

Consultation Response – Leon Y. Xiao (lexi@itu.dk)

1. This is a response to the consultation on the draft law for the protection of minors in digital environments.
2. I am an academic researcher of video game law with a focus on the regulation of loot boxes in particular. I have previously responded to two previous Spanish consultations on loot boxes in March 2021¹ and July 2022.² I was also invited to give a presentation on loot boxes in June 2023 before the Consejo Asesor de Juego Responsable.
3. I write with reference only to the draft Article 5 of the law, which intends to prohibit access to loot boxes by under-18s.
4. The issue is that the draft Article 5 will only prohibit so-called ‘Embedded-Embedded’ loot boxes and will not regulate ‘Embedded-Isolated’ loot boxes at all.³
5. Both types of loot boxes (i) are activated by spending real-world money and (ii) are randomised. The only difference is that, with Embedded-Embedded loot boxes, the prizes won from the loot box can be transferred to another player and therefore possess real-world monetary value (because players can trade the items within the game and pay each other real-world money outside of the game to even out any differences in value). The prizes won from Embedded-Isolated loot boxes stay permanently with the user’s account: they *cannot* be traded and so do not have real-world monetary value.

¹ https://drive.google.com/file/d/16PAgbPmsbfSWu4vZphd4aoQfBeS_O2yW/view.

² <https://osf.io/preprints/osf/48yta>.

³ Rune Kristian Lundedal Nielsen and Paweł Grabarczyk, ‘Are Loot Boxes Gambling? Random Reward Mechanisms in Video Games’ (2019) 4 Transactions of the Digital Games Research Association 171; Leon Y Xiao and others, ‘Regulating Gambling-like Video Game Loot Boxes: A Public Health Framework Comparing Industry Self-Regulation, Existing National Legal Approaches, and Other Potential Approaches’ (2022) 9 Current Addiction Reports 163.

6. A representative of the Dirección General de Ordenación del Juego (DGOJ) has confirmed to me on 18 June 2024 by email that the draft Article 5 will indeed only regulate Embedded-Embedded loot boxes.
7. I therefore raise two concerns.
 - 7.1. Firstly, Embedded-Isolated loot boxes should *also* be subject to stricter regulation because they are no less harmful than Embedded-Embedded loot boxes.
 - 7.2. Secondly, the Government must not mislead the public by giving the incorrect impression that Embedded-Isolated loot boxes will also be regulated by the draft law if it passes and / or that the draft law can address the entirety of the loot box problem.

Potential Effect of the Draft Law

8. As only Embedded-Embedded type loot boxes would be regulated, only a few games, such as *Counter-Strike 2* and *EA FC 24* (previously *FIFA*) would be affected. Under-18s would no longer be able to buy loot boxes in those games. *Counter-Strike 2* and *EA FC 24* are very popular, so undoubtedly this would have a big impact on a lot of players of those games.
9. However, importantly, most video games do *not* implement this type of loot box (and instead implement Embedded-Isolated ones). On mobile platforms (iOS and Android), about 80% of the highest-grossing games contain loot boxes, such as *Genshin Impact*, *Brawl Stars*, and so-called social or simulated casino games that allow players to spend money to participate in traditional gambling but do *not* allow them to convert any potential winnings back into real-world money (e.g., *Monopoly Go* and *Big Fish Casino*).⁴ Nearly all of the loot boxes implemented by those mobile games are only Embedded-Isolated ones. This means that all of

⁴ Leon Y Xiao, Laura L Henderson and Philip Newall, 'What Are the Odds? Lower Compliance with Western Loot Box Probability Disclosure Industry Self-Regulation than Chinese Legal Regulation' (2023) 18 PLOS ONE Article e0286681; Leon Y Xiao, 'Breaking Ban: Belgium's Ineffective Gambling Law Regulation of Video Game Loot Boxes' (2023) 9 Collabra: Psychology Article 57641; Leon Y Xiao, 'Failing to Protect the Online Consumer: Poor Compliance with Dutch Loot Box and Video Game Consumer Protection Guidelines' (OSF, 7 May 2024) <<https://osf.io/tmg34>> accessed 13 May 2024.

these games can continue to sell loot boxes to children. They would *not* be affected by the draft law even if it passes.

10. Accordingly, the draft law is only capable of affecting a small minority of video games, which admittedly are some (but certainly still a minority) of the most popular titles. Children will *not* be protected from the potential harms of most video games with loot boxes.

Embedded-Isolated Loot Boxes Should Also Be Regulated

The Distinction Mattered Only for Legal Analysis Applying Gambling Law

11. The technical distinction between Embedded-Embedded and Embedded-Isolated loot boxes has been important for the purposes of previous legal analysis only because Embedded-Embedded loot boxes would already legally constitute gambling under most countries' gambling laws (as the Austrian court has held, for example⁵), but Embedded-Isolated ones do not constitute gambling unless the law is changed (with the exception of Belgium⁶).

The Scientific Literature Generally did not Distinguish the Two Types

12. The distinction matters little in terms of the potential harms of the mechanics in practice. Indeed, nearly all scientific studies did not distinguish between the two. This means that the academic literature that the Government has relied upon to draft this law was almost certainly addressing both Embedded-Embedded and Embedded-Isolated loot boxes together as one single phenomenon.
13. Previous studies assessing the prevalence of loot boxes assessed the prevalence of both types combined and provided no data on the respective prevalence of each type individually.⁷ No data exist as to the prevalence of Embedded-Embedded loot boxes specifically even as of the date of writing.

⁵ Vikki Blake, 'Austrian Court Rules That FIFA's FUT Packs Violate the Country's Gambling Laws' (*Eurogamer*, 5 March 2023) <<https://www.eurogamer.net/austrian-court-rules-that-fifas-fut-packs-violate-the-countrys-gambling-laws>> accessed 8 March 2023.

⁶ Xiao (n 4).

⁷ David Zendle and others, 'The Prevalence of Loot Boxes in Mobile and Desktop Games' (2020) 115 *Addiction* 1768; Xiao, Henderson and Newall (n 4).

14. Indeed, the press release concerning the draft law published by the Ministry of Social Rights, Consumer Affairs and 2030 Agenda referenced the following participation rate: ‘almost 24% of minors between 15 and 17 years old acquired “loot boxes” in the last year.’⁸
15. The ‘loot boxes’ being referred to there are presumably of both types, rather than of the Embedded-Embedded type alone, given previously reported participation rates in other regions (approximately just over 20% amongst under-18s for both types of loot boxes combined).⁹ No data is available as to how many young people bought Embedded-Embedded type loot boxes specifically.
16. The Government is arguably misusing the academic literature: there is no data on how many Spanish minors spent money on Embedded-Embedded loot boxes specifically; the data for both types of loot boxes combined (which is undoubtedly higher than that of only each type individually) cannot be directly used to justify the draft law without providing any caveats.

The Scientific Evidence Suggests the Two Types are NOT Practically Different

17. Further, the positive correlation between loot box spending and problem gambling was observed in relation to both types of loot boxes considered together in nearly all studies.¹⁰ The two published Spanish studies also did not make a distinction between the two types.¹¹

⁸ Ministerio de Derechos Sociales, Consumo y Agenda 2030 [Ministry of Social Rights, Consumer Affairs and 2030 Agenda] (Spain), ‘El Ministerio de Consumo prohíbe el acceso de menores a las “cajas botín” de los videojuegos para evitar conductas adictivas’ (4 June 2024) <<https://www.mdsocialesa2030.gob.es/comunicacion/noticias/derechos-sociales/20240604-consejo-ministros-loot-boxes.htm>> accessed 25 June 2024.

⁹ Department for Communities (Northern Ireland), ‘Experience of Gambling by Young People in Northern Ireland: Findings from the Young Persons’ Behaviour and Attitudes Survey 2022’ (6 December 2023) <<https://datavis.nisra.gov.uk/communities/experience-of-gambling-by-young-people-in-northern-ireland-2022.html>> accessed 28 February 2024.

¹⁰ David Zendle and Paul Cairns, ‘Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey’ (2018) 13 PLOS ONE e0206767.

¹¹ Joaquín González-Cabrera and others, ‘Loot Boxes in Spanish Adolescents and Young Adults: Relationship with Internet Gaming Disorder and Online Gambling Disorder’ (2022) 126 Computers in Human Behavior Article 107012; J González-Cabrera and others, ‘Loot Box Purchases and Their Relationship with Internet Gaming Disorder and Online Gambling Disorder in Adolescents: A Prospective Study’ (2023) 143 Computers in Human Behavior 107685.

18. Importantly, to my knowledge, only one study (outside of Spain) distinguished between the two types of loot boxes and concluded that there are *no* practically significant differences between the two types.¹²

Embedded-Embedded Loot Boxes are NOT More Attractive to Under-18s

19. We have had reports of players spending large amounts of money on Embedded-Isolated loot boxes specifically.¹³ In my opinion, because the possibility to spend a large sum of money exists with both, they are not particularly different. Players are willing to spend on Embedded-Isolated loot boxes knowing full well that the prizes cannot be transferred and have no real-world monetary value.
20. In fact, one study found that only 0.9% of adolescent participants said that their motivation for buying loot boxes was specifically to ‘cash out’ by selling the received item.¹⁴ This suggests a low participation rate in buying Embedded-Embedded loot boxes specifically amongst under-18s or at least that most young people do not specifically care whether they are purchasing the Embedded-Embedded type. There is no scientific evidence that Embedded-Embedded type loot boxes are particularly attractive to children.
21. In the event the draft law passes, it would also not be difficult for companies to change their Embedded-Embedded loot boxes into Embedded-Isolated loot boxes, as some have done to comply with Dutch law.¹⁵ Players would continue to spend money on these loot boxes because they want the potential prizes (in order to, e.g., play with new characters or to wear a new costume) and may not care very much about any monetary value attached. The draft law would therefore achieve very little.

¹² David Zendle and others, ‘Paying for Loot Boxes Is Linked to Problem Gambling, Regardless of Specific Features like Cash-out and Pay-to-Win’ (2019) 102 *Computers in Human Behavior* 181.

¹³ Sisi Jiang, ‘These Genshin Impact Fans Spent \$1,000 to \$90,000 On Its Characters’ (*Kotaku*, 2 November 2022) <<https://kotaku.com/genshin-impact-whales-hoyoverse-gacha-gambling-spending-1849734889>> accessed 16 January 2023; Osmond Chia, ‘Dad Saddled with \$20,000 Credit Card Bill after Daughter’s in-Game Spending Spree on Genshin Impact’ *The Straits Times* (Singapore, 2 January 2022) <<https://www.straitstimes.com/singapore/community/dad-saddled-with-20000-credit-card-bill-after-daughters-in-game-purchase-spree-on-genshin-impact>> accessed 28 March 2024.

¹⁴ David Zendle, Rachel Meyer and Harriet Over, ‘Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase’ (2019) 6 *Royal Society Open Science* Article 190049.

¹⁵ 2K Games, ‘Statement Netherlands’ (2K Games Official Website, 2018) <<https://www.2k.com/myteaminfo/nl/>> accessed 12 March 2021.

Both Types Should be Regulated to the Same Degree

22. I believe both types of loot boxes should be regulated to the same degree because they can cause financial harm in the same way. There is no evidence that the Embedded-Embedded type is worse than the Embedded-Isolated type. The distinction has been made in the academic literature only because of how the gambling laws of many countries were drafted and would be capable of regulating the Embedded-Embedded type as gambling already. The psychology literature has generally not distinguished between the two.
23. The Spanish Government is, of course, entitled to decide that only Embedded-Embedded loot boxes should be regulated, and that Embedded-Isolated loot boxes should be left unregulated. However, such a decision would not be based on scientific evidence: there is no evidence that Embedded-Embedded loot boxes are worse; in fact, the evidence suggests that both types are practically identical, *i.e.*, similarly harmful. The Government claims to have considered the academic literature and so should follow its guidance when making policy.

The Public has been Misled as to the Potential Benefits of the Draft Law

24. Finally, the government press releases are giving the false impression to the public that all issues associated with loot boxes (both types) will be solved by this draft law, but actually this draft law could only be a first step towards addressing a fraction of the problem (because only the small minority of Embedded-Embedded loot boxes would become regulated, whilst most other Embedded-Isolated loot boxes will remain unregulated).
25. For example, the press release from the Ministry of Social Rights, Consumer Affairs and 2030 Agenda misleadingly stated: ‘The Ministry led by Pablo Bustinduy has included in this draft law an express prohibition on girls, boys and adolescents accessing random reward mechanisms in video games, known as “cajas botín” or “loot boxes.” A restriction that will also prevent these mechanisms from being active among minors.’¹⁶

¹⁶ Ministerio de Derechos Sociales, Consumo y Agenda 2030 [Ministry of Social Rights, Consumer Affairs and 2030 Agenda] (Spain), ‘El Ministerio de Consumo prohíbe el acceso de menores a las “cajas botín” de los videojuegos para evitar conductas adictivas’ (4 June 2024) <<https://www.mdsocialesa2030.gob.es/comunicacion/noticias/derechos-sociales/20240604-consejo-ministros-loot-boxes.htm>> accessed 25 June 2024.

26. Such public statements are missing the highly important caveat that only a small fraction of loot boxes will, in fact, be regulated. Instead, the public is being misled into believing that access to *all* loot boxes will be restricted. The public understands ‘cajas botín’ and ‘loot boxes’ to mean both types and not the Embedded-Embedded type specifically.
27. This type of misinformation could have negative consequences because, for example, parents might incorrectly believe that their child who plays the very popular game *Genshin Impact*, for example, is now protected by the law (when they are, in fact, not) and put in less effort in providing guidance.
28. Due to the ambiguous wording of the draft Article 5 itself and the misleading government press releases, most media reporting of the draft law also failed to report this important limitation of the draft law.
29. It is of utmost importance that the public (including players and parents) understands that a lot of loot boxes will not, in fact, be covered by this law. The protection that the draft law can provide does not actually extend to most loot boxes that the public might be concerned about.
30. I recommend that the Government immediately publish remedial press releases highlighting this distinction and noting how children would not be protected in relation to the vast majority of popular games with loot boxes, particularly on mobile platforms.

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