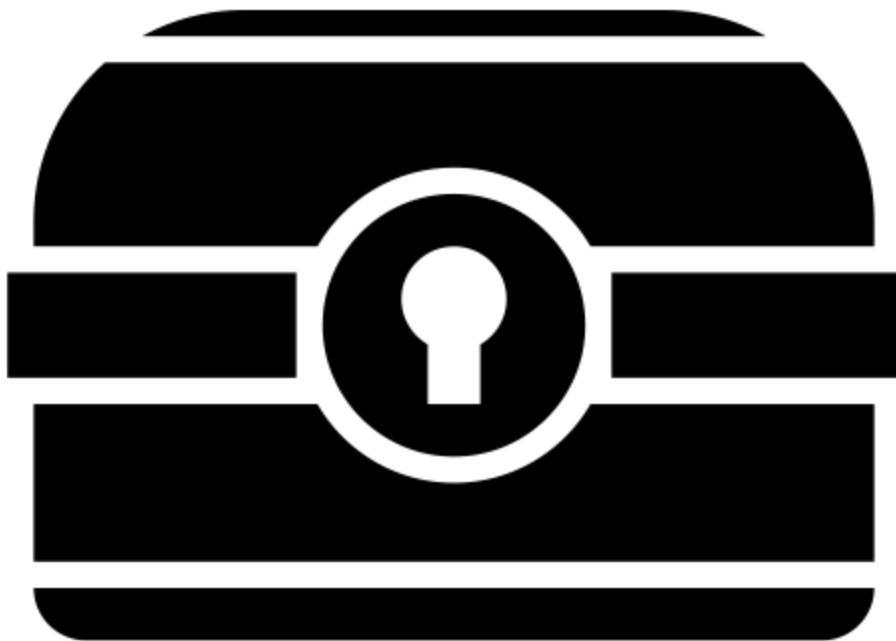




THE LAW OF **LOOTBOXES**

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Introduction

In 2019, perhaps no video game mechanic is more divisive and reviled than the lootbox.

Defined as a random grant of a virtual item, character, or other in-game implement usually purchased by means of real money, free in-game currency, or both, lootboxes have been a subject of controversy, criticism, and scorn – with concerns of them being marketed to children becoming the subject of multiple parliamentary reports and proposed regulatory bills. The public's opinion of lootbox seems clear; they are viewed a predatory game mechanic on an unprecedented scale. But is that view necessarily accurate from a legal perspective?

Existing legal analysis of lootbox mechanics primarily examines how lootboxes can be classified under current and traditional gambling legislation, but pays little attention to the historical sources of these “chance-based mechanics”. In order to fully understand and explore the current legislative environment surrounding lootboxes, this analysis proposes that it is necessary to take an in-depth, intersectional view to the issue – examining past technologies, marketing schemes, and legislature to draw parallels and analogies to the contemporary discussions about lootbox law. This will be accomplished through establishing a comprehensive timeline of the development of lootbox mechanics, discussing current international legislation initiatives involving lootboxes, then finally presenting conclusions that industry may use to inform best function and compliance with current legislative trends.

Microtransactions and Games of Chance (1871 – 1933)

While the history of lootbox mechanics may seem to be rooted in purely electronic mediums, its status as a subsidiary of the classic microtransaction (i.e. making a nominal purchase in exchange for goods) means lootboxes initially originated in the coin-operated machine industry.

While vending machines have roots in 16th century England, the first coin-operated amusement to truly enter the public sphere was a clockwork diorama created by Henry Davidson that was exhibited in 1871. Davidson's invention featured a mechanical chimney sweep that would jump from rooftop to rooftop once a coin was inserted and the mechanism activated. From there, the complexity and services offered by coin-operated amusements continued to evolve. Facilities grouping these machines together called "automatic shops" began to appear in England in around the 1890's, whereas America was more focused around the coin-operated phonograph industry which had opened over 100 parlours in large cities by 1893. Kinetoscope parlours (which used sequential pictures on a continuous strip of film then played at moderate speeds on a reel to create movement) soon emerged to tremendous profit. One parlour purportedly reported revenue of \$1400 a week in 1894 during its first year of operations; this would amount to a total of almost \$2.5 million of annual profit in 2019 when adjusted for inflation.¹

These amusements, however, only had limited entertainment utility, as once a Kinetoscope was viewed or a motion diorama was activated, the consumer had nothing else to see. The relatively novel nature of these machines provided a prime opportunity for games of chance – which provided the consumer a new experience every time they were played with – to flood the market. Slot machines became the coin-operated amusement of choice throughout the late 1800's and early 1900's, but were legally regulated in the early 1920's, limiting their potential for countrywide distribution and their acceptance by the wider public. With the stigma that followed these amusements, though, soon followed new and innovative ways for coin-operated

¹ Alexander Smith, "Historical Interlude: The History of Coin-Op Part One, The Rise and Fall of the Penny Arcade" (24 March 2015), online (blog): *They Create Worlds* <videogamehistorian.wordpress.com>.

amusement developers to market their products – doing so by injecting elements of skill into their games of chance.²

From a legal standpoint, there was good reason to innovate. Games of chance had a long history in Europe and an almost equally as long history of corresponding regulation. English law had severely limited the allowable operation of games of pure chance in acts passed in 1853 and 1854, while French law had outlawed gaming for money in 1781 by an edict that lasted through the Revolution and subsequent governments. America's slot machine boom saw San Francisco at a legislation epicenter with their slot machine ban instituted 1909. Two years after the initial restrictions were passed, the entire state of California instituted its own ban, and the rest of the country followed suit as it entered Prohibition.³

Pinball Wizard: Reigniting the Magic (1933 – 1950)

Following reactions to slot machines, the next game to trigger a response among legislators was the pinball machine. Having developed from the Bagatelle tables imported from Europe, pinball derivatives like *Whiffle*, *Whoopee*, *Roll-A-Ball*, *Bingo*, and *Baffle Ball* all had players launch a small ball up an incline into a field of pegs, aiming for holes assigned varying point values. By the time Prohibition ended in 1933, pinball machines had become a staple in bars and taverns, also being ubiquitous enough to be found not only in arcades and amusement parks, but also roadside stands, bus and railway stations, gas stations, cafes, drug stores, tobacco outlets, and barber shops. While some machines offered a monetary payout for reaching certain score thresholds, the 1935 *Flash* machine implemented extra “plays” as a

² Alexander Smith, “Historical Interlude: The History of Coin-Op Part Two, From Slot Machines to Sportlands” (25 March 2015), online (blog): *They Create Worlds* <videogamehistorian.wordpress.com>.

³ *Supra* note 2.

reward instead – one of the first instances of a game directly encouraging a player to keep playing in exchange for good performance.⁴ As the profits that payout machines offered proved enticing to pinball game producers, soon they were drawing attention from anti-gambling opponents who linked the “clean money” the machines produced to organized crime and juvenile delinquency. New York City Police Commissioner from 1934-1945 Lewis Valentine purportedly said of pinball machines “(they) are a harmful influence because of their strong tendency to instill desire for gambling in immature young people.”⁵ Much like the slot machines that came before them that were relegated by legislature to private casinos and clubs, pinball machines were eventually subject to blanket bans in New York City, Chicago, and Los Angeles.⁶

A Knee-Jerk Reaction: Reflexive Bans and Subsequent Overturning (1950 – 1985)

The issue of distributing pinball machines was further complicated by the introduction of the *Johnson Act* in 1950, which banned the transportation of “gambling devices” (almost exclusively limited to slot machines by definition) to states where they had been outlawed.⁷ In 1956, the Vermont Supreme Court ruled that free plays offered by pinball games like the *Flash* machine still qualified as “something of value” due to the common practice of exchanging plays for a cash payout, therefore qualifying a pinball machine as a “gambling machine” subject to relevant prohibitions.⁸ By 1957 in *United States v Korpan*, the US Supreme Court reached the same conclusion; although there was some element of skill involved in the game, said the court, it was insufficient to preclude pinball from being characterized as a game of chance.⁹ This eventually

⁴ Extra plays could also be exchanged with a shop clerk for a payout, essentially circumventing future legislations that targeted payout machines directly – at least for a time. See note 2.

⁵ Seth Proges, “Gary Stern is the only guy in the world still making pinball machines.”, *The Chicago Reader* (2 September 2005) S1 20.

⁶ *Supra* note 2.

⁷ Rufus King, “The Rise and Decline of Coin-Machine Gambling” (1964) 55:2 J Crim L & Criminology 199 at 205.

⁸ *State of Vermont v Bally Beach Club Pinball Machine*, 119 A (2d) 876 (VT SC 1956).

⁹ *United States v Korpan*, 354 US 271 (1957).

resulted in the 1962 amendments to the *Johnson Act* that caused pinball machines to be captured in the category of “gambling machines” alongside slots.¹⁰

Attempts to repeal bans occasionally followed within the next three decades, but only saw success as of 1976. When the Music and Amusement Association organized a hearing to attempt to convince New York City that pinball was, in fact, a game of skill, they enlisted an established expert player, Robert Sharpe, to help. In the presence of city committee officials in the courtroom, he predicted where the ball would go once he released the plunger in a move likened “to Babe Ruth calling his home run of the 1932 World Series” and sunk the shot. Convinced, the officials voted to repeal the ban, although even Sharpe himself admitted the show of skill was perhaps not so skillful – “(t)here was divine intervention” he would later comment.¹¹

But this was not the last time that the public and politics would turn their gaze on the arcade industry. While the video game arcade machines of the 1970’s and 80’s were never subject to any bans in North America, they still managed to attract the attention of adults who feared they were poisoning the youth – just like the pinball machines that came before them. Laura June of The Verge describes:

“In November of 1982, the US Surgeon General C. Everett Koop gave a speech in Pittsburgh, Pennsylvania on the subject of domestic violence and child abuse. After concluding his remarks, he fielded a question about the harmful effects of video games on children. Koop said that while there wasn’t yet scientific evidence of any harm,

¹⁰ *Supra* note 2.

¹¹ *Supra* note 4.

children were becoming "addicted" to video games, "body and soul." Though Koop quickly released a statement following up to curtail fears, an AP story, wired out to newspapers across the country, had done its damage. By February of 1983, psychologists were positing that the "intensity of the experience" of video games was worrisome, as was the fact that the games "seem[ed] to be real." In July of 1983, two young people were arrested in Houston, Texas for the stabbing deaths of four arcade employees in an after-hours robbery, making national headlines. By 1985, Steve Epstein's Times Square institution, the Broadway Arcade (which had been Lou Reed's wedding reception venue), was lumped in with porn shops under a plan to redevelop the area, and the business which had been in the neighborhood for 50 years was forced to close. A customer of the arcade told the New York Times, "it's a moral crusade. A lot of good things [like the Broadway Arcade] will get swept out with the bad".¹²

Differing Perspectives on Historical Regulation: Japan and Pachinko (1930 – Present)

Across the Pacific, the coin operated amusement industry experienced a much different reception. In Japan, the popularity of Bagatelle saw enterprising owners buy vertically oriented tables in order to save space in the narrow alleyways of the traditional Japanese marketplace. Children initially played for prizes of candy or fruit, though eventually adults began to participate, winning small amounts of luxury items such as soap and cigarettes as rewards. This popularity eventually saw the development of the Pachinko machine (*pachi* for the onomatopoeia of the ball clinking against the pegs in the machine enclosure, and *ko* for ball), with the first dedicated Pachinko parlour being opened in 1930 seeing considerable success.¹³

¹² Laura June, "For Amusement Only: The Life and Death of the America Arcade", *The Verge* (16 January 2013), online: <theverge.com>.

¹³ Alexander Smith, "Historical Interlude: The History of Coin-Op Part Six, A Technological Revolution" (8 June 2015), online (blog): *They Create Worlds* <videogamehistorian.wordpress.com>.

Much like the pinball machines found in America, the new Pachinko machines featured novelties like spinners and additional pins that paid out extra balls for reaching certain score thresholds, which could then be exchanged for a prize. The basic concept of Pachinko, however, differs from its American peer of the pinball machine. As opposed to having the ball stay firmly in its enclosure, Pachinko players pay the parlour for a certain number of balls that are then fed into the machine. Depending on how they perform or how lucky they are, the player then receives back bonus balls (which in their numeracy are often fed into a tray). These balls then can be exchanged with the parlour for prizes, which range from novelties to appliances like rice cookers.¹⁴

Although Japan has a longtime ban on gambling in s.23 of its *Criminal Code*¹⁵, the Pachinko industry is a notable exception to otherwise considerably strict regulation. Although Pachinko balls themselves can not be exchanged for cash prizes, they can instead be swapped for innocuous items like giant stuffed animals with a labelled nominal value, which then can then be taken to a nearby “independent” office that exchanges the item for money. That “office” then sells the “prize” back to the parlour.¹⁶ Some parlours simply swap Pachinko balls for special tokens with small amounts of gold or silver in them, which allows for the conversion of the balls to an object with market value that can then be exchanged for cash.¹⁷ This shows a considerable willingness – both in a historical and contemporary sense – by Japanese

¹⁴ Graham Brooks, Tom Ellis & Chris Lewis, “Pachinko: A Japanese Addiction?” (2008) 8:2 Intl Gambling Studies 193.

¹⁵ Article 23 Penal Code (Japan). As of 2018, Casinos in the form of Integrated Resorts (IRs) were finally allowed to open in the country; see Dave Hueston, “Casino giants crank up PR to snag first Japanese resort licenses” *The Japan Times* (3 September 2019), online: <japantimes.co.jp>.

¹⁶ *Supra* note 13. See also Keiji Amano and Geoffrey Rockwell, “Pachinko: A Game Studies Perspective” (2015) 5:1 J of Media Studies and Popular Culture 161.

¹⁷ Tara Francis Chan “Japan’s pinball gambling industry makes 30 times more cash each year than Las Vegas”, *Independent* (26 July 2018), online: <independent.co.uk>.

authorities to qualify “things of value” in loose terms as long as money is not directly involved. Children under the age of 18 also are not allowed in Pachinko parlours much like how children are restricted from entering casinos in North America, though purportedly youth do not show much interest in Pachinko due to the Japanese arcades that they instead have easy access to.¹⁸ Much like western amusement complexes like *Dave & Busters* and *Playdium*, these arcades have gambling games of their own that instead pay out tokens; these can be used to play other games or exchanged for prizes such as stuffed animals and figurines.¹⁹

Real Life “Loot”: The Rise of Gachapon

Coin operated amusements are not the only technology that largely influenced what would later become what we understand to be lootboxes. Yet another Japanese invention has significant similarities to modern chance mechanisms in video games, and in fact might be the source of their business model.

In the 1960’s, Japanese entrepreneur Ryuze Shigeta received from his American business associates a typical vending machine of the time that dispensed small prizes and candy. Eventually, he had the idea to enclose the vended products in a small plastic capsule, ensuring they were not dispensed directly into the customer’s hands. By 1965, the gachapon machine (*gacha*, from the sound of the machine’s coin operated mechanism dispensing the capsule, and *pon*, from the capsule falling into the machine’s chute) entered the field of Japan’s coin-operated amusement offerings.²⁰

¹⁸ *Supra* note 13.

¹⁹ Dan Taipua, “The beginner’s guide to arcade culture in Japan” *The Spinoff* (26 July 2016), online: <thespinoff.co.nz>.

²⁰ Tim Hornyak “Gachapon: Tracing the evolution of Japan’s colorful toy capsules”, *The Japan Times* (19 August 2017), online: <japantimes.co.jp>.

Before 1977, Gachapon was primarily occupied by low-cost novelties constructed with scrap plastic, but this changed when toy giant Bandai entered the market. Trademarking their toys as “Gashapon”, Bandai’s offerings were sometimes up to five times more expensive than its competitors, but featured popular characters from series such as *Gundam*, *Kamen Rider*, and *Ultraman*. The gamble proved incredibly successful, seeing Bandai sell approximately 3.4 billion Gachapon units in the following 40 years.²¹

In the competitive modern toy market, part of the appeal of Gachapon products may very well be the element of chance inherent in them. Each individual machine is filled with toys from a set, which customers can then try their luck to complete – receiving duplicates is a sometimes frustrating but common experience. If a customer does not like every offering in the set or seeks only to collect items featuring a certain character branding, there are very limited ways to obtain a particular Gachapon without the inherent chance. On occasion third party shops will sell unpackaged products so customers know exactly what they are purchasing, but since Gachapon rarely cost more than the equivalent of 500 yen²², the gamble is a relatively cheap alternative.

²¹ *Ibid.*

²² *Supra* note 19.



Gachapon toy vending machines in Yodobashi Camera in Tokyo's Akihabara district via Tim Hornyak for The Japan Times.

Another aspect that makes the Gachapon less likely to be resold is their exclusivity. Bandai alone launches anywhere from 30-40 new Gachapon sets from a variety of their intellectual properties every month, with themed sets sometimes being released alongside seasonal events and holidays. Once the set is completely depleted from machines, it is usually gone for good, as repeat production runs are a rare occurrence.²³ Stateside offerings of this scheme are more commonly seen in blind bags and blind boxes which have become increasingly more popular in the late 2010's, though Gachapon machines can occasionally be found in the foyers of large retail stores with other vending machines. These products usually contain a random object (such as a toy, figurine, or key chain) from a set in an opaque pouch or small cardboard box, preventing the customer from seeing exactly what is inside.

²³ *Supra* note 19.



An assortment of blind bags and boxes via Angelic Sinova for simplysinova.com.

Cardboard Consumerism: Stateside Gachapon Comparatives

Gachapon and blind bags/boxes were not the only products marketed to children that followed a chance-based model – made even more prolific by employing similar mechanisms was the trading card. Originally packaged in cigarettes and later packs of gum, trading cards were eventually manufactured and packaged separately, and soon featured sports stars in collectible limited run sets that could number up to 250 (or more) individual cards. In the 1990's, the industry expanded enticement strategies and started to include “chase cards” (also known as “insert cards” in the sports card community²⁴) – in other words, cards that were inherently more rare than the others in the set that sometimes featuring special incentives such as autographs or holographic images.²⁵ In collectible strategy games²⁶, this rarity is an integral feature of not

²⁴ “Sports Card Collecting 101: Glossary of Sports Cards Terms and Definitions” (2019), online: GOGTS <gotgts.net>.

²⁵ David Seideman, “How The Biggest Baseball Card Scam In History Could Cost You \$13,000” *Forbes* (5 August 2014), online: <forbes.com>.

²⁶ Alternatively: competitive card games.

only the collectibility of the cards themselves, but also the player's ability to perform in the card game as a whole. As stated in *Consumption and Authenticity in the Collectable Strategy Games Subgenre*, author and experienced *Magic: The Gathering* player J. Patrick Williams states the following:

“(Collectible strategy games) all operate under the same basic format: game producers create (cards) that vary in terms of in-game usability and rarity. With few exceptions, the rarer or more powerful the (card), the more collectible it becomes. Gamers seek out these rare/powerful (cards) either as a form of curatorial consumption or to use during gameplay. In both instances, owning such (cards) enhances their prestige in local, regional, national, and international player networks...”²⁷

Given these chance-based attributes, it is perhaps unsurprising, then, that the trading card industry has been subject to its own unique controversies. In *Chaset v Fleer/Skybox Limited*, a class action was brought against multiple trading card and sports card manufacturers as a civil remedy under the *Racketeer Influenced and Corrupt Organizations (RICO)* Act. The suit alleged “that the random inclusion of limited edition cards in packages of otherwise randomly assorted sports and entertainment trading cards constituted unlawful gambling in violation of *RICO*”. The Plaintiffs argued that the rarity of these specific cards – when combined with cost of the card packs and the odds of obtaining different classes of card rarity being disclosed on card packets – meant that the trading card manufacturers had the “essential elements of gambling – price, chance, and prize” in their product. When incorporated with the card manufacturer's business

²⁷ J Patrick Williams, “Consumption and Authenticity in the Collectible Strategy Games Subgenre” in Sean Q Hendricks, J Patrick Williams, and W Keith Winkler, eds, *Gaming as culture: essays on reality, identity and experience in fantasy games* (Jefferson NC: McFarland & Co 2006) 76 at 79.

and promotion practices, this was said to amount to “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity,” that caused the Plaintiff injury, which constituted a violation of *RICO* and entitled the Plaintiff to civil remedy. Despite this, the court held with the Fifth’s Circuit’s earlier ruling: “the [p]laintiffs do not allege that they received something different than precisely what they bargained for: six to twenty cards in a pack with a chance that one of those cards may be of Ken Griffey. Jr... Injury to mere expectancy interests or to an “intangible property interest” is not sufficient to confer *RICO* standing.”²⁸

This was not the first time the issue had been considered, however. In *Major League Baseball Props. Inc. v Price*, it was determined:

“A card purchaser buying a pack of cards enters into a bargain with the licensors and manufacturers whereby in return for payment the purchaser will receive a random assortment of regular cards and a chance to receive an insert card. This bargain delivers actual value to each party because the chance itself is of value regardless of whether or not the card purchaser later suffers a “loss.” The bargain is not for a phantom chance. Just as a card purchaser may realize a gambling loss, so a card purchaser may also find an insert card and sell it or keep it for value. The chance is real, and having paid for it and received it, the card purchaser has not suffered any financial loss...”²⁹

Although perhaps made in *obiter*, this ruling seems to imply that chance mechanics like those seen in trading cards do not constitute gambling, as unlike traditional gambling the purchaser still receives something of value from the transaction, even if it was not what they wanted.

²⁸ *Chaset v Fleer/Skybox International Lmted*, 300 F (3d) 1083 (9th Cir 2002).

²⁹ *Supra* note 27.

Furthermore, the act of promoting collection with a direct impact on game performance makes trading cards a clear predecessor to virtual Lootbox mechanics – and may have been the source of their first practical implementation in virtual spaces. *Magic: The Gathering Online* launched in 2002, offering virtual card packs for the same price physical Magic packs could be purchased for; and of course, virtual packs featured the same random chances as physical card packs.³⁰ Other virtual competitive card game platforms have proliferated throughout the 2000's, with online platforms of popular physical card games such as *Pokémon*, *Yu-Gi-Oh!*, and even online-only games such as Blizzard's *Hearthstone* and Cygames' *Shadowverse* rising to prominence without a physical release. Notably, no more lawsuits seem to have followed despite the rise of virtual card game platforms; though it seems fairly evident that the lootbox is a logical extension of these platforms and has been subject to a fair amount of controversy.

The “Gacha” Game: From IRL to the Virtual World

Despite virtual lootboxes reaching prominence in the mid-2010's, chance-based mechanics that center around obtaining an in-game resource have been integral motivation mechanics since early in gaming history. RPGs (Role Playing Games) such as the Final Fantasy series instituted random rewards starting in 1988 with the Japanese release of *Final Fantasy II* – certain powerful items usually have a fixed percentage probability to drop as a result of defeating specific enemies.³¹ Later MMO games (Massive Multiplayer Online games) such as *Runescape* and *World of Warcraft* all instituted their own group loot systems, with the most statistically advantageous rewards often having a very small chance to be awarded to one player upon

³⁰ SaffronOlive, “The Complete History of Magic Online” (17 August 2015), online: *MTGGoldfish* <mtggoldfish.com>.

³¹ “Item Drop” (18 November 2019) online: *Final Fantasy Wiki* <finalfantasy.fandom.com>.

defeating a typically extremely difficult foe. Since enemies will usually respawn after a set amount of time, players can sometimes spend a significant period defeating the same enemy over and over again in order to “farm” for a specific piece of loot – bad luck can sometimes result in extended farming that can last for months or even years.

Although they initially may seem to have few merits, there are compelling reasons to incorporate these mechanics in both online and offline play. In the case of single-player RPGs, chance-based mechanics were originally developed when the primary audience of these games was thought to be children and teenagers with limited income. Presumably, engaging players with the game for as long as possible (by giving them tangible but difficult goals) enabled gamers – and perhaps more importantly, their parents – to feel they were getting their money’s worth of entertainment value. In the case of MMOs, given that these games primarily function on subscription models to generate revenue, this system is a functional and logical extension of the way they earn profit. Because these games have no ultimate end point due to content and expansions being continually added to them, the longer developers can keep players engaged, the longer they can continue to keep the game generating revenue from the existing playerbase. After all, the costs of creating new content and simply maintaining game servers are often significant,³² and unlike typical console and PC games, players possess no capacity to play the game locally once the host’s servers go offline. So both developers and players have a good reason to enter into this arrangement – developers have a vested interest in continuing to profit off their product, and dedicated players, having invested a significant amount of time and money through their subscription, have a vested interest in continuing to support the game.³³

³² Meghan Watt, “World of Warcraft facts put in perspective” *Geek.com* (25 February 2010), online: <geek.com>.

³³ James Davenport and Wes Fenlon, “25 MMOs that lived and died since World of Warcraft launched” *PC Gamer* (21 May 2019), online: <pcgamer.com>, but note that exceptions due to dedicated fans still

One of the first MMOs to institute modern lootbox mechanics – i.e. a random virtual reward generator purchasable for real or virtual currency – was the Chinese MMO *ZT Online*. Launching in 2007, *ZT* followed the “free to play” (alternatively known as F2P) model, charging no subscription fees like its peers. Also unlike *World of Warcraft* and other contemporaries, *ZT* offered no loot drops from defeating foes or opening chests in dungeons. In order to obtain stronger gear, players needed to either purchase materials from the in-game shop and then craft them, or “gamble” by opening locked chests and keys costing 1 yuan. Chests could contain high-class gear, but purportedly almost always granted common items. There are no recorded grant rates, but one player’s experience suggests that the chance to obtain a rare item from each chest was no more than 1.5%.³⁴ Models such as these would seem to be inspired by similar motivations as those possessed by the typical MMO developer (i.e. supporting content development and mitigating the costs of continuing to host the game’s servers) with added benefits. Eliminating the entry cost logically results in a greater amount of players being willing to initially try the game, while incorporating additional elements of chance to a player’s success could be intended to extend the time each player spends engaged with the game. Moreover, players that spend a significant (or even a moderate) amount on these chance-based mechanisms help support the game for the players who choose not to spend at all, while the free players contribute to the community by perpetuating discussion, providing data/feedback for game, and generating fan content, creating a symbiotic environment.

But soon game developers saw fit to merge the old and the new. Mobile devices provided an accessible platform by offering lower development costs than PC and console gaming

exist. See Benjamin Burns, “Back from the dead: The people keeping old MMOs alive” *gamesindustry.biz* (2 November 2018), online: <gamesindustry.biz>.

³⁴ Joel Martinsen, “Gamble your life away in ZT Online” *Danwei* (26 December 2007), online: <danwei.org>.

counterparts, and early mobile games were often either purchasable for a small amount of money or allowed players to unlock more of the game or surpass a daily amount of allotted “plays” via a nominal purchase.³⁵ Most of these games soon moved to a free to play model like *ZT Online* employed, deriving sole financial support from microtransactions and advertisements as opposed to being flat-fee purchasable or employing a hybrid model. Using the traditional characteristics of Gachapon and the trading cards that came before, however, enterprising developers further developed new mechanisms to entice and excite players.

Named after its real-life counterpart, a “Gacha” game tends to follow the free to play model. However, instead of incentivising players to spend money to continue playing the game, they have the concept of the microtransaction dictate how the game is played. Players exchange in-game currency – which can be gained from completing game objectives or buying it with real-life money – to obtain a random selection from a “pool” that can be composed of gear, characters, and/or purely aesthetic skins. These rewards often have differing statistical attributes and abilities tied to a rarity (usually denoted by a “star rating”), with higher rarity rewards usually being the strongest, most efficient in-game options. Naturally, higher rarity rewards are correspondingly less likely to be granted to the player, sometimes having an overall grant rate percentage of less than 1% – with the chance of obtaining a specific reward of a certain rarity being much lower, as this 1% chance is shared with other rewards in the rarity pool. These rewards can then be used in single-player content; though once this content is completed, players often turn their attention to player versus player (PVP) modes where they battle against other players instead. The similarities to Gachapon are striking, but there is perhaps a greater parallel to be drawn to the trading card model, especially because higher

³⁵ See *Candy Crush Saga*, *Cut the Rope*, *Angry Birds*, etc.

rarity characters are often the best available in-game options. Many players also attempt to obtain certain characters because of favoritism and/or prestige, much like how competitive card game players seek rarer cards for the status it grants them among their peers.

The basic conceit of Gachapon and trading cards is not the only incentive mechanism Gacha games borrow – they also incorporate the concept of limited runs. Although some Gacha games have permanently available opportunities to obtain a reward from prize pools (known to players as banners) that players may “pull” from using their currency whenever they wish, many more follow an exclusive limited-time banner model. Much like traditional Gachapon and trading card sets, these limited banners typically feature new rewards as well as the pre-existing general prize pool. There is sometimes no guarantee that the featured rewards will enter the general prize pool of future banners or that the banner will be re-run, encouraging players to sink their currency into a banner they find to be particularly appealing.

As Gacha games continued to develop, they were able to institute complex chance mechanisms that would be practically infeasible for physical Gachapon. Many Gacha games offer time limited “rate ups” which offer an overall increased chance to pull a max rarity reward or an increased probability of pulling a specific reward, further building on the concept of the limited run model. Others offer a “pity” system, which increases the chance of a player pulling a higher rarity reward the more they continue to invest in a banner – which “breaks” and is reset when the player finally pulls a reward of higher rarity. Often, the pity probability increase is negligent unless the player invests a significant amount into any given banner, and in most games, pity does not carry over to new banners. If the player does not continue to pull one banner until the pity is broken, the pity is reset and begins anew.

Representation of the Pity System in Fire Emblem Heroes			
Amount of Characters Obtained	Added Pity (Cumulative)	Total Chance to Pull a Max Rarity Reward ³⁶	Currency Spent ³⁷
0	0%	6.0%	0
5	0.5%	7.0%	20-25
10	1.0%	8.0%	40-50
15	1.5%	9.0%	60-75
20	2.0%	10.0%	80-100
25	2.5%	11.0%	100-125

Decidedly unlike Gachapon, though, Gacha games most often feature a static pool of rewards that slowly gains new additions through limited banners which has the further effect of pool dilution. As the game continues to add new rewards to its prize pool, the chance of receiving a

³⁶ This represents a compounded base chance – 3.0% for max rarity characters featured on the given banner (i.e. “focus” characters) + pity & a 3.0% chance for characters in the general max rarity pool + pity (for a formula of $(3\% + \text{pity}) + (3\% + \text{pity}) = \text{total chance to pull a max rarity reward}$) – but for illustrative purposes has been simplified.

³⁷ Fire Emblem Heroes allows players to pull up to five characters in each “session”, with the base cost of a single character pull being 5 currency. It also, however, reduces the amount of currency needed to pull each character if the player continues to pull in the same session (with a progression of 5 currency > 4 currency > 4 currency > 3 currency for a total of 20). As characters are split into different colour classes and sessions randomly generate a selection of colour classes that the player can see before they pull, they may choose to exit a session without pulling all 5 characters if they do not want to waste currency pulling characters of a colour class they do not desire. In this case, the cost of pulling a single character resets to 5 in the next summon session, and follows the same progression – therefore making the currency cost vary.

specific individual reward is reduced – assuming each has an equal chance to be granted.³⁸

Alternatively, some games have each reward possess its own grant percentage within its rarity pool, making certain rewards much more rare than others.³⁹ Regardless, both systems further incentivize players to take advantage of certain banners or rate-ups, as they increase the chance of receiving a specific reward.

Other Gacha games – including the game said to have pioneered the genre in 2010, *Dragon Collection*⁴⁰ – have the opportunity to pull for rewards almost exclusively earned through in-game actions, but instead of having the reward generate instantly, it instead is assigned a timer once the player activates it. The player may then choose to skip the real-world waiting period with another item (or a microtransaction if they do not currently have any). Although the Gacha mechanic is prevalent in many top-grossing mobile games, some games of this timer genre in actuality only charge a real-life fee for such conveniences or purely aesthetic skins.⁴¹ These are regarded by players as “F2P friendly” Gacha, though on average they do tend to trend less profit than their less “generous” counterparts.⁴² The model as a whole, though, when combined with the more typical microtransaction, has proven to be tremendously profitable; having arguably resulted in mobile games seizing a majority market share of global video game revenue in 2019.

³⁸ See *Fire Emblem Heroes*, *Fate/ Grand Order*, *Azur Lane*, *Pokemon Masters*, *Mario Kart Tour*, *Puzzles and Dragons*, and *Arknights*.

³⁹ See *Girls Frontline*, *Dragon Ball Legends*, and *Overhit*.

⁴⁰ Luke Winkie, “The History of Gacha in Video Games” *The Medium* (29 June 2018), online: <medium.com>.

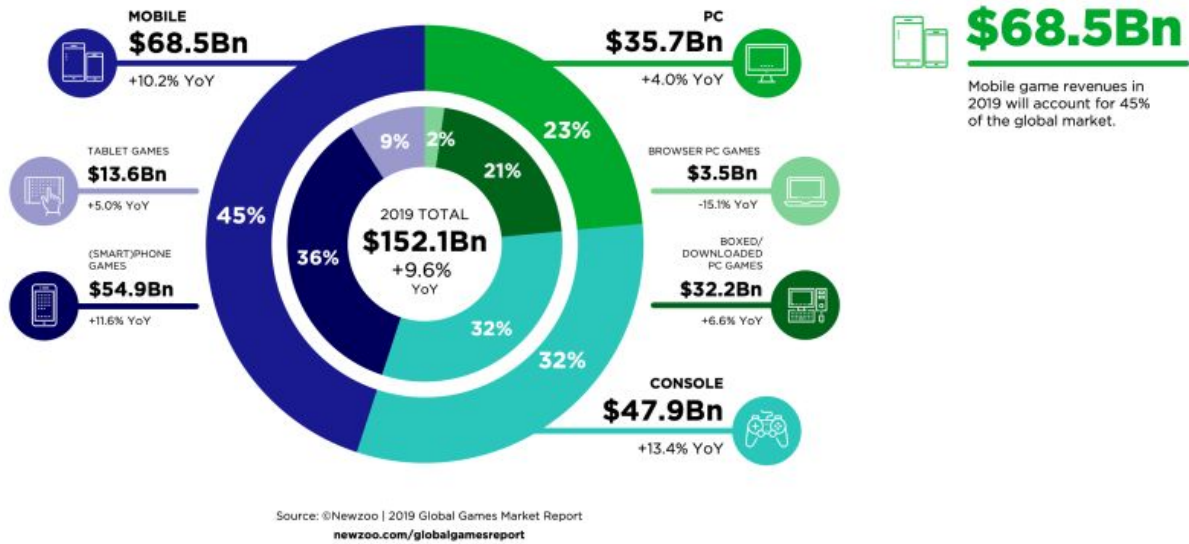
⁴¹ See *Girls Frontline* and *Azur Lane*.

⁴² See *Azur Lane* compared to other comparable games in revenue rankings via David Teraoka, “Top 20 Anime Mobile Gacha Games of Q1 2019 in Japan and US” *Gamepress* (22 June 2019), online: <gamepress.gg>.



2019 GLOBAL GAMES MARKET

PER DEVICE & SEGMENT WITH YEAR-ON-YEAR GROWTH RATES



A graph showing total revenue of the global video game market via newzoo.com.

PC and Console Games Go Gacha

Following the lead of their mobile contemporaries, PC games soon saw the benefits of instituting similar chance-based systems. The First Person Shooter (FPS) *Team Fortress 2* – previously purchasable on PC for about \$20 – switched to the free to play model as of late 2010, generating income by offering players the option to unlock crates obtainable in-game with keys purchasable for a nominal fee. These crates contained aesthetic hats and items that affected the 8 playable character classes depending on their rarity; and max rarity “unusual” hats had extra elements of chance inherent in them since their particle effects were

randomized.⁴³ Because the majority of *TF2*'s appeal revolved around matches played with real-life opponents, there was quantifiable reason for players to engage with these mechanics; hats that had certain thematic combinations were an elusive and exclusive status symbol, and certain weapons naturally had advantages over others.

Perhaps the most notable aspect to the *TF2* trade system, however, was how items quickly had a real-world value ascribed to them. Although *TF2*'s in-game economy did not at first allow for the trade of real-life money between players in exchange for items, a complex economy soon formed (instead using farmable currency called metal, the keys purchasable directly from the game developer for about \$2.50, and certain exclusive items that were only available in limited runs)⁴⁴, and the hat aftermarket became an open secret. Backpack.tf currently charts the value of *TF2* items across its database on a variety of platforms⁴⁵, including *TF2* developer Valve's Steam Community Marketplace.⁴⁶ There were compelling motivations for Valve to support the player-made economy – profits from the game were said to have increased by “a factor of twelve”⁴⁷ and the player base grew fivefold⁴⁸ once *TF2* went free to play. Perhaps because of this significant growth, Valve soon instituted a similar model in *Counter-Strike: Global Offensive* – this time allowing players to purchase on the Steam Community Marketplace purely aesthetic gun skins obtained through randomized crates from the game's launch.⁴⁹

⁴³ Patrick Hancock, “A beginner's guide to the Team Fortress 2 economy” *Destructoid* (1 July 2012), online: <destructoid.com>.

⁴⁴ Yanis Varoufakis, “Arbitrage And Equilibrium In The Team Fortress 2 Economy” (22 June 2012), online (blog): *Valve Economics* <blogs.valvesoftware.com/economics>.

⁴⁵ See <backpack.tf/stats/Strange/Australium%20Force-A-Nature/Tradable/Craftable> for an example.

⁴⁶ See The Steam Community Market. It should be noted that hats and other items were originally not directly purchasable with real money via the in-game Mannconomy, but have since been added to the community market along with items from other games offered on the Steam platform.

⁴⁷ Patrick Miller, “GDC 2012: How Valve made Team Fortress 2 free-to-play”, *Gamasutra* (7 March 2102), online: <gamasutra.com>.

⁴⁸ Tom Senior, “Team Fortress 2 free-to-play shift increased player base “by a factor of five” says Newell”, *PC Gamer* (24 October 2011), online: <pcgamer.com>.

⁴⁹ Steven T Wright, “The evolution of loot boxes”, *PC Gamer* (8 December 2017), online: <pcgamer.com>.

Console games on systems such as the Xbox 360 and Playstation 3 took a slightly different, though not dissimilar, approach to monetization. Instead of having players outfit their in-game characters with new weapons and cosmetic effects in multiplayer and online play, *UEFA Champions League 2006-2007* instead had players have to assemble a virtual team of soccer stars using in-game cards, combining aspects of both sports card collecting and collectable card games. Cards could be obtained from the single-player campaign as drops – much like the MMOs of the time and traditional RPGs – or players could speed up the process by purchasing virtual card packs for cash from the in-game shop. Game publisher Electronic Arts (EA) soon instituted this system in their own sports games including the *FIFA* and *Madden* series, with similar systems soon being instituted in *Mass Effect 3* and *Dead Space 3* to mixed reception.⁵⁰ Many players expressed frustration that additional money was all but required to rank decently on online leaderboards when, unlike free to play games, players had already paid \$50 to \$60 for the game. Others saw the card pack mechanics as an interesting reward for casual play, either not ascribing importance to being successful in online multiplayer or simply avoiding modes where the card packs had an effect. After all, these games had considerably robust single-player campaigns that could sometimes last upwards of 30 hours; the multiplayer modes, for some, were nothing more than an added bonus.

Blizzard's hit multiplayer shooter, *Overwatch*, was arguably the PC/Console game that proved these chance-based model had real promise on PC and consoles. Although in-game skins (obtained from lootboxes that can be purchased for real money) are purely cosmetic, in 2017 Blizzard reported to have earned \$1 billion in overall revenue from the franchise – though given

⁵⁰ *Supra* note 48.

Overwatch had 30 million active players at the time⁵¹ and the game itself cost \$40 at least, it is unlikely that this number solely came from lootbox sales. Regardless, the game's popularity is significant enough to be notable among its peers, even if it is unclear if that popularity is due to lootbox mechanics or if lootbox mechanics are an incidental effect of its popularity.

The Players Strike Back: Star Wars Battlefront II Controversy (2017)

As quite possibly the event that sparked much of the contemporary rhetoric surrounding lootbox mechanics, this controversy certainly represents a tipping point of public's perception of them.

EA's *Star Wars Battlefront II* retailed at \$80 and featured lootbox mechanics for use in the game's multiplayer mode, theoretically allowing a player who purchased a significant amount of lootboxes to gain a statistical advantage over those who did not. Certain fan-favourite characters such as Luke Skywalker and Darth Vader were also available for purchase with in-game currency, but the grant rate of that currency was so low and the prices of the characters were so high, it was estimated to take an average of 2395.97 in-game minutes (or approximately 40 hours) to unlock them through conventional gameplay.⁵² Of course, this in-game currency was also granted by lootboxes, so if a player chose to buy them, they could significantly cut down on the grind. An EA employee commented on the negative reception in a thread on Reddit, citing that the system was intended to grant players a "sense of pride and accomplishment" from unlocking content.⁵³ The resulting backlash was nigh-instantaneous, with

⁵¹ Jeff Grubb, "With \$1 billion in revenue, Overwatch is Blizzard's fastest-growing franchise", *VentureBeat* (4 May 2017), online: <venturebeat.com>.

⁵² TheHotterPotato, "It Takes 40 hours to Unlock a Hero. Spreadsheet and Galactic Assault Statistics" (13 November 2017), online: *Reddit* <reddit.com/r/StarWarsBattlefront>.

⁵³ EACommunityTeam, "The intent is to provide players with a sense of pride and accomplishment for unlocking different heroes." (13 November 2017), posted on *Seriously? I paid 80\$ to have Vader locked?*, online: *Reddit* <reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/>.

the comment becoming the most downvoted content in the history of Reddit within 24 hours.⁵⁴

Multiple mainstream news outlets picked up the story and momentum only grew; only three days later the Belgium Gaming Commission announced they would be investigating lootboxes specifically in *Battlefront II* and *Overwatch*.⁵⁵ Hours before *Battlefront II*'s official launch, EA removed the ability of players to spend money on lootboxes, although not the lootboxes themselves. The damage, however, was already done – having caught the attention of not only Belgium but also Hawaiian State Representatives Chris Lee and Sean Quinlan. Lee commented on Twitter that *Battlefront II* was essentially "... a Star-Wars themed online casino designed to lure kids into an addictive cycle of spending money gambling for upgrades."⁵⁶ Four bills were later proposed to regulate lootboxes in the state, but ultimately failed to pass.⁵⁷

Among the general public, this act of what must have seemed like outright greed may have seemed shocking, but for members of the gaming community, this likely did not come as a surprise. EA is well-known among the group for its anti-consumer business practices, ranging from having a game purchased for full price featuring predominantly single-player gameplay to require an internet connection at all times to prevent piracy⁵⁸ to inserting a clause in their game distribution platform's User Agreement that necessitated players logging in every two years to prevent their account being deleted and their purchases lost.⁵⁹ Combined with their consistent

⁵⁴ Jason Schreier, "EA Defense Of Star Wars Battlefront II Becomes Most Downvoted Reddit Comment Ever", *Kotaku* (13 November 2017), online: <kotaku.com>.

⁵⁵ Luke Plunkett, "Battlefront & Overwatch's Loot Boxes Under Investigation In Belgium", *Kotaku* (15 November 2017), online: <kotaku.com>.

⁵⁶ Chris Lee, "This game is basically a Star-Wars themed online casino designed to lure kids into an addictive cycle of spending money gambling for upgrades. It's a Trap." (21 November 2017 at 22:06), online: *Twitter* <twitter.com/chrisleehawaii/status/933169794739716096>.

⁵⁷ Michael Brestovansky, "'Loot box' bills fail to advance", *The Hawaii Tribune Herald* (24 March 2018), online: <hawaii-tribune-herald.com>.

⁵⁸ Frederic Lardinois, "EA Apologizes For SimCity Disaster, Says It Was "Dumb" And Offers Free Game To Players", *TechCrunch* (9 March 2013), online: <techcrunch.com>.

⁵⁹ Will Usher, "Why People Hate EA? Ten Simple Reasons", *Cinemablend* (2012), online: <cinemablend.com/games>.

and aggressive use of “day one” downloadable content – which often has resulted in players being made to feel they purchased an incomplete game – it follows that EA was even voted to the “The Worst Company in America “ multiple times throughout the 2010s on the *Consumerist* blog.⁶⁰ As Jim Sterling of the *Escapist* magazine commented in 2012, while EA often did not pioneer these practices, they certainly perfected using them in new and nefarious ways.⁶¹ This does seem to imply that perhaps EA’s practices specifically are an exception, not the rule – though that has not stopped the introduction of bills meant to regulate lootboxes and inquiries conducted in response to EA’s actions.

Alternative Regulation: North America

Before examining formal legislation on lootboxes, it is important to note that many of the video game industry’s attempts to right what was seen by legislators as moral wrongs has resulted in voluntary controls that the video game industry still complies with today, with one example of these schemes being the Electronic Software Ratings Board (ESRB). Following by the 1992 congressional hearings that had games such as *Night Trap* and *Mortal Combat* be subject to criticism for the violence and sexual themes they purportedly portrayed⁶², video game creator, publisher, and console manufacturer SEGA (whose console these games appeared on) instituted its own software rating system. This system did not meet the standards set out by the presiding senators, however, and the industry as a whole was threatened with government intervention absent of self-regulation. By 1994, the ESRB was formed, an initiative founded by trade members in the Interactive Digital Software Association (now known as the Entertainment

⁶⁰ Eddie Makuch, “EA Exec Responds to “Worst Company in America” Controversy, Admits It Made Mistakes”, *Gamespot* (31 August 2016), online: <gamespot.com>.

⁶¹ Jim Sterling, “Why Do People Hate EA?”, *The Escapist* (18 June 2012), online: <escapistmagazine.com>.

⁶² NeoGamer Video Game Archive, “Violence In Video Games - Highlights of the American Senate Committee Hearings in 1993” (21 April 2019) at 00h:01m:11s and 00h:03m:10s, online (video): *Youtube* <www.youtube.com>.

Software Association). As a collaboration of the industry's top publishers, the ESRB sought to classify every game on the market into 5 categories: Early Childhood, Kids to Adults, Teen, Mature, and Adults Only. Although compliance was not mandatory, major console manufacturers such as Nintendo, Sony, and later Microsoft would not authorize the sale of unrated games on their consoles. Furthermore, retail outlets generally would not carry unrated games, meaning that not obtaining an ESRB rating was, at the time, somewhat of a death sentence.⁶³ Other jurisdictions soon followed, with European publishers establishing the Pan European Game Information (PEGI) board and Japanese publishers founding the Computer Entertainment Rating Organization (CERO). With the rise of digital game distribution platforms such as Steam which allow for games to go unrated⁶⁴, however, the ESRB and its peers perhaps no longer have the iron-clad control over the industry that they once possessed. This does not mean, however, that other self-regulation measures have not been instituted. While major mobile platforms such as the Google Play Store require ESRB ratings on games, the Apple App Store and Amazon App Store instituted their own internal ratings systems that are sometimes even stricter than ESRB guidelines.⁶⁵ Notably, in 2017 the Apple App Store created a requirement for games featuring lootbox mechanics to disclose the odds of receiving rewards of a certain rarity; a requirement that even the ESRB lacks.⁶⁶ The Google Play Store followed suit in 2019⁶⁷, and major console manufacturers Nintendo, Sony, and Microsoft also recently

⁶³ Michelle Deco, "A Brief History of the ESRB" (10 September 2017), online (blog): *Gamasutra* <gamasutra.com/blogs/MichelleDeco/20171009/307222/A_Brief_History_of_the_ESRB.php>. See also ESRB, "Frequently Asked Questions" (2019), online: *ESRB* <esrb.org/faqs/#do-video-game-retailers-support-and-enforce-the-esrb-rating-system>.

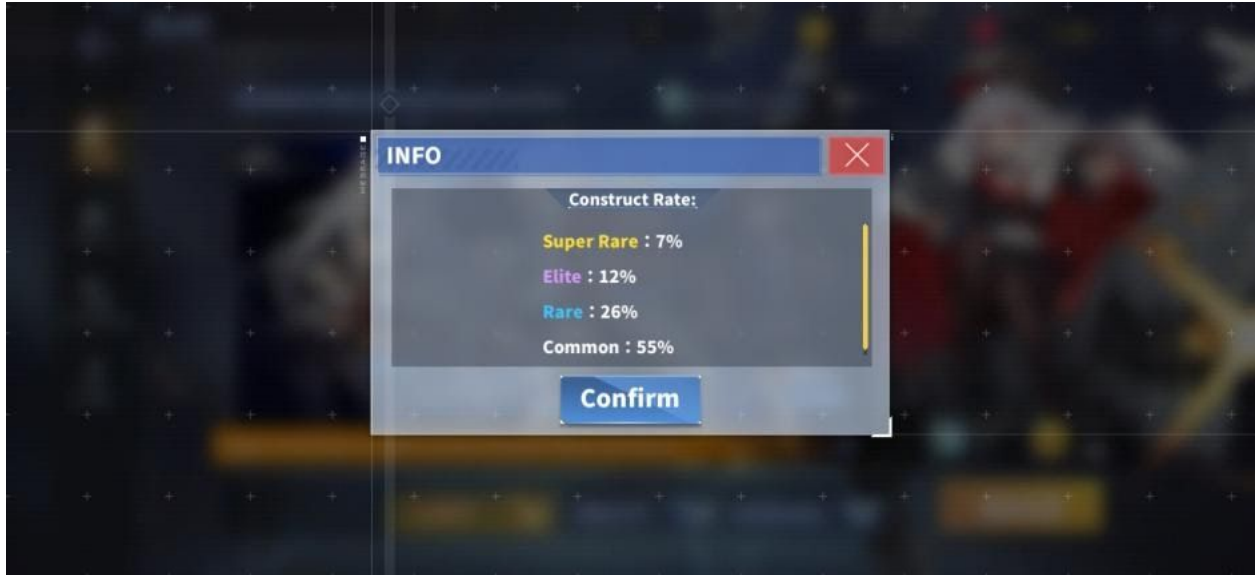
⁶⁴ Instead allowing for the Steam community to "tag" games with associated banners, which can range from "great soundtrack" to "violent" or "sexual content".

⁶⁵ Stephanie Chan, "ESRB: Devs will still get free ratings for digital games after Short Form phase-out" *VentureBeat* (17 May 2018), online: <venturebeat.com>.

⁶⁶ Chaim Gartenberg, "Apple now requires games with loot boxes to disclose odds" *The Verge* (21 December 2017), online: <theverge.com>.

⁶⁷ Adi Robertson, "Google's Play Store starts requiring games with loot boxes to disclose their odds" *The Verge* (29 May 2019), online: <theverge.com>.

announced they would be instituting odds disclosure requirements beginning in 2020 in the wake of an FTC workshop on Lootboxes⁶⁸. Countries such as China have even adopted this model in a legislative approach by making odds disclosure required by law.⁶⁹



An example of odds disclosure as instituted in the Gacha game Azur Lane.

The ESRB has also directly addressed the issue of lootboxes. When asked for a statement regarding the issue by the video game journalism site *Kotaku*, the ESRB unequivocally declassified lootboxes as gambling mechanics. “(The) ESRB does not consider loot boxes to be gambling,” said an ESRB spokesperson. “While there’s an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don’t want). We think of it as a similar principle to collectible card games: Sometimes you’ll open a pack and get a brand new holographic card

⁶⁸ Kyle Orland, “Sony, Microsoft, Nintendo team up to force loot box odds disclosures”, *Ars Technica* (8 July 2019), online: <arstechnica.com>.

⁶⁹ Tracey Tang, “China: A Middle-Ground Approach: How China Regulates Loot Boxes And Gambling Features In Online Games”, *Mondaq China* (16 May 2018), online: <mondaq.com/china>.

you've had your eye on for a while. But other times you'll end up with a pack of cards you already have." They also noted that the ESRB requires games that contain in-game purchases to self-identify via a descriptor of "interactive elements"; a catch-all label for games containing lootboxes among other features such as downloadable content and online play.⁷⁰

Alternatively, some game publishers have taken a more proactive approach. Launching in 2017, Epic Games' shooter *Fortnite* has swept the market, becoming ubiquitous among children and teens. There were reportedly 250 million unique *Fortnite* players in May 2019, with 53% of those players being between the ages of 10-25 playing for a median of 6-10 hours weekly. In July 2018, 148 million cumulative hours of *Fortnite* replays and streams were viewed on Twitch, a premier video game streaming platform, and the July 2019 Fortnite World Cup had concurrent viewership peak at 2.3 million viewers. There is little doubt that *Fortnite* is a leading market force among younger demographics, which is only further supported by the fact that *Fortnite* earned \$2.4 billion in revenue in 2018 despite the game being free to play. So how does *Fortnite* turn a profit? The answer is multifaceted, and incorporates many models that have previously been discussed in this analysis; aesthetic skins purchasable for flat fees like free to play/F2P-friendly Gacha games, a subscription service like MMOs, and, of course, lootboxes deemed "llamas".⁷¹ But by January 2019, Epic made a fundamental change to purchasable llamas by allowing players to be able to see before purchase what items were within them. Would-be purchasers could then choose whether to wait until the next day to allow a llama (perhaps now more

⁷⁰ Jason Schreier, "ESRB Says It Doesn't See 'Loot Boxes' As Gambling" *Kotaku* (10 November 2017), online: <kotaku.com>. See also Patricia E Vance, "What Parents Need to Know About Loot Boxes (and Other In-Game Purchases)" (24 July 2018), online (blog): *ESRB Blog* <esrb.org/blog/what-parents-need-to-know-about-loot-boxes-and-other-in-game-purchases/>.

⁷¹ Albeit only available for purchase with real-life cash in *Fortnite*'s "Save the World" single-player mode, which is significantly less popular than the online multiplayer "Battle Royale" mode. See Chis Carter, "Fortnite loot box and Battle Pass beginner's guide" *Polygon* (26 March 2018), online: <polygon.com>.

accurately categorized as a daily bundle) to “refresh” its contents, or to buy the llama as-is.⁷² The change perhaps came too little too late – on February 28th, 2019 a class action suit was filed against Epic, alleging that the company “...has perfected a predatory scheme whereby it exploits players, including minors, by inducing them to purchase in-game loot boxes in the pursuit of the best in-game item schematics, heroes, and survivors (collectively, “loot”).”⁷³ As of September 2019, Epic’s attempts to bring the case to arbitration were unsuccessful, though the company has brought a motion to dismiss.⁷⁴ The trend seems to be catching, though, and many other publishers have followed Epic’s lead by either modifying their lootbox mechanics to mitigate their elements of chance or removing lootboxes from their games entirely; *Rocket League*, *Middle-Earth: Shadow of War*, and most recently Activision’s *Call of Duty: Modern Warfare* series have all elected to discard lootbox mechanics in favour of alternative revenue models.⁷⁵

Alternative Regulation: Japan

Perhaps the most apparent and dramatic example of industry self-regulation of lootbox mechanics can be found in Japan, where actual legislative controls are loose but industry pressures are a powerful, restrictive force. Circa 2011-2012, “Kompu Gacha” (Complete Gacha) had players pulling to complete a set of items or characters in order to receive a “grand prize”, but when combined with the limited-time availability of these item sets, Kompu Gacha was deemed by the Japanese Consumer Affairs Agency to encourage the “gambling spirit”. As of May 2012, Gacha games in general were purportedly being considered by the government as

⁷² Zack Zwiezen, “Loot Boxes Are Changing In Fortnite Save The World” *Kotaku* (26 January 2019), online: <kotaku.com>.

⁷³ Makena Kelly, “Epic Games sued over ‘predatory’ Llama loot boxes” *The Verge* (28 February 2019), online: <theverge.com>>

⁷⁴ *RA v Epic Games Inc* (31 July 2019) North Carolina 2:19-CV-01488 (US Dis Ct).

⁷⁵ Kyle Orland, “So long, supply drops: Call of Duty gets rid of randomized loot boxes” *Ars Technica* (17 October 2019), online: <arstechnica.com>.

being a possible area for regulation.⁷⁶ Before the legislature could intervene, however, a group of 6 major Japanese game developers, publishers, and hosting platforms formed their own council and announced that Kompu Gacha mechanics would no longer be allowed either in their games or in games offered through their distribution channels.⁷⁷ Other regulatory measures introduced included the odds disclosure for certain rarity rewards⁷⁸ – a feature that would later become a nigh-universal staple among Gacha games created by Japanese developers.



An illustration on how Kompu Gacha would grant players a Grand Prize via Dr. Serkan Toto for serkantoto.com.

⁷⁶ Rick Martin, "Japan's Consumer Affairs Agency Deems 'Kompu Gacha' Sales a Violation of Law" *Tech in Asia* (7 May 2012), online: <techniasia.com>.

⁷⁷ Dr. Serkan Toto, "Kompu Gacha" Social Game Mechanic Is History, Here's How It All Went Down" (9 May 2012) online (blog): *KantanGames* <serkantoto.com/2012/05/09/kompu-gacha-dena-gree-history/>.

⁷⁸ Dr. Serkan Toto, "Japan's Social Gaming Industry Announces New Set Of Self-regulatory Measures" (27 June 2012) online (blog): *KantanGames* <serkantoto.com/2012/06/27/social-gaming-japan-self-regulation/>.

Other methods of spending controls that the Japanese Gacha game industry seems to be experimenting with involves “box” gacha. This system essentially places prizes of varying rarities in set amounts within a virtual box, and players can then choose to pull a random prize from the box. The difference between box gachas and traditional lootboxes is that in box gacha, receiving a prize depletes the prize pool, therefore raising the chances of receiving a desired reward the more the player pulls from the box.⁷⁹ Furthermore, box Gacha creates a hard cap of expenditure that is required to receive a certain reward, as the theoretical worst case scenario (i.e. the player is unlucky, and the prize the player is seeking is the last reward left in the box) has a clear limit. Regular gacha has no such guarantees, and therefore does not pose any sort of spending cap for a specific prize.

Current Legislation: An International Perspective

While outright bans of lootboxes have so far proven rare, the mechanic has garnered worldwide attention from legislators and prominent members of the industry alike. While the actual implementation of proposed bills regulating lootboxes seems to be limited, it is evident that there is some standing for the consideration of regulation.

United States

The timeline for attempted lootbox regulation in the United States spans from 2017 to present. As previously mentioned, in 2017 Hawaiian State Representatives Chris Lee and Sean Quinlan introduced four bills to regulate lootboxes in Hawaii that failed to pass; House Bill 2686 and Senate Bill 3024, as well as House Bill 2727 and Senate Bill 3025.

⁷⁹ Dr. Serkan Toto, “Box Gacha: Gree And Dena Found A Replacement For Kompu Gacha” (1 November 2012) online (blog): *KantanGames* <serkantoto.com/2012/11/01/kompu-gacha-package-box-gacha/>.

House Bill 2686 and Senate Bill 3024 identically cited the key issues of lootbox mechanics being “predatory mechanisms designed to exploit human psychology to compel players to keep spending money in the same way that casino games are so designed...” and aftermarkets essentially allowing players to “cash out their winnings”. The bills therefore proposed that *Chapter 481B* of the *Hawaii Revised Statutes* be amended to prohibit the sale of video games containing “a system of further purchasing... randomized rewards” to people under the age of 21. A cursory reading of this bill reveals a deficiency – it does not account for games that are not “sold” on account of being free to play. House Bill 2727 and Senate Bill 3025 alternatively proposed amendments to *Chapter 481B* of the *Hawaii Revised Statutes* that require full odds disclosure of lootbox mechanics to be verified by the Department of Commerce and Consumer Affairs (§481B-A), as well as stringent labelling controls for games that feature “systems of further purchasing randomized rewards” (§481B-B), but they also became inactive.

In January 2018, three Washington state Senators brought Senate Bill 6266. The bill sought to compel the study of lootbox and lootbox-type mechanics in video games by the Washington State Gambling Commission before December 1 of that year. The bill was no longer eligible for consideration as of February 22.⁸⁰ Soon following was Assembly Bill 2194, brought in February 2018 by Assembly Member Dr. Bill Quirk. The bill sought to compel game manufacturers selling a game that contained microtransactions in the state of California to disclose the inclusion of microtransactions on the box via warning label, with civil penalties of up to \$1000 for each instance of non-compliance. Once again, this bill did not account for the free to play games that

⁸⁰ US, SB 6266, *An Act relating to loot boxes and similar types of mechanisms in 2 online games and apps; creating a new section; and providing an expiration date*, 2017-18, Was, 2018.

arguably are much more likely to contain microtransactions compared to their paid counterparts – but regardless, the bill became inactive and failed to progress.⁸¹

In April 2018, the Minnesota House of Representatives introduced House Bill 4460 and the companion Senate Bill 4042, seeking to ban the sale of video games featuring lootbox mechanics to children under 18 years of age and apply stringent warning label requirements.⁸² 4460 was referred to the Commerce and Regulatory Reform Committee (which does not seem to have convened since May 2018⁸³) while 4042 was referred to the Commerce and Consumer Protection Finance and Policy Committee and has not yet been actioned on.⁸⁴ In February 2019 a nigh-identical version of these bills, House Bill 1767, was introduced, and it too was introduced to the Commerce Committee and has seen no action since.⁸⁵

The next notable development was in May 2019, when Senator Josh Hawley introduced Senate Bill 1629. The Bill proposed that no “minor-oriented games featuring that includes pay-to-win microtransactions or loot boxes” should be allowed to be published or distributed, provided civil remedy for non-compliance, and orders a study to be conducted on pay-to-win microtransactions and lootboxes within 2 years of the bill coming into effect. Presently, 1629 has been referred to the Committee on Commerce, Science, and Transportation.⁸⁶

⁸¹ US, AB 2194, *An act to add Chapter 6.8 (commencing with Section 20660) to Division 8 of the Business and Professions Code, relating to video games* 2017-18, Cal, 2018.

⁸² US, HF 4460, *A bill for an act relating to consumer protection; video games; prohibiting certain sales; proposing coding for new law in Minnesota Statutes, chapter 325I*, 2017-18, Min, 2018.

⁸³ See <house.leg.state.mn.us/committees/home/90005>.

⁸⁴ See <senate.mn/committees/cmte_bill_index.php?ls=90&cmte_id=1024>.

⁸⁵ US, HF 1767, *A bill for an act relating to consumer protection; prohibiting certain video game sales; proposing coding for new law in Minnesota Statutes, chapter 325I*, 2019-20, Min, 2019.

⁸⁶ US, Bill SB 1629, *A bill to regulate certain pay-to-win microtransactions and sales of loot boxes in interactive digital entertainment products, and for other purposes*, 116th Cong, 2019.

The failure of the vast majority of these proposed bills does imply that while the US legislature does see lootboxes as being a potential subject of regulatory intervention, legally their classification is innocuous. While perhaps at state level some sort of regulation will eventually be passed, on a national level an overall ban or similarly restrictive legislation is unlikely to succeed, and US Jurisprudence also supports this view. In 2015, *Mason v Machine Zone Inc*, a class action was brought against the developer of the free to play microtransaction game *Game of War* over a paid roulette wheel that granted in-game resources. Its judgement stated “(p)erceived unfairness in the operation and outcome of a game, where there are no real-world losses, harms, or injuries, does not and cannot give rise to the award of a private monetary remedy by a real-world court”, also providing that the game’s primary function was that of a game of skill, not of chance.⁸⁷ In 2016, *Soto v Sky Union LLC* reached a similar decision in regards to a class action brought against the developer of *Castle Clash*, a game which features gacha elements. The court also rejected that account resale on the aftermarket constituted as “cashing out” prizes from the gacha, that rolling for a random character with currency purchasable for money equated to ascribing value to each character, and that powerful character constituted something of value under the *California Penal Code*. As stated, “... high quality Heroes and Talents *improve* gameplay... Added enjoyment does not have a measurable worth, and it cannot be a “thing of value” under (California Gambling Prohibitions).”⁸⁸

While some legal news outlets have taken the 2018 decision *Kater v Churchill Downs Inc* to run contrary these rulings⁸⁹, some key factual elements distinguish this case from *Mason* and *Soto*. First, at issue in *Kater* was an online casino, not a “social game” like *Game of War* and *Clash of*

⁸⁷ *Mason V Machine Zone Inc*, 140 F Supp (3d) 457 (MD Dis Ct 2015).

⁸⁸ *Soto et al v Sky Union* (29 January 2016), Illinois 15-C-4768 (IL Dis Ct).

⁸⁹ Eric Ball, Jennifer Lloyd Kelly & Nicholas Plassaras, “In-Game Currency Triggers State Gambling Laws, Rendering Mobile Game “Illegal Gambling”” *Mondaq* (13 April 2018), online: <mondaq.com/unitedstates>.

Clans. The chance elements present in *Kater* were directly that of a physical roulette wheel or slot machine, and the currency in question was virtual chips that only differed from their real-life counterpart by way of being unable to be “cashed out”. Second, these virtual chips were the means of playing the game – which also incorporated no primary elements of skill – not a mechanism incidental to it. It would logically follow, then, that the chips in this situation would be prescribed to hold value, unlike the characters at issue in *Soto*.⁹⁰

Canada

As of time of writing, Canada has been completely silent on the topic of lootbox and microtransaction regulation. However, that does not necessarily mean that there is no possibility of lootbox mechanics being classified as gambling mechanics if challenged.

Under s.206(f) of the *Criminal Code*, gambling encompasses:

“dispos(ing) of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration.”⁹¹

This definition raises similar issues to those explored in American jurisprudence in the case of lootboxes; as the product that is received is solely virtual with no official ascribed monetary value, do they qualify as “goods, wares or merchandise”? Moreover, in the case of lootboxes that are not directly purchased for real funds and are instead obtained through expenditure of in-game currency that is purchased with money, is “valuable consideration” being paid? Although the first question poses considerable ambiguity, the second is presumably less likely

⁹⁰ *Kater v Churchill Downs Inc* 886 F (3d) 784 (9th Cir 2018).

⁹¹ Criminal Code, RSC 1985, c C-46 s.206 (f).

to prove to be persuasive in a game publisher's favour; if in-game currency can be directly be ascribed a monetary value, then it is unlikely that it would be deemed to not fulfill the consideration requirement. This line of reasoning has been supported in early Canadian jurisprudence – in *Computer, Internet, and Commerce Law* by Barry Sookman, he states:

“... although there must be consideration, it has been held that it need not necessarily be given directly for the chance of winning the prize. There is some authority that the element of consideration may be satisfied where there is a purchase of an article or another thing even though no additional consideration is charged for the chance of winning.”⁹²

However, given the relative lack of Canadian jurisprudence in the area of online gambling in general⁹³, it would seem that Canadian legislators and prosecutors do not consider the issue one of great concern, perhaps due to the relatively robust self-directed industry controls already established and in place.

United Kingdom

In the United Kingdom, lootboxes have not formally subject to regulation. Gambling Commission Chief Executive Neil McArthur said in a July 2019 address to Parliament that although lootboxes did include elements of chance, that did not necessarily classify them as gambling implements themselves. “There are other examples of things that look and feel like gambling that legislation tells you are not,” said McArthur, “[such as] some prize competitions but because

⁹² Barry Sookman, *Computer, Internet, and Commerce Law*, 7th ed (Toronto: Carswell, 2019) at chapter 11.6.

⁹³ Sandra Rubin, “Gaming the System”, *Lexpert* (16 May 2016), online: <lexpert.ca>.

they have free play or free entry they are not gambling... but they are a lot like a lottery.” He did, however, note that there was a “serious concern” associated with children playing games that combines elements of real-life purchases and chance, and Gambling Commission Programme Director Brad Enright raised issue with the aftermarket that existed for some prizes obtained from lootboxes. Although these aftermarkets often run contrary to a game’s terms of service, Enright called for greater accountability among game companies in enforcing these terms.⁹⁴

A Parliamentary inquiry, however, strongly disagreed. In a report released in September 2019 titled *Immersive and Addictive Technologies*, the inquiry found testimony from Epic and EA representatives “...lack(ing) of honesty and transparency”⁹⁵, and made three notable suggestions:

- 1) That lootboxes that contain the elements of chance not to be sold to children and instead exclusively be earned through in-game credits,
- 2) That the UK Government compel PEGI to label games with purchasable lootboxes with the already existing “gambling” label and enforce the corresponding age limits associated with this label, and
- 3) That the UK Government should regulate lootboxes as games of chance, or, barring this, clearly explain why lootboxes are not considered games of chance under section 6 of the *Gambling Act, 2005*.⁹⁶

⁹⁴ Zoe Kleinman, “Fifa packs and loot boxes 'not gambling' in UK” *BBC* (22 July 2019), online: <bbc.com>.

⁹⁵ UK, Commons Committee of Culture, Media, and Sport, *Immersive and Addictive Technologies* (Report) Damian Collins et al (London: House of Commons) at section 3.

⁹⁶ *Ibid* at paras 79, 86, 98.

Section 6 of the *Gambling Act* reads:

(1) In this Act “gaming” means playing a game of chance for a prize.

(2) In this Act “game of chance”

(a) includes

(i) a game that involves both an element of chance and an element of skill,

(ii) a game that involves an element of chance that can be eliminated by superlative skill, and

(iii) a game that is presented as involving an element of chance, but

(b) does not include a sport.

(3) For the purposes of this Act a person plays a game of chance if he participates in a game of chance

(a) whether or not there are other participants in the game, and

(b) whether or not a computer generates images or data taken to represent the actions of other participants in the game.

(4) For the purposes of this Act a person plays a game of chance for a prize

(a) if he plays a game of chance and thereby acquires a chance of winning a prize, and

(b) whether or not he risks losing anything at the game.

(5) In this Act “prize” in relation to gaming (except in the context of a gaming machine)

(a) means money or money's worth, and

(b) includes both a prize provided by a person organising gaming and winnings of money staked. (emphasis added)

(6) *The Secretary of State may by regulations provide that a specified activity, or an activity carried on in specified circumstances, is or is not to be treated for the purposes of this*

Act as

(a) a game;

(b) a game of chance;

*(c) a sport.*⁹⁷

Evidently, there is little doubt that lootboxes would fulfill ss.1-4 and 6, but ss.5 is where the legislative language is a great deal more ambiguous. Evidently, lootbox prizes are not money, but are they “money’s worth”? McArthur stated:

“There is quite a lot of case law around what money or money’s worth means, the difference between how you would assess value, the fact that value needs to be *objectively assessed (emphasis added)* rather than in the eye of the beholder, so it is quite a complicated area.”⁹⁸

It was further stated that this presumption was based on the fact that “in-game items have no real-world monetary value outside the games”.⁹⁹ As for the issue of aftermarkets assigning monetary value for the prizes obtained from lootboxes, an EA representative testified that these aftermarkets were not authorized and that they have “24/7 security staff monitoring activity to be sure that people are not engaging in this type of behaviour” – although the report then responded with criticism that EA “... still bans thousands of players a year for violating its rules

⁹⁷ *Gambling Act 2005 (UK)*, s.6.

⁹⁸ *Supra* note 93 at para 88.

⁹⁹ *Ibid* at para 87.

prohibiting people from selling in-game items outside the game”¹⁰⁰, seemingly not understanding that bans are the primary method of enforcing consequences for prohibited behaviour in video games.¹⁰¹ As for the subject of voluntary industry self-regulation, the report noted that while PEGI has instituted similar measures to the ESRB in regards to lootbox mechanics (a generic non-specific label), it has not officially classified lootboxes as gambling. A PEGI representative did raise the possibility that greater controls could be instituted if necessary, stating “(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.”¹⁰²

Methodological Deficiencies of the UK Inquiry

Once again, however, much of the controversy cited by the UK inquiry seems to be localized entirely to EA. Having particularly cited the lootbox mechanics in their *FIFA* series as being particularly problematic, the inquiry noted that *FIFA*’s annual release schedule necessitates players to move on to the newest addition to the series – and therefore leave behind whatever they’ve obtained from lootboxes thus far – every year.¹⁰³ Although gains from lootboxes are often (if not always) non-transferrable to other games in a series, most games that employ the mechanic tend to have a life cycle of at least 2-3 years. *Fate/ Grand Order*, one of the most popular and profitable Japanese Gacha games, launched in Japan in 2015 and has steadily

¹⁰⁰ *Supra* note 93 at para 90.

¹⁰¹ This does raise the question of what the MPs writing this report expected of EA to somehow prevent the activity through monitoring alone, and how they would feasibly expect EA to stop the disallowed activity without any sort of enforcement mechanism. The implication seems to be that the prohibited trading should be halted through monitoring alone, which of course is impossible.

¹⁰² *Supra* note 93 at para 85.

¹⁰³ Sam Machkovech, “UK Parliament: Ban all loot boxes until evidence proves they’re safe for kids” *Ars Technica* (12 September 2019), online: <arstechnica.com>.

been adding new content and characters for no upright charge ever since, even occasionally granting players new characters through events and forgoing Gacha mechanics entirely.¹⁰⁴

The inquiry also failed to make a distinction between full-price retail games that feature lootbox mechanics as an incidental feature to their main product (i.e. the single-player campaign) and free to play games that depend on lootboxes and microtransactions in order to receive any revenue at all. Also largely ignored by the report was lootbox mechanics that have no discernible effect on gameplay, which has little intersection with the examples that the report cited of particularly problematic use of lootbox mechanics. A member of the public told the inquiry about *FIFA*:

“...in order to compete, players feel like they need to buy hundreds, if not thousands, of £s worth of packs in order to get the best players. Children are especially vulnerable because they lack the maturity to understand that these purchases are manipulative, and their parents may not understand that these purchases are entirely unnecessary...”

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In some of the most profitable games with lootbox mechanics, however, prizes obtained from lootboxes have no effect on gameplay at all.¹⁰⁶ The report also takes issue with games intended for young children featuring elements of chance such as roulette wheels, even when there was no option for purchases with real-life money to be made.¹⁰⁷ In making this statement, the inquiry

¹⁰⁴ Rafael Pineda, “Fate/Grand Order RPG's Promo Previews Game Mechanics” *Anime News Network* (31 July 2015), online: <animenewsnetwork.com>.

¹⁰⁵ *Supra* note 93 at para 76.

¹⁰⁶ See *Overwatch* and *Counter-Strike: Global Offensive*.

¹⁰⁷ *Supra* note 93 at para 69.

gave no acknowledgement that elements of chance have been an integral aspect of a vast majority of games marketed to children for decades without issue, providing very little analysis of what and which elements of chance – if any – would be deemed acceptable.¹⁰⁸ Also entirely absent was the discussion of parental controls, which are available on every device that features a game featuring lootboxes from Android and Apple phones to the PS4, Xbox One, and Nintendo Switch. Lootboxes can not be purchased without a linked credit card or other funds, and children obviously are not permitted to have their own credit cards without parental consent. The question of why parents are allowing their children to have full unrestricted access to what essentially must seem like unlimited funds to a child with little concept of money went entirely unanswered, and no attention was dedicated to the facilitation or creation of education and outreach initiatives. A similar question could be raised in reaction to the *Chaset v Fleer/Skybox Limited* suit; is it the responsibility of company providing the lootbox (or trading cards) in question to not include any elements of chance in their marketing, or is it the responsibility of the parent to not spend \$2000 on Pokemon cards for their child, and to teach their child to be an informed consumer?¹⁰⁹ And since *Chaset* implies that there is no issue with the marketing of trading cards under the law, it would seem that similar logic should be applied to lootboxes as well. Given the official established stance of the UK on the legal status of lootboxes, however, it is rather unlikely that there will be significant movement on the issue in the near future.

¹⁰⁸ See *Mario Kart's* item roulette, *Mario Party's* chance time, loot mechanics in various RPGs, etc. The Game Corner in the Pokémon (which contained slot machines that rewarded coins that could be exchanged for special prizes), however, was slowly phased out of the series starting in 2009 due to stricter PEGI guidelines. See Justin Towell, "European Pokemon Platinum's missing Game Corner explained" *GamesRadar* (9 June 2009), online: <gamesradar.com>.

¹⁰⁹ See David Halbfinger, "Suit Claims Pokemon Is Lottery, Not Just Fad", *New York Times* (24 September 1999) B5.

Other Common Law Jurisdictions

New Zealand's Gambling Compliance Office said in a 2017 statement that lootboxes did not constitute gambling under New Zealand law and therefore did not require specific regulation.¹¹⁰

Australia, much like the UK, had the Senate Committee on Environment and Communications conducted an inquiry on lootboxes and raised resulting policy suggestions. The report, titled *Gaming micro-transactions for chance-based items*, called for “comprehensive review” of lootbox mechanics in order to discern their “gambling-related” harms, as well as consideration of if lootboxes constituted as gambling under Australian law and stricter labelling controls.¹¹¹ The Australian government noted these suggestions, but has made no further steps towards implementation.¹¹²

Belgium and the Netherlands

Belgium and the Netherlands have some of the strictest controls on lootboxes, having classified lootbox and lootbox-esque mechanics as “games of chance” making them subject to criminal gambling prohibitions. Sparked by the *Star Wars Battlefront II* controversy, Belgium's Minister of Justice Koen Geens announced in the midst of the fervor that lootboxes should be banned throughout Europe.¹¹³ The Belgium ban was formally announced in April 2018, affecting all games that had “... a game element, a bet (that) can lead to a win or a loss, and (a) chance

¹¹⁰ Katharine Cross, “New Zealand says lootboxes 'do not meet the legal definition for gambling'”, *Gamasutra* (11 December 2017), online: <gamasutra.com>.

¹¹¹ Austl, Commonwealth, Environment and Communications References Committee, *Gaming micro-transactions for chance-based items* (report) by Senator Anthony Chisholm et al (Canberra: Australian Government Publishing Service, 2019).

¹¹² *Ibid.*

¹¹³ Kyle Orland, “Video game loot boxes are now considered criminal gambling in Belgium” *Ars Technica* (25 April 2018), online: <arstechnica.com>.

(that) has a role in the gameplay”¹¹⁴, citing *FIFA*, *Overwatch*, and *Counter-Strike: Global Offensive* as examples. This regulation was subject to caveats, however – changes to the *Star Wars Battlefront II* lootbox system that had lootboxes only being awarded through regular gameplay and being unavailable for purchase with real funds¹¹⁵ meant the mechanic “no longer constitute(d) a game of chance” and therefore did not contravene Belgian law.¹¹⁶ This would seem to imply that the definition of lootboxes as gambling in Belgium seems to primarily turn on their purchasability, but available jurisprudence and analysis in the area is scant. Regardless, these regulations have proven to be significant deterrents to game publishers who seem unsure of if their games would be subject to heavy fines and lengthy prison sentences. Nintendo withdrew operations of their mobile games that featured gacha mechanics, *Fire Emblem Heroes* and *Animal Crossing: Pocket Camp*, from Belgian players. Blizzard removed Belgian player’s access to lootboxes in *Overwatch* and *Heroes of the Storm*, with Activision following suit in *Counter-Strike: Global Offensive*.¹¹⁷ EA attempted to bring a legal challenge against the gaming commission’s decision, but ultimately dropped the suit in January 2019 and further halted sales of in-game currency to purchase lootboxes.¹¹⁸

April 2018 also saw the Netherlands gaming authority conduct a study into lootbox mechanics, coming to the following conclusions:

¹¹⁴ Machine translation. See original: *Is er sprake van een spelelement , kan een inzet leiden tot winst of verlies en heeft toeval een rol in het spelverloop*.

¹¹⁵ Kyle Orland, “Star Wars: Battlefront II’s new update axes “pay-to-win” upgrades” *Ars Technica* (16 March 2018), online: <arstechnica.com>.

¹¹⁶ Koen Geens and the Belgium Gaming Commission, News Release, “Loot boxen in drie videogames in strijd met kansspelwetgeving” (25 April 2018), online: <koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving>.

¹¹⁷ Andy Chalk, “Blizzard removes paid loot boxes from Overwatch and Heroes of the Storm in Belgium” *PC Gamer* (27 August 2018), online: <pcgamer.com>. See also Sarah James, “Rocket League disables Crate Keys in the Netherlands and Belgium”, *PC Gamer* (17 April 2019), online: <pcgamer.com>.

¹¹⁸ Kyle Orland, “Belgian loot box decision takes down some of Nintendo’s mobile games” *Ars Technica* (22 May 2019), online: <arstechnica.com>.

- 1) There is a distinction between lootbox mechanics classified as *gaming* and those classified as *gambling*.
- 2) Lootboxes that granted players content that was non-transferrable were classified as gaming and did not contravene Dutch law.
- 3) Lootboxes that granted players content that was transferable between players was classified as gambling and where therefore subject to Dutch gambling laws and regulations.
 - a) This was also inclusive of any items that could be classified as having “market value”, though the report does not mention if this value was ascribed by unauthorized secondary markets.¹¹⁹

The gaming authority then suggested that developers “disable functionalities that allow items to be converted into money or transferred to other parties (including other players)”, instituting a two month grace period for compliance.¹²⁰ In response, *Rocket League* removed the ability of Dutch players to open lootboxes.¹²¹ Valve also took measures by disabling the Steam Marketplace (which allows players to directly trade items for money) and item trading functionality in the Netherlands.¹²²

¹¹⁹ Netherlands Gaming Authority, *Onderzoek naar loot boxes - Een buit of een last?* (10 April 2018) at page 2.

¹²⁰ Dutch Games Association, “Loot boxes & Netherlands Gaming Authority’s findings” (19 April 2018), online: *Dutch Games Association* <dutchgamesassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings>.

¹²¹ *Supra* note 115.

¹²² Shabana Arif, “The Netherlands Starts Enforcing Its Loot Box Ban” *IGN* (20 June 2018), online: <ca.ign.com>.

Conclusions and Suggestions

Historical analysis of other chance-based mechanics and examination of current legislative initiatives regarding lootboxes reveal a variety of important conclusions. These conclusions can be related to various suggestions for industry in order to ensure best functioning and compliance with current legislative trends.

Formal Legislation Governing Lootbox Regulation is Unlikely in Certain Jurisdictions

In North America, Japan, and New Zealand, the probability of specific regulation regarding lootboxes being passed seems to be low. The approach these jurisdictions have taken towards lootbox mechanics – mainly, comparing lootbox mechanics to existing gambling mechanisms as classified under gambling legislation – has led lawmakers to the conclusion that lootboxes do not constitute gambling under the law. This is especially true of the United States, where previous jurisprudence is likely to be called upon in the process of instituting any lootbox regulation law as support for avoiding formal regulation, and Canada, which has not taken any significant stance on lootboxes or online gambling in general. Historical attitudes towards legislation of indeterminate gambling mechanics (such as pinball) also support this view; the overturning of the pinball ban and the US' long and storied history with chance-based amusements implies that current legislative initiatives are a result of a pointed and centralized cultural zeitgeist. In other words: even in the height of the outrage surrounding lootboxes, most of the prohibitory bills proved unsuccessful. As lootboxes continue to fade from public consciousness, so too will these initiatives likely lose momentum. Industry should continue to address concerns on an as-needed basis and explore alternative revenue models (such as flat-purchase skins, downloadable content, and subscription models) in order to facilitate this process.

The Industry is Likely to Satisfy Legislators through Alternative Regulation

In jurisdictions like the UK and Australia where there is a greater risk of legislative intervention, it is likely that the more stringent voluntary controls by industry will satisfy legislators and render formal regulation unneeded. The trend towards distribution platforms requiring odds disclosure already complies with both UK and Australian report recommendations and contributes towards mitigation of the problematic aspects of lootbox mechanics that these reports cite in-depth. Furthermore, the removal of chance-based grants from lootboxes in games such as *Fortnite* make many of the observations noted in these reports non-issues. In these jurisdictions, game publishers continuing to take a proactive approach (making lootbox purchases aesthetic-only, continuing to dissuade the trading of lootbox purchases for money or disabling trading altogether to avoid the ascribing of real-world value to prizes, etc) will likely make lootboxes less likely to be deemed to need formal regulatory schemes.

Market Trends will Likely Depreciate Lootboxes as a Mechanic

Regardless of trends in specific jurisdictions, market forces are the most likely way lootboxes will be depreciated. Disasters such as the *Star Wars Battlefront II* controversy imply that game purchasers and players have little to no interest in having lootboxes materially affect gameplay in full priced retail games, and major juggernauts in the industry such as the *Call of Duty* series, and Epic's offerings of *Fortnite* and *Rocket League* moving to remove lootboxes imply that the mechanic is no longer worth the profits it generates. In fact, a game lacking lootboxes has become a valuable marketing tool.¹²³ Although this does not account for gacha games that rely

¹²³ Samuel Roberts, "EA's promise of 'no loot boxes' in Jedi: Fallen Order is bold but not a good look" *PC Gamer* (15 April 2019), online: <pcgamer.com>. See also Fraser Brown, "Call of Duty: Modern Warfare art director says no loot box system is in development" *PC Gamer* (14 October 2019), online:

on lootbox mechanics to make any profit at all or other free to play games that rely on lootboxes and microtransactions, developments such as “box gacha” imply that the industry is continually contemplating new ways for players to feel they are receiving their money’s worth, even when they engage with chance-based paid item or character grants. Just as the microtransaction has historically and contemporarily been subject to controversy that later died down as industry controls and public opinion stabilized, lootbox mechanics will likely follow a similar route. Video game publishers should, however, continue to institute spending controls and other mechanisms to promote fairness in order to facilitate this process.

<pcgamer.com> and Fraser Brown, “Need for Speed: Heat will never have loot boxes” *PC Gamer* (16 August 2019), online: <pcgamer.com>.