

Loot Boxes – Video gaming industry’s hidden treasure or a Pandora’s Box that misleads consumers?

George Spence-Jones & Leon Y. Xiao

This article considers the UK consumer protection law that may apply to the current practice in the video game industry of offering purchasable loot boxes to consumers.

What are loot boxes?

Loot boxes are virtual treasure chests. They contain randomised rewards or items, and a video game player does not know what item is inside until they ‘open’ them. Although some loot boxes are earned by playing the game, many are instead purchased using real money. Ordinarily, players invest time playing the game in order to earn items, but loot boxes instead offer a chance at obtaining items instantly. In fact, some items are only available through purchasable loot boxes.

Loot box items are often cosmetic, simply changing various in-game aesthetics. However, other items enhance the player’s experience, for example making a character stronger thereby providing a competitive advantage over other players (against both those who buy and those who do not buy loot boxes). The randomised items contained in loot boxes are of varying rarity and value. Most items do not offer significant in-game effects and are not particularly valuable. However, rarer items often influence the game significantly and are highly valuable.

The concept behind loot boxes is not new. They are partly inspired by existing physical products that feature a randomised element of reward – sealed booster packs of trading cards from games such as Pokémon or Magic: The Gathering. In fact, much like the physical trading cards, the loot box items in some games can be traded between players in the video gaming community, and they are often traded for real money.

Are they significant?

Loot boxes are widely implemented. 59% of top-grossing UK iPhone games contained loot boxes.¹ Loot boxes are often available for children to purchase. 95% of iPhone games containing loot boxes were deemed suitable for children aged 12+. Total spending on loot boxes and on

¹ David Zendle and others, ‘*The Prevalence of Loot Boxes in Mobile and Desktop Games*’ (2020) Advance online publication. Addiction <<https://doi.org/10.1111/add.14973>> accessed 3 August 2020.

LOOT BOXES – HIDDEN TREASURE OR A MISLEADING PANDORA’S BOX? BY GEORGE SPENCE-JONES & LEON Y. XIAO

gambling relating to in-game items has been predicted to rise from US\$30 billion in 2018 to US\$50 billion in 2022.² The virtual items (including those obtained through loot boxes) of three popular PC games have been bought and sold 1.45 billion times between players, with an aggregated transaction value of over US\$1 billion.³

What is the problem?

The problem appears to be the risk of financial harm to consumers. Perhaps unsurprisingly, there are reports of consumers (often children) paying significant sums to purchase loot boxes, often chasing items that have a vanishingly small probability of being rewarded. The items are often chased (i) as collectibles for their inherent rarity, (ii) to enhance a competitive gaming experience or (iii) for subsequent trade for profit within the community.

Psychological research has established that paid loot boxes are linked to problem gambling: either problem gamblers spend significant money on loot boxes, or loot box spending can cause players to develop problematic gambling habits. Further, loot box design may abuse gambling-related irrational decision-making biases and fallacies to cause players to spend more money than they had originally intended to spend or even are able to afford.

Gambling Commission’s Investigation

Given the potential impact on the public and the link to problem gambling, in 2016, the UK Gambling Commission investigated the matter in consultation with the video game industry. In 2017, its position paper⁴ was published which noted:

‘The payment of a stake ... for the opportunity to win a prize (in-game items) determined (or presented as determined) at random bears a close resemblance, for instance, to the playing of a gaming machine. Where there are readily accessible opportunities to cash in or exchange those awarded in-game items for money or money’s worth those elements of the game are likely to be considered licensable gambling activities.’

However, they concluded that:

² Juniper Research, April 2018, *In-Game Gambling ~ the Next Cash Cow for Publishers* <<https://www.juniperresearch.com/document-library/white-papers/in-game-gambling-the-next-cash-cow>> accessed 3 August 2020.

³ Aaron Drummond and others, *‘Why Loot Boxes Could Be Regulated as Gambling’* (2020) Advance online publication. *Nature Human Behaviour* <<https://doi.org/10.1038/s41562-020-0900-3>> accessed 3 August 2020.

⁴ Gambling Commission, March 2017, *Virtual currencies, eSports and social casino gaming – position paper* <<http://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>> accessed 19 October 2020.

'[w]here prizes are successfully restricted for use solely within the game, such in-game features would not be licensable gambling, notwithstanding the elements of expenditure and chance.'

Although the relevant activities appear to have not fallen within the scope of UK gambling legislation, the issue facing consumers is still a pressing concern. In September 2020, the Government opened a Call for Evidence⁵ on the matter, and the deadline for submissions is later this month.

With the concerns of regulators and the government in mind, this article considers another branch of law that may apply to the practice of offering purchasable loot boxes.

Law

One area of law that may apply is the Consumer Protection from Unfair Trading Regulations 2008/1277 ('CPUT'). CPUT prohibits unfair commercial practices, which includes misleading actions, misleading omissions and automatically unfair commercial practices, and a trader engaging in such unfair commercial practices can be guilty of a criminal offence.

Although a full investigation of a particular video game practice may engage several provisions of CPUT, the most straightforward commercial practice to consider would be the absence of available information on the odds of loot box items – a potentially misleading omission under Regulation 6 of CPUT:

6.— Misleading omissions

(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a) the commercial practice omits material information,

...

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are—

(a) all the features and circumstances of the commercial practice;

...

⁵ Department for Digital, Culture, Media & Sport, September 2020, *Loot Boxes in Video Games: Call for Evidence*

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920393/Loot_Box_Call_for_Evidence_Document_.pdf> accessed 23 September 2020.

LOOT BOXES – HIDDEN TREASURE OR A MISLEADING PANDORA’S BOX?
BY GEORGE SPENCE-JONES & LEON Y. XIAO

(3) *In paragraph (1) “material information” means—*

(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and

...

(4) *Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)—*

(a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;

...

Would it apply?

The following elements would need to be made out:

- (i) A commercial practice
- (ii) That omits material information
- (iii) And as a result causes, or is likely to cause, the average consumer to take a transactional decision he would not have taken otherwise

The elements are considered in turn.

(i) Commercial practice

Commercial practice has a broad definition:⁶

“commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product;

The commercial practice is the offering of loot boxes as digital content through the game. Importantly, the scope of a commercial practice (and transactional decisions, see below) is broad and is not limited to contracting parties or even there being a contract – it is about traders who direct commercial practices relating to a product towards individuals acting as consumers.

⁶ Regulation 2(1) CPUT.

(ii) Omits material information

The omission is straightforward. Either the odds relating to the relevant loot box and the possible items therein are communicated to the consumer or not.

Whether the odds are “*material information*” is debatable. However, the odds are possibly material as, per Regulation 6(3), ““*material information*” means— (a) *the information which the average consumer needs, according to the context, to take an informed transactional decision; ...*” Arguably, a consumer who is about to spend money on one or several loot boxes would need to know if their odds of obtaining a certain item are 1 in 10 or 1 in 10,000. However, the opposing position is still viable – consider the individual who simply “has a flutter” just for the thrill of it. That action may not be influenced by the odds of their bet. The issue of causation is considered in more detail below, but there is clearly an overlap with this element.

(iii) Causing the average consumer to take a transactional decision he would not have taken otherwise

The average consumer

First, the average consumer must be identified, and Regulation 2 of CPUT provides further guidance:

2.— Interpretation

(1) *In these Regulations—*

“average consumer” shall be construed in accordance with paragraphs (2) to (6);

...

(2) *In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.*

(3) *Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.*

(4) *In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.*

(5) *In determining the effect of a commercial practice on the average consumer—*

LOOT BOXES – HIDDEN TREASURE OR A MISLEADING PANDORA’S BOX?
BY GEORGE SPENCE-JONES & LEON Y. XIAO

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

...

Two categories of consumer therefore need to be considered: (1) the ordinary average consumer, under Regulation 2(2), and (2) the average consumer who is member of a group that is particularly vulnerable to the commercial practice because of their infirmity, age or credulity (for example, children or people susceptible to issues with gambling), under Regulation 2(5).

Transactional decision

Secondly, the relevant transactional decision must be identified. One likely candidate is the decision to purchase a particular loot box in a given video game:

“transactional decision” means any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—

(a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or

(b) whether, how and on what terms to exercise a contractual right in relation to a product

As above, the concept is not limited to particular contracting parties. Although it will normally be the individual who purchased the game who will later purchase loot boxes, children can be the consumer for the purposes of transactional decisions even where the game was purchased for them by an adult.

Causation

With these concepts in mind, attention is turned to the issue of causation, which has already been held to be a “but for” test – whether but for the relevant misleading omission of the trader, the average consumer would have made a different transactional decision from that which he did make.⁷

Category (1) – the ordinary average consumer

⁷ *OFT v Purely Creative Limited* [2011] CTLC 45 at [71].

By Regulation 2(2), consumers under category (1) are presumed to be reasonably well informed, reasonably observant and circumspect. Further, it has been held that the underlying EU directive to CPUT⁸ exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over hasty.⁹

Therefore, it is arguable that responsible gaming and purchasing habits ought to be expected from the average consumer in category (1). They ought to know that, regardless of the odds, there is a risk of the loot box not awarding a certain item, and their general loot box purchasing habits ought to be tailored accordingly. There is further support for this proposition in that booster packs of cards with randomised rare cards do not appear to have been compelled to publish their odds.

However, this may just be because of limited published concern about physical trading card booster packs. Ultimately, a loot box bears a strong resemblance to a game of chance, much like the national lottery, and one might expect reasonably informed adults to be less inclined to buy multiple lottery tickets to chase the jackpot once they have found out that the odds are about 1 in 45 million. This change in purchasing habit might therefore satisfy the “but for” test.

Category (2) – the average vulnerable consumer

However, even if the practice is not misleading to the average consumer, it may nonetheless be misleading for the category (2) consumer. It may be difficult to properly make an assessment for this category without the benefit of expert evidence. Although such evidence can be relied upon, the courts are generally encouraged to make this assessment without recourse to statistical or expert evidence about typical consumer behaviour.¹⁰

In any event, for the sake of argument, an intuitive thought might be that those with a predisposition to gambling may unfortunately heed little notice of the published odds of loot boxes such that causation would fail for this category of consumer.

The category of vulnerable consumer will also include children. Adults may be presumed to understand the published odds, but asking a child to comprehend the significance of spending £1 to chase 1 in 10 and £1 to chase 1 in 10,000 and the concepts of statistics and expected values is quite another. Again, omitting supposedly material information may have little impact on children.

Consequences

⁸ Unfair Commercial Practices Directive 2005/29/EC.

⁹ *OFT v Purely Creative Limited* [2011] CTLC 45 at [62].

¹⁰ *OFT v Purely Creative Limited* [2011] CTLC 45 at [63] – [64].

LOOT BOXES – HIDDEN TREASURE OR A MISLEADING PANDORA’S BOX?
BY GEORGE SPENCE-JONES & LEON Y. XIAO

If the above elements can be made out, then, by Regulation 10, a trader engaging in a Regulation 6 misleading omission is committing a criminal offence. The penalty for this is (a) on summary conviction, an unlimited fine; or (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

There is also the possibility for local Trading Standards departments or even the Competition and Markets Authority to pursue civil enforcement action, pursuant to Part 8 of the Enterprise Act 2002, if the misleading commercial practice is established and the practice “*harms the collective interests of consumers*”.¹¹

Conclusion

It is clearly arguable that omitting to publish odds relating to items contained in video game loot boxes can be considered a misleading omission. It will be interesting to see what evidence is submitted in the Government’s Call for Evidence, as complaints may just relate to what this article has focused on – the omission of published odds. There are also reports of loot boxes of certain items initially being made available for a limited time, only for the same boxes and items to be made available more generally at a later time. This may engage some of the other provisions of CPUT.

In any event, it is without doubt that loot boxes have been and continue to be profitable for the video game industry, and where great money flows, the attention of regulators often follows. At the time of writing, prominent video game companies are being pursued across Europe by regulators, although it is currently limited to alleged breaches of gambling legislation in particular EU Member States. However, as the concern about the impact of the practice on consumers grows, it is likely that regulators will be looking at what other areas of law may apply, and a concern about consumers often leads one to consumer protection legislation.

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George Spence-Jones is a tenant at Gough Square Chambers.

Leon Y. Xiao is currently a Bar course student at City Law School and a Lord Denning Scholar at Lincoln’s Inn. He is also an independent researcher who is further investigating the connection between Loot Boxes and gambling and consumer protection legislation worldwide.

Disclaimer: This article is intended for informational purposes only and does not constitute legal advice. It will always be necessary to consider the specific facts of a case before reaching a conclusion.

¹¹ s.211 Enterprise Act 2002.