (including non-paid loot boxes) used by players.⁶⁶
334 When assessing how the ‘majority’ of players experience the FUT game mode, the Council of State
335 seems to have accepted the arguments presented by Electronic Arts uncritically and without sufficient
336 further scrutiny. Specifically, the Council of State relied on Electronic Arts’ assertion that ‘92 percent
337 of packs are obtained through game engagement [and are not purchased using real-world money,
338 which is the remaining 8%].’⁶⁷ It is not known what other evidence was available to the Council of
339 State; however, that assertion by Electronic Arts must be challenged. More contextual information
340 about both percentages (rather than merely those two figures alone) should have been required by the
341 Council of State to increase the quality of their Ruling. Reliance on the 8% out of context is
342 misleading: although only 8% of loot boxes are bought with real-world money and this percentage
343 appears comparatively small, these loot boxes generated a substantial amount of revenue for the
344 company. Electronic Arts’ 2021 annual report revealed that: ‘Net revenue from Ultimate Team
345 represented 29 percent of our total net revenue during fiscal year 2021, a substantial portion of which

⁶² Leon Y Xiao, ‘Loot Boxes Are Good (or at Least Not That Bad)...? Arguing against a Ban’ (OSF Preprints, 23 June 2022) <<https://osf.io/eztvd/>> accessed 23 June 2022.

⁶³ Close and others (n 39).

⁶⁴ Wesley Yin-Poole, ‘FIFA Player Uses GDPR to Find out Everything EA Has on Him, Realises He’s Spent over \$10,000 in Two Years on Ultimate Team’ (*Eurogamer*, 25 July 2018) <<https://www.eurogamer.net/articles/2018-07-23-fifa-player-uses-gdpr-to-find-out-everything-ea-has-on-him-realises-hes-spent-over-usd10-000-in-two-years-on-ultimate-team>> accessed 3 August 2020.

⁶⁵ Similarly, further research is needed on players who are not classified as whales, but belong to the category just below, namely those players whose spending behaviour may be seen as dangerous but is not sufficient to trigger any regulatory threshold. These players are sometimes referred to as ‘dolphins.’

⁶⁶ *ibid* para. 8.5

⁶⁷ Ruling (n 17) para 8.5.

346 was derived from FIFA Ultimate Team.⁶⁸ Electronic Arts' 2021 net revenue was stated to be
347 '[US]\$5.629 billion' in the same report.⁶⁹ Therefore, the FUT mode (*i.e.*, paid loot boxes in various
348 Electronic Arts sports games, including but not limited to FIFA games) generated over US\$1.6
349 billion. This substantial amount of revenue generated by paid loot boxes in the FUT mode justifies a
350 separate assessment of them on their own, without considering non-paid loot boxes. Further
351 information on who bought that 8% of paid loot boxes should also have been sought. This percentage
352 itself is not informative as to who exactly bought the loot boxes and why. Some players may have
353 purchased loot boxes because they do not want to spend time earning non-paid loot boxes, whilst
354 other individual players, more concerningly, may have purchased them due to underlying problematic
355 behaviour and spent significant sums of money. In our view, the Council of State should not have so
356 easily accepted and relied upon the 8% figure without seeking further contextual information from
357 Electronic Arts.⁷⁰ Indeed, if the relative percentages of paid and non-paid loot boxes become a legal
358 consideration, companies could artificially increase the prevalence of non-paid loot boxes (containing
359 worthless content) in order to make their game's loot box statistics appear more acceptable in order to
360 hide behind the argument that the majority of loot boxes are non-paid and 'safe'.

361
362 Additionally, Electronic Arts' presentation of the two figures without context misrepresents paid and
363 non-paid loot boxes as being identical to each other and equally 'desirable' by players. The Council of
364 State took the percentages presented by Electronic Arts at face value and seemingly assumed that,
365 because only 8% are paid loot boxes, they are therefore unimportant for the assessment of whether the
366 loot boxes (both paid and non-paid combined) represent a separate game.⁷¹ However, the fact that
367 92% of loot boxes were non-paid and obtained through gameplay but that players were still willing to
368 purchase the other 8% of loot boxes demonstrates the perceived importance of *paid* loot boxes by
369 players. Popular media has reported that players are generally unable to obtain all desirable loot box
370 content purely through gameplay without purchasing paid loot boxes because of the extensive amount
371 of time they must spend on the game in order to obtain sufficient numbers of non-paid loot boxes⁷²
372 Further, the paid loot boxes and the non-paid, 'free' loot boxes in these games do not always contain
373 similar content: some desirable loot box content that provides the best competitive advantage may
374 appear *exclusively* in, or may have a higher probability of being obtained from, paid loot boxes.

⁶⁸ Electronic Arts, 'Notice of 2021 Annual Meeting and Proxy Statement' (26 May 2021) app 1, p 4
<[https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-\(2021\).pdf](https://s22.q4cdn.com/894350492/files/doc_financials/2021/ar/Annual-Report-(2021).pdf)> accessed 27
September 2021.

⁶⁹ *ibid* 4.

⁷⁰ Ruling (n 17) para 8.5.

⁷¹ Ruling (n 17) para 8.5

⁷² Wesley Yin-Poole, 'Putting EA's Claim "You Can Acquire All Items without Spending Money" in FIFA
Ultimate Team to the Test' (*Eurogamer*, 22 March 2021) <<https://www.eurogamer.net/putting-eas-claim-you-can-acquire-all-items-without-spending-money-in-fifa-ultimate-team-to-the-test>> accessed 19 April 2022.

375 Electronic Arts also places restrictions on how loot box content obtained from non-paid loot boxes
376 can be used: specifically, loot box content obtained from paid loot boxes is generally transferable to
377 other players on the games' internal marketplace and therefore has more utility and desirability, whilst
378 loot box content from non-paid loot boxes is not always similarly transferable and would therefore be
379 less valuable within the FUT mode's in-game economy.

380

381 **3.5. An alternative: The 'majority' of paying players' (rather than all players') experience?**

382 The Council of State failed to recognise these important technical distinctions between paid and non-
383 paid loot boxes and how fundamental purchasing paid loot boxes may be to the experience of the
384 averagely skilled FUT mode players who want to play somewhat competitively without spending too
385 much time doing repetitive tasks and, particularly, to the experience of those highly competitive, high
386 spending players who are arguably most at risk of potential harms. The Council of State should have
387 required more in-depth information regarding the respective importance of items obtained from non-
388 paid and paid loot boxes respectively. This could have shed more light on how difficult it is for
389 players to consistently obtain the highly desired items through gameplay alone, which incentivises
390 these players to resort to purchasing loot boxes.⁷³ If the 'majority of players' criterion must be
391 retained in some form, that 'majority' should alternatively be derived from only paying players, or
392 arguably even only high-spending (and potentially vulnerable) players who purchase loot boxes,
393 rather than from all players. This is because the latter approach presents a 'majority' that is
394 meaningless: it would unnecessarily include many non-paying players, whose experience of not
395 encountering any potential harm from non-paid loot boxes and not engaging with paid loot boxes at
396 all fails to reflect those of loot box-purchasing players.

397

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

399 Although the case did not turn on this point (because the Netherlands Gambling Authority did not
400 dispute it), the Dutch Council of State decided that the FUT game mode is considered a game of skill,
401 despite it involving an element of chance (*i.e.*, the loot boxes).⁷⁴ Reliance was placed on previous case
402 law (specifically, the *Saturne* (1965)⁷⁵ and *Golden Ten* (1991)⁷⁶ judgments), which enunciated the
403 legal principle that a game of chance remains a game of chance, even if a small minority of players
404 might be able to influence their chances of winning through an element of skill, because the majority

⁷³ *ibid.*

⁷⁴ Ruling (n 17) para 8.5.

⁷⁵ *Saturnespel* [*Saturne game*] (1965) Hoge Raad [Supreme Court of the Netherlands] (21 December 1965)

ECLI:NL:PHR:1965:AB5541, NJ 1966, 364

<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1965:AB5541>> accessed 19 April 2022.

⁷⁶ *Golden Ten* (1991) Hoge Raad [Supreme Court of the Netherlands] (25 June 1991)

ECLI:NL:PHR:1991:AD1447, NJ 1991, 808

<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:1991:AD1447>> accessed 19 April 2022.

405 of players continue to play it as a game of chance.⁷⁷ In other words, a small element of skill in a
406 broader game of chance does not render that game into a game of skill. Yet, the reverse of this legal
407 principle should not automatically be assumed to be true, which the Council of State has done by
408 ruling that a (small) element of chance in a broader game of skill does not change this game into a
409 game of chance. An element of chance (however small) introduced by the rules of the game itself,
410 rather than arising purely from external factors (*e.g.*, changing wind directions in golf),⁷⁸ in a game of
411 skill arguably could potentially change the game of skill into a game of chance: this position is taken,
412 for example, in the UK, whose simple definition of a ‘game of chance’ includes ‘a game that involves
413 both an element of chance and an element of skill’.⁷⁹ In comparison, the legal principle in *Saturne* and
414 *Golden Ten* seems present instead in how UK law deems ‘a game that involves an element of chance
415 that can be eliminated by superlative skill’ to still be a game of chance,⁸⁰ given that a ‘superlative’
416 skill, by definition, could only be exercised by a small minority and not by the majority of players.
417 This again reflects that the Dutch decision is restricted to an interpretation of the application of Dutch
418 gambling law. Other countries might come to a different view as to the legality of different types of
419 video game loot boxes depending on their applicable gambling laws.⁸¹

420

421 **5. Procedural issue: Partial exclusion of the Netherlands Gambling Authority’s submissions**

422 As a procedural point, the Council of State excluded from its consideration a ‘very extensive,’⁸²
423 ‘voluminous’⁸³ further document that was submitted by the Netherlands Gambling Authority very late
424 into the appeal process for violation of due process because Electronic Arts was ‘unable to respond
425 adequately’ to it due to the unfairly short notice its legal team was given.⁸⁴ It is not publicly known
426 what was contained in that document and which arguments were omitted and disregarded by the
427 Council of State, or even whether this document was submitted after a relevant court deadline or just
428 relatively ‘very late.’ Therefore, it must be queried whether the Netherlands Gambling Authority
429 presented its case as strongly as it could have done. In the Ruling, the discussion on the ‘prize’
430 criterion (*i.e.*, whether the loot box content is transferable and therefore gains real-world monetary
431 value) was not given specific attention, as the Ruling focused on the ‘separate game’ issue. As such,

⁷⁷ Ruling (n 17) para 8.4.

⁷⁸ For the similar Canadian law position, see Michael D Lipton, Morden C Lazarus and Kevin J Weber, ‘Games of Skill and Chance in Canada’ (2005) 9 *Gaming Law Review* 10, 13.

⁷⁹ UK Gambling Act 2005, s 6(2)(a)(i).

⁸⁰ *ibid*, s 6(2)(a)(ii).

⁸¹ Leon Y Xiao, ‘Which Implementations of Loot Boxes Constitute Gambling? A UK Legal Perspective on the Potential Harms of Random Reward Mechanisms’ (2022) 20 *International Journal of Mental Health and Addiction* 437.

⁸² Ruling (n 17) para 5.

⁸³ *ibid* para 5.2.

⁸⁴ *ibid*.

432 the Ruling did not engage with the most controversial question with loot box regulation using
433 gambling law (which also troubles many other countries and the academic literature): whether the *de*
434 *facto* real-world economic value of loot box content gained through the use of ‘black market’ trading
435 practices satisfies the ‘prize’ (or equivalent) criterion of gambling law⁸⁵, despite the company
436 explicitly prohibiting players from selling loot box content in exchange for real-world money (*i.e.*,
437 participating in black market practices) and thereby granting them real-world economic value.⁸⁶ In
438 other words, if paid loot boxes are implemented, must the company be forced to terminate all
439 potential player-to-player trading facilities in the game to be compliant with the law (as some
440 companies have previously done in the Netherlands following the Netherlands Gambling Authority’s
441 since overruled interpretation of the law⁸⁷)?⁸⁸ The Council of State had an opportunity to clarify this
442 important point of law, but it did not do so as it was instead preoccupied with the preliminary question
443 of whether loot boxes represent a separate game.

444

445 **6. Conclusion**

446 Paid loot boxes, as a potentially problematic element of video games, should continue to be examined
447 separately as to whether they would legally constitute gambling. The Dutch Council of State has taken
448 a unique interpretation that, generally, only the overarching video game should be scrutinised: this
449 approach differs from how the issue has hitherto been examined and, as this paper has argued,
450 underplays the possible gambling-related potential dangers and concerns regarding *paid* loot boxes
451 specifically. The Dutch Council of State’s reliance on what it referred to as how the ‘majority’ of
452 players engage with the game was criticised. Insufficient attention was given to the respective
453 importance of paid and non-paid loot boxes and their differing impact on the gameplay experience
454 within the FUT mode. Particularly, this approach of considering the supposedly ‘majority’ player
455 experience failed to specifically consider how the important *minority* of highest spending and most
456 vulnerable consumers experience loot boxes and might potentially be harmed by them. Indeed, the
457 interpretation of Dutch gambling regulation adopted by the Council of State would *de facto* cause loot
458 boxes in video games to never be seen as games of chance, except in extreme cases where actual
459 gambling has been implemented in the guise of a video game.

460

461 When compared to the gambling regulations of other countries (*e.g.*, the UK, Belgium, and Denmark),
462 the Council of State has added a unique legal criterion in its interpretation (whether the loot boxes

⁸⁵ Xiao (n 81).

⁸⁶ The Ruling (n 17), para 8.5; Xiao (n 81).

⁸⁷ For example, 2K Games, ‘Statement Netherlands’ (2K Games Official Website, 2018)
<<https://www.2k.com/myteaminfo/nl/>> accessed 12 March 2021.

⁸⁸ Leon Y Xiao, ‘Regulating Loot Boxes as Gambling? Towards a Combined Legal and Self-Regulatory
Consumer Protection Approach’ (2021) 4 Interactive Entertainment Law Review 27, 43–44.

463 represent a ‘separate game’). This interpretation arguably renders gambling regulation toothless in
464 relation to gambling-like mechanisms in video games, due to the convergence (or blurring of lines) of
465 video gaming and gambling. Policymakers and regulators in other countries should therefore consider
466 the shortcomings of emulating the Dutch Council of State’s approach to loot boxes. Importantly,
467 Dutch policymakers should also consider whether this narrow interpretation of gambling law by the
468 Council of State, whose implication is that very few, if any, (paid) loot boxes in video games could be
469 regulated via gambling law, is what the legislature originally intended and continues to intend.
470 Preparatory documents to gambling legislation suggest a contrary intention: to prevent the migration
471 of young players from video games to gambling, it was intended that ‘games offering loot boxes
472 containing prizes with monetary value cannot be offered.’⁸⁹. There appears to be some uncomfortable
473 discrepancy between the intentions of the legislature in drafting the law (which the Netherlands
474 Gambling Authority and the District Court of The Hague at first instance attempted unsuccessfully to
475 more closely follow) and how the law has been judicially applied in practice by the Council of State
476 in the final appeal. If wider and more effective regulation of loot boxes is deemed appropriate and
477 intended by the legislature, then changes to Dutch law should be brought to override the Council of
478 State’s restrictive interpretation.

479

480 7. Postscript

481 Since the initial drafting of this article, six political parties, which together hold a majority in both
482 Houses of the Dutch Parliament,⁹⁰ have submitted a Motion in the lower house asking the Cabinet to
483 investigate the possibility for loot boxes to be banned, potentially through amending existing law if
484 necessary.⁹¹ That Motion specifically recognised that the Netherlands Gambling Authority has
485 attempted to regulate these mechanics but that the Council of State overruled those enforcement
486 actions. It remains to be seen whether that Motion seeks to ban only paid loot boxes (given that the
487 Motion references ‘these loot boxes’ having already been prohibited in Belgium, which could only
488 refer to paid loot boxes, unless the Belgian regulatory position has been misunderstood by the
489 Motion’s petitioners) or all loot boxes regardless of their paid or non-paid status (given that the same
490 Motion references that the Netherlands Gambling Authority’s previous attempted regulation of ‘these

⁸⁹ See Eerste Kamer der Staten-Generaal [First Chamber of the States-General], Kamerstuk Vergaderjaar 2018-2019, 33 996, I (14 December 2018) 9 <<https://zoek.officielebekendmakingen.nl/kst-33996-I.html>> accessed 21 April 2022.

⁹⁰ Marie Dealessandri, ‘Six Political Parties Campaign for Loot Boxes Ban in the Netherlands’ (*GamesIndustry.biz*, 4 July 2022) <<https://www.gamesindustry.biz/articles/2022-07-04-six-political-parties-campaign-for-loot-boxes-ban-in-the-netherlands>> accessed 18 July 2022.

⁹¹ Henri Bontenbal and others, ‘Motie van het lid Bontenbal c.s. over loot boxes in videogames ook in Nederland verbieden [Motion by members Bontenbal et al. on banning loot boxes in video games in the Netherlands as well]’ (30 June 2022) <<https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2022Z13703&did=2022D28235>> accessed 16 July 2022.

491 loot boxes,' which would include both paid and non-paid loot boxes whose content possess real-world
492 monetary value). This Motion lends credence to the assertion that many Dutch members of
493 parliament might not agree with the Council of State's Ruling.

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Preprint not peer reviewed