

MASTERARBEIT | MASTER'S THESIS

Titel | Title

“The New Generation of online gaming: In-Game Purchases and the loot box system from a gambling law perspective with a focus on the protection of underage players”

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of
Master of Laws (LL.M.)

Wien | Vienna, 2025

Studienkennzahl lt. Studienblatt |
Degree programme code as it appears on the
student record sheet:

UA 999 083

Studienrichtung lt. Studienblatt | Degree programme as it appears on the student record sheet:

Informations- und Medienrecht

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Table of contents

1. Introduction	3
1.1 Problem Definition	3
1.2. Research objective	4
1.3 Thesis structure and methodology	5
2. Fundamentals and definition of terms	6
2.1 A brief history of video Games and In-Game Purchases	6
2.2 Definition of loot boxes and how they work	9
2.3 Analysis of gambling elements of loot boxes	12
3. Legal Framework	16
3.1 Overview of Austrian gambling law	16
3.1.1 Section 1 (1) Gambling Act – Games of Chance	17
3.1.2 Section 2 Gambling Act – Draws	19
3.1.3 Section 3 & 4 Gambling Act – Gambling Monopoly and Exemptions from the gambling monopoly	20
4. Loot boxes from the perspective of gambling law	22
4.1 Is the Gambling Act applicable (Section 1 (1) Gambling Act)	22
4.2 Critical Analysis of the legal classification	23
4.3 Current case law and regulatory approaches	31
4.4 Youth and consumer protection in the context of loot boxes	34
4.5 Existing protection mechanisms and their effectiveness (Technical solutions and preventive measures)	38
4.6 Critical Analysis of the legal classification	43
5. International Comparison of law	47
5.1 The role of game companies and platform operators	54
6. Conclusions	56
6.1 Summary of the most important findings	56
6.2 Proposals for adapting the legal framework	58
6.3 Outlook	60
7. Bibliography	62
8. Abstract	73

Use of the Generic Masculine Form

In this paper, the author uses the generic masculine form to ensure readability and clarity. This linguistic choice is solely for simplification purposes and is intended to include all genders equally.

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1. Introduction

1.1 Problem Definition

Video games used to be a niche hobby, made by gamers for gamers. Nowadays, playing in the virtual space has turned into a multi-billion-dollar industry. In terms of sales, they are now the largest genre in the entertainment industry. In 2020, already 2.9 billion people played video games, a number that continues to grow. Especially during the COVID-19 pandemic, the number of players and revenue drastically increased. In 2022 alone, video games generated a turnover of 184.4 billion USD.¹

It is interesting to note that more than 51% of players do not play video games on traditional consoles and PCs anymore, but on smartphones and tablets, where the games often are free. But not only the devices used for playing have changed, also the type of video games are changing. Whereas in the past, games were largely designed to be played offline, nowadays games are mostly played online with other players. A large portion of those newer games are free to play, which raises the question of how such high revenue can be generated with seemingly free games.²

The answer to this is so called in-game purchases, primarily via the loot box system. In-game purchases are purchases that take place in the game after the game itself has already been bought. In 2022, these in-game purchases accounted for 70% of revenue of PC games in Germany and as much as 99% of revenue of mobile games.³

From an economic perspective, it therefore makes sense that video game manufacturers and publishers focus even more on in-game purchases. The problem, however, is that the system of loot boxes is quite similar to gambling, which is potentially addictive. Because the target audience for video games is largely minors, it raises the question how underage players can be protected from these potentially addictive mechanisms.

1.2 Research objective

¹ Wijman T. (2022): The Games Market in 2022: They Year in Numbers. Available at: <https://newzoo.com/resources/blog/the-games-market-in-2022-the-year-in-numbers> [last accessed: November 8, 2024].

² Ibid.

³ Zandt F. (2023): In-Game Käufe dominieren PC und Mobile. Available at: <https://de.statista.com/infografik/30636/umsatz-mit-games-in-deutschland-nach-geschaeftsmodell/#:~:text=Videospielumsatz%20in%20Deutschland&text=Im%20Mobile%20Segment%20betrug%20der,also%20mit%20diesem%20Gesch%C3%A4ftsmodell%20generiert> [last accessed: June 28, 2024].

The main objective of this thesis is to conduct a comprehensive and critical analysis of the legal framework and the applicability of gambling law to in-game purchases and loot boxes. There is a particular focus on the protection of minors from the potential risks of these practices.

The aim is to determine to what extent legal regulations are adequate to protect minors from the dangers of gambling and gambling-like mechanics in video games, and whether and how these regulations should be adapted or extended to ensure effective protection.

Specifically, the following aspects will be examined:

- The legal classification of and in-game purchases loot boxes under the existing gambling law definition in the jurisdictions of Austrian and EU law, including an analysis of case law and the position of regulatory authorities
- The investigation of the risks and potentially harmful effects of in-game purchases and loot boxes on minors, particularly with regard to addictive behavior and financial burdens
- Evaluating the effectiveness of current legal and regulatory measures to protect minors in the context of in-game purchases and loot boxes
- The development of proposals for legal and regulatory improvements to strengthen the protection of minors in the digital gaming environment while considering the economic freedoms of the gaming industry

This thesis is intended to contribute to the discussion on the necessity and design of regulatory measures in the field of digital games and to a better understanding of the interface between gambling law and the protection of minors.

1.3 Thesis structure and methodology

The thesis follows a legal approach to the topic, which includes an analysis of the relevant legal norms at a national and EU level, case law and statements by the supervisory authorities and specialist literature.

This work will also define, explain and examine the terms “in-game purchases” and “loot boxes” in detail and placed in the context of gambling. Furthermore, the relevant legal framework will also be identified, both at national and European level.

The current legal situation will be analyzed, in particular the extent to which loot boxes fall under the existing gambling regulations. In particular, case law will be relevant here. The legal provisions for the protection of minors and consumer protection aspects in connection with the fairness and transparency of in-game purchases will also be analyzed.

The thesis will assess how effectively the current legal framework ensures the protection of minors from the potential risks of in-game purchases and identifies any legal loopholes. It also examines whether the distributors of video games comply with the legal requirements and do justice to the protection of minors.

A comparison with countries that have already implemented specific regulations for loot boxes in order to identify successful approaches and solutions will be made.

Finally, concrete proposals will be developed on how the protection of minors can be better guaranteed, considering the perspectives and interests of various stakeholders like game distributors, parents, consumer protection agencies etc.

2. Fundamentals and definition of terms

2.1 A brief history of video games and In-Game purchases

In order to understand the revenue model of modern video games, it is necessary to take a look at what video games are, their history and the way the video game industry generates money:

Video games can be defined as electronic games that are played by interacting with an input device or user interface like a keyboard or a controller which then generates audiovisual feedback. Usually, video games can be categorized according to the device on which they are played⁴, but also if they are intended to be played alone (“single player”) or with other people (“multiplayer”). Video games can be classified into a wide range of genres, depending on the type of gameplay and/or the target audience.

The first prototypes of video games emerged in the 1950s and were simple extensions of already existing electronic games. The first hit video game aimed at consumers was the game “Pong” and was released in 1972. In the late 1970s and early 1980s, a new form of gaming emerged, arcade gaming. Arcade gaming cabinets were machines in which people inserted coins in order to play certain games. Video game companies built their own machines and sold the cabinets to various places, like bars, cafés etc. In 1980, the most successful arcade game of all time, *Pacman*®, was released. Pac Man sold over 350,000 arcade machines and generated a revenue of more than \$2 billion⁵.

In 1986, when the *Nintendo Entertainment System* and the *Sega Master System* were released, the focus of the industry shifted away from arcade gaming towards gaming at home.⁶

In 2004, a game was introduced to the market that would change the industry forever: *World of Warcraft*®. *World of Warcraft*® is an MMO (“Massive Multiplayer Online Game”), a game that is meant to be played online with many people at the same time. Because the game is played online, there is no more need for expensive hardware, it can also be played with an

⁴ Esposito N. (2005): A short and simple Definition of What a Videogame Is. University of Technology of Compiègne.

⁵ Paris/Herweck-Paris, 2016: 12.

⁶ Ibid., 14.

average computer system. Furthermore, *World of Warcraft*® took a different approach on how to make a profit. Instead of buying the game one time and then playing it, players have to pay a monthly subscription fee in order to play the game. At its peak, the game had 12 million active players, all paying between \$10-15 every month.⁷ This successful pricing model showed the industry that it is possible to generate money after the game has already been “bought”.

With the launch of Apple’s iPhone in 2007 and the App Store in 2008, the gaming industry underwent its biggest transformation to this day. With the increasing popularity of smartphones, own app ecosystems came to life, parallel developments could be seen with the introduction of the Google Play Store in 2008.⁸

Early mobile games mostly focused on making already existing games playable on mobile devices. As smartphone technology advanced, it became clear that mobile gaming could provide opportunities that other gaming platforms could not, mainly the convenience of being able to play everywhere with minimal effort. This development led to a rising popularity of video games, as for the “old” way of gaming, people would need a certain console or computer in order to be able to play. They were bound to a certain location. However, smartphones offered a solution to this issue, as they are widespread and easily obtainable. The development in smartphone internet technology played a substantial role in solidifying the role of mobile gaming in the entertainment industry.⁹

In- Game Purchases

With the rise of mobile gaming, the revenue models underwent a change. When mobile games first arrived on smartphones, the games needed to be purchased one time but due to market saturation, the prices for mobile games sank rapidly, so game publishers had to resort to different pricing strategies. Publishers started introducing free-to-play models for mobile

⁷ Paris/Herweck-Paris, 2016: 34.

⁸ Mäyrä,/Alha, 2020: 109.

⁹ Ibid., 111.

gaming. Games could now be downloaded for free and are monetized via in-game advertisements and voluntary in-game purchases.¹⁰

Bringing this pricing model into the realm of videogames ended up being one of the biggest success stories in the gaming industry. Because of this huge success, almost all games available for mobile devices have adapted the in-game-purchasing model.¹¹

However, the free-to-play model requires players to make in-game purchases, ideally on a regular basis, so many free-to-play games share similar characteristics. The revenue is generated during playing the game, not beforehand, therefore, games are typically never-ending and are updated and supplied with new content constantly to keep players interested. The issue with this pricing model is that only a small minority of players actually spend money on the game, the vast majority does not.¹² Being dependent on a small number of players in order to achieve profits tends to be exploitative, because the game companies are incentivized to maximize player spending.

To prevent a player from advancing too easily, many free-to-play games include long waiting times or grinding in their mechanics and players can skip timers or “boring” content by making in-game purchases.¹³

Those in-game purchases can be just of a cosmetic nature but also help with the game progression, making the playing experience more convenient or feel more rewarding.¹⁴

It is important to state that while free-to-play games are the top-grossing games, there are still games with other revenue models. In this thesis however, only the model of in-game purchases, especially the system loot boxes, will be thoroughly examined.

2.2 Definition of loot boxes and how they work

¹⁰ Mäyrä, /Alha, 2020: 113.

¹¹ Zandt F. (2023): In-Game Käufe dominieren PC und Mobile, Available at: <https://de.statista.com/infografik/30636/umsatz-mit-games-in-deutschland-nach-geschaeftsmodell/#:~:text=Videospielumsatz%20in%20Deutschland&text=Im%20Mobile%20Segment%20betrug%20der,also%20mit%20diesem%20Gesch%C3%A4ftsmodell%20generiert> [last accessed: June 28, 2024].

¹² Brightman J. (2016): Only 3.5% of gamers make in-app purchases – AppsFlyer, Available at: <https://www.gamesindustry.biz/only-3-5-percent-of-gamers-make-in-app-purchases-appsflyer> [last accessed: June 29, 2024].

¹³ Mäyrä, /Alha, 2020: 114.

¹⁴ PEGI: In-Game Purchases. Available at: <https://pegi.info/page/game-purchases> [last accessed: June 29, 2024].

One of the most important sources of revenue for modern video games are loot boxes. The most popular games (e.g. Call of Duty, FIFA, Fortnite, League of Legends) contain them as well. Between 2010 and 2019, the presence of loot boxes increased by 67% and more than 58% of the games sold in the App Store or Google Play Store have loot boxes in them. Among active players, 78% of adult players have purchased a loot box at least once and 40.5% of minors between the age of 16 and 18 have purchased at least one loot box within the past month. It is noteworthy that 56% of the mobile games which contain loot boxes are deemed suitable for children aged 7 years or older and 93% are considered suitable for children aged at least twelve years.¹⁵

These statistics show the relevance of loot boxes in the discussion around monetarization systems in the video game industry, it is therefore worth to take a closer look at loot boxes.

Loot boxes can be defined as: *“features in video games which are usually accessed through gameplay, or which may optionally be paid for with real-world money. They are 'mystery boxes' which contain randomized items, so players do not know what they will get before opening.”*¹⁶

Another definition found online describes loot boxes the following: *“In the realm of videogame regulation, "loot boxes" are defined as virtual mystery packages that players can acquire using in-game credits or real money, offering a random assortment of items.”*¹⁷

The loot box itself can be named in different ways, usually in some relation to the game it appears in, they can be called “loot box”, “loot care”, “treasure box” etc.¹⁸

It is important to note that the concept of randomized content in video games is not a new concept *per se*, these tools were used lots of times to introduce elements of surprise in video games in order to keeping the players engaged. At first, such content was unlocked through

¹⁵ Montiel/Basterra-González/Machimbarrena/Ortega-Barón/González-Cabrera 2020: 2.

¹⁶ Directly out of: Cerulli-Harms, A. et al. (2020): Loot boxes in online games and their effect on consumers, in particular young consumers, 14, Available at: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)652727](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)652727) [last accessed: November 11, 2024].

¹⁷ Directly out of: 1d3.com (2023): *A look at the current state of videogame loot box regulation worldwide*, Available at: <https://www.1d3.com/blog/loot-box-regulation-worldwide> [last accessed: December 16, 2024].

¹⁸ Derstandard.at (2017): Was ist Loot?, Available at: <https://www.derstandard.at/story/2000065957534/loot> [last accessed: June 29, 2024].

playing the game and could not be purchased. However, the monetarization of that concept came up in the 2000s.¹⁹

How do loot boxes work?

In a video game, the player plays a character. The character completes tasks in the game and as a reward, he gets items that help him with game progression or in-game currency to buy items in the game. The items can be of different quality or rarity, and the better the rewards, the faster the player can advance in the game. In order to get better items and therefore progressing faster, the player now has the choice to either continue playing, which can be time-consuming and sometimes frustrating or using in-game currency to buy loot boxes which can possibly contain the desired items. Loot boxes can contain either useful items for game progression or just purely cosmetic items.²⁰

Some games reward players with loot boxes as they progress through the game, complete missions, or achieve certain milestones. For example, *Overwatch*® grants loot boxes when players level up or complete specific in-game challenges. This method encourages continuous gameplay and engagement.²¹

Occasionally, games might offer loot boxes as part of promotional events, seasonal updates, or special occasions. These loot boxes might be given for free or as part of a limited-time event, enticing players to participate during the promotional period.²²

However, many games allow players to buy loot boxes directly using real-world currency. This is the most straightforward method, where players spend money to acquire loot boxes that contain randomized rewards. (This method is often seen in games like *Overwatch*® and *FIFA*®).²³ Players can also obtain loot boxes using in-game currency, which can sometimes be

¹⁹ Zendle/Meyer/Harriet 2019: 2-4.

²⁰ Europäisches Verbraucherzentrum (2024): Lootboxen: verstecktes Glücksspiel in Computer- und Videospielen?, Available at: <https://www.evz.de/einkaufen-internet/gaming/lootboxen-in-computer-und-videospielen.html> [last accessed: June 29, 2024].

²¹ Wiltshire A. (2017): Behind the addictive psychology and seductive art of loot boxes, Available at: <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/> [last accessed: July 9, 2024].

²² Newhouse A. (2017): Free Overwatch Loot Boxes Available Now for Amazon Prime Members, Available at: <https://www.gamespot.com/articles/free-overwatch-loot-boxes-available-now-for-amazon/1100-6452448/> [last accessed: June 29, 2024].

²³ Zendle/Meyer/Harriet 2019: 2-4.

earned through gameplay. However, this in-game currency can often be purchased with real money, creating a link between spending and loot box acquisition. (Games like *Fortnite*® use this model, allowing players to buy V-Bucks, which can then be used to purchase loot boxes).²⁴

Some loot boxes can be opened immediately, some of them also need a “key” to open them, which has to be acquired separately.²⁵

Often, the items that can be contained in a loot box are usually graded according to "rarity", whereby the probability of obtaining an item decreases rapidly with each level. The player therefore knows not what he will get out of the loot box, he just knows that there is a possibility that a certain item is in that box. Although the items are selected at random, there are certain guarantees, e.g. that at least one item of a certain rarity or higher is included.²⁶

The inventory acquired via those loot boxes is often visible to other players, it is possible for players to obtain the same item multiple times; those items can often be converted back into the in-game currency in order to buy even more loot boxes.²⁷ In some games, players can trade items or rewards obtained from loot boxes with other players, or exchange them for in-game currency or other rewards. This system can add a layer of community interaction and in-game economy, as seen in games like *Counter-Strike: Global Offensive*®²⁸. As explained above, loot boxes can appear in all shapes and forms in video games and the economic data shows that this monetization model is extremely successful.

2.3 Analysis of gambling elements of loot boxes

²⁴ Malen K. (2021): Understanding Loot Boxes in Video games and Why there are calls to regulate this feature, Available at: <https://www.gamespace.com/all-articles/news/understanding-loot-boxes-in-video-games-and-why-there-are-calls-to-regulate-this-feature/> [last accessed: July 9, 2024].

²⁵ Simmons & Simmons (2019): Regulating loot boxes – open your beginner crate, Available at: <https://www.simmons-simmons.com/en/publications/ck0a3qu8hnmz760b33l0vul474/240519-regulating-loot-boxes---open-your-beginner-crate> [last accessed: July 9, 2024].

²⁶ Zaid K. (2023): The Psychology of Loot Boxes: How Game Developers Exploit Human Behaviour for Profit, Available at: <https://medium.com/@Zaid-Khalid/the-psychology-of-loot-boxes-how-game-developers-exploit-human-behavior-for-profit-5e7afcc6d861> [last accessed: July 9, 2024].

²⁷ Cerulli-Harms, A. et al. (2020): Loot boxes in online games and their effect on consumers, in particular young consumers, 16, Available at: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)652727](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)652727) [last accessed: November 11, 2024].

²⁸ Malen K. (2021): Understanding Loot Boxes in Video games and Why there are calls to regulate this feature, Available at: <https://www.gamespace.com/all-articles/news/understanding-loot-boxes-in-video-games-and-why-there-are-calls-to-regulate-this-feature/> [last accessed: July 9, 2024].

Loot boxes in video games have sparked considerable debate in recent years due to their structural and psychological similarities to traditional forms of gambling. These digital “treasure chests”, which offer random virtual rewards in exchange for monetary payment, bear many similarities to gambling mechanics. Their design often incorporates elements such as chance-based outcomes, monetary investments, psychological reinforcement, and emotional manipulation—all of which are key factors in gambling addiction.²⁹ In this section, the multiple layers of how loot boxes resemble gambling will be explored, focusing on the underlying mechanics, psychological effects, financial implications, and regulatory concerns.

At the heart of both loot boxes and traditional gambling is the element of chance. When players purchase a loot box, they typically do so without knowing what specific rewards they will receive, mirroring the uncertainty found in gambling games like slot machines, roulette, or lottery tickets. This randomness creates an exciting and unpredictable experience for players. As with gambling, the outcomes in loot boxes are determined by probabilistic algorithms, which offer low odds for receiving highly valuable or rare items³⁰. These rare items may have in-game advantages or aesthetic appeal, incentivizing players to spend more in pursuit of these rewards.

The structure of loot boxes often deliberately obscures the odds of receiving specific items, making the experience opaquer and further heightening the sense of excitement. This is similar to how traditional gambling operators often keep the odds of winning unclear to players. For example, slot machines rarely advertise the probability of hitting a jackpot, and lotteries only vaguely communicate the odds of winning major prizes. This lack of transparency in loot boxes fosters a greater degree of risk-taking behavior, as players may overestimate their chances of acquiring valuable items.

Loot boxes utilize the concept of “*variable-ratio reinforcement mechanism*”³¹, which can be found in many gambling activities. This type of reinforcement refers to a reward schedule in which a player receives rewards after an unpredictable number of attempts. In psychology, variable-ratio reinforcement is known to be one of the most powerful tools for promoting persistent and compulsive behavior. It is the same mechanism that fuels slot machine

²⁹ Drummond/Sauer, 2018: 530–532.

³⁰ *Ibid.*

³¹ Directly out of: Griffiths, 2018: 52.

addiction, where players are drawn into repeated play because they believe the next spin could be the one that results in a win, even after many losses.³²

In loot boxes, players often receive a mix of common, low-value rewards and rare, high-value items. The random appearance of rare rewards encourages players to keep buying loot boxes in the hope that their next purchase will result in a valuable item. Even after multiple purchases with unsatisfactory results, the allure of potentially winning a highly desired item drives continued spending. The unpredictable nature of when these rewards will appear fosters the same compulsive behavior seen in gambling addicts. *Drummond/Sauer* argue, this type of reinforcement is particularly dangerous because it maintains player engagement and makes it difficult for them to stop buying loot boxes, even when the rewards are not immediately incoming.³³

Another psychological mechanism that loot boxes share with traditional gambling is the “near-miss effect³⁴”. A near-miss occurs when a player comes close to achieving a desirable outcome but falls just short, creating a sensation of almost winning. This phenomenon has been extensively studied in gambling psychology, particularly in slot machines, where near-misses (e.g., two matching symbols appearing on a payline but the third not) are engineered to keep players engaged and hopeful that a win is almost there. Near-misses have been shown to increase arousal and motivate players to continue gambling. Loot boxes often use similar tactics. For example, some games visually display the contents of a loot box as it is being opened, showing the player the possibility of obtaining a rare or valuable item before ultimately awarding a less desirable prize.³⁵

The psychological impact of seeing rare items just out of reach can encourage players to try again, believing that their next purchase might result in the desired item. The near-miss effect can induce players to perceive themselves as being on the verge of success, even when the actual probability of receiving a rare item remains low. This effect plays a crucial role in perpetuating spending and engagement in both gambling and loot box systems.³⁶

³² *Ibid.*, 53,54.

³³ *Drummond/Sauer*, 2018: 530.

³⁴ Directly out of: *Ibid.*, 531.

³⁵ *Ibid.*, 532.

³⁶ *King/Delfabbro*, 2019: 166-179.

In most games that feature loot boxes, players can spend actual money to purchase virtual currency, which is then used to buy loot boxes.³⁷ This process creates a separation between the real-world cost and the in-game expenditure, making it more difficult for players to track how much they are spending. Additionally, some games allow players to sell or trade the items they receive from loot boxes, creating a secondary market where virtual items can be exchanged for real money. This introduces a gambling-like aspect where players not only seek rewards for their in-game utility but also for their potential resale value. For example, in games like *Counter-Strike: Global Offensive*® (CS), certain rare items obtained from loot boxes (such as weapon skins) can be sold on third-party markets for substantial sums of money. This dynamic creates a strong financial incentive for players to continue purchasing loot boxes, as they may see their spending as an investment with the potential for real-world financial returns. However, just like in traditional gambling, the likelihood of obtaining a high-value item is often very low, leading to excessive spending in pursuit of rare rewards.³⁸

One of the most concerning aspects of loot boxes is their potential to normalize gambling behaviors, particularly among younger players who may be more vulnerable to their effects. Research has demonstrated a correlation between loot box purchasing and problem gambling behaviors, with frequent loot box buyers more likely to exhibit signs of gambling addiction.³⁹

Loot boxes can serve as a gateway to more traditional forms of gambling by desensitizing players to the risks of spending money on uncertain outcomes. Young players, in particular, may not fully understand the financial and psychological implications of loot boxes and may develop harmful habits that persist into adulthood. Studies suggest that early exposure to gambling-like activities can increase the likelihood of developing gambling problems later in life, as players become accustomed to risk-taking and the anticipation of potential rewards.⁴⁰

Dark Patterns

Another big issue regarding loot boxes are dark patterns, which are frequently used by video game publishers and gambling entrepreneurs alike.

³⁷ Example for website to buy in-game currency from: Available at: <https://www.g2a.com/de/category/points-currencies-c1462>, [last accessed: November 6, 2024].

³⁸ Macey/Hamari, 2019: 20-41.

³⁹ Zendle/Cairns, 2019.

⁴⁰ Drummond/Sauer, 2018: 530–532.

Dark patterns are user interface designs that are deliberately crafted to mislead or coerce users into actions they might not otherwise take, such as spending money. In the context of loot boxes, these manipulative strategies include elements such as **scarcity cues** (limited-time offers), **visual and auditory stimuli** (flashing lights, celebratory sounds upon opening)⁴¹, and **false urgency** (countdown timers), which create a psychological pressure to buy immediately. These tactics exploit cognitive biases, such as the "fear of missing out" (FOMO), to encourage impulsive behavior, often leading players to spend more than they originally intended.⁴² The use of dark patterns in loot boxes significantly correlates with problem gambling behaviors, particularly in minors who are more susceptible to these persuasive tactics due to their developing impulse control and financial literacy. These designs are especially harmful in youth-focused games, where minors may not fully understand the financial or psychological risks they are exposed to.

In conclusion, it can be said that loot boxes exhibit numerous characteristics that align them with traditional gambling, including their reliance on chance, variable-ratio reinforcement, near-miss effects, and real-world financial stakes. These mechanics can foster addictive behaviors and may normalize gambling for younger players, leading to long-term consequences.

⁴¹ Cotte, 1997: 380-406.

⁴² Zagal/Björk/Lewis, 2013.

3. Legal Framework

The randomly generated contents of the loot boxes and the surprise elements when opening them, including the display of the acquired contents, are reminiscent of gambling. For this reason, this chapter provides an overview of Austrian gambling law, as well as consumer protection and the protection of minors in the world of video games.

3.1 Overview of Austrian Gambling Law

3.1.1 Section 1 (1) Gambling Act – Games of Chance

The definition of a game of chance in the Austrian Gambling Law can be found in Section 1 (1) GspG (Glücksspielgesetz – Gambling Act), which says:

*“A game of chance within the meaning of this Federal Law is a **game** in which the decision on its outcome is solely or predominantly **reliant on chance**. ”⁴³*

“Game”

In the Austrian Gambling Act, there is no definition of the word “game”. However, in the explanatory notes to the relevant government bill of 1989, *“a game is a contract of chance within the meaning of Section 1267 ABGB”⁴⁴* (Allgemeines Bürgerliches Gesetzbuch – Austrian Civil Code). According to Section 1267 of the Austrian Civil Code, a contract of chance is a *“contract, whereby the hope of a still uncertain benefit is promised and accepted.”⁴⁵* Therefore it is a two-sided contractual relationship in which the amount of the benefit to one of the contracting parties is uncertain at the time the contract is concluded.

⁴³ Section 1 Austrian Gambling Act (Glücksspielgesetz (GspG)).

⁴⁴ Directly out of: Explanatory remarks to Government Bill No 1067, Parliamentary Records of the 17th Legislative Period, Section 16 (ErläutRV 1067 BlgNR 17. GP 16).

⁴⁵ Section 1267 Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch (ABGB)).

“reliant on chance”

More important than the definition of game is the “reliance on chance” in Section 1 (1) Gambling Act. Following the explanatory notes to the government bill concerning the gambling act, “*it is not a game of chance, if skill or dexterity decide whether a player wins or loses*”.⁴⁶ In other words, the player must not be able to influence the outcome of the game. To assess whether a player can influence the course or the outcome of the game, the average player and his abilities, skill, speed etc. are considered.⁴⁷

Section 1 (2) Gambling Act lists certain games as games of chance *ex lege*, such as Poker, Black Jack, Two Aces, Roulette, etc.⁴⁸ Even though these games require a certain amount of skill, they are still considered a game of chance, as the outcome of the game depends largely on chance.⁴⁹

3.1.2 Section 2 Gambling Act - Draws

The term “Draws” is defined in the Gambling Act to determine, in combination with Section 1 and 4 of the Gambling Act, what kind of games are covered by the gambling act.

“Draws are games of chance

- 1. which an **entrepreneur** arranges, organizes, offers or makes accessible, and*
- 2. in which players or others render monetary benefit or benefit in kind in connection with participation in gambling (**stake**), and*
- 3. in which the prospect of monetary benefit or benefit in kind is offered by the entrepreneur, from players, or from others (**prize**).⁵⁰*

⁴⁶ Directly out of: Explanatory remarks to Government Bill No 1067, Parliamentary Records of the 17th Legislative Period, Section 16.

⁴⁷ Rapani/Kotanko in Zillner, 2021: § 1 GSpG RZ 5.

⁴⁸ Section 1 Austrian Gambling Act (GspG).

⁴⁹ Schwartz, 1998: 51.

⁵⁰ Section 2 Austrian Gambling Act (GspG).

In the case of Draws, entrepreneurs face the players. This distinguishes such games of chance from those in which only players face each other.⁵¹ An **entrepreneur** is defined in Section 2 (2) Gambling Act as *“any person who independently and continuously performs an activity for the generation of income from the conduct of games of chance, even if it is not directed towards profit.”*⁵²

If the game of chance is not organized by an entrepreneur, Section 2 of the Gambling Act is not applicable.

Another element of “Draws” in the Gambling Act are the necessity of a certain **stake** (Section 2 (2) No. 2 GspG). It is necessary that a “monetary benefit in connection with participation in the game of chance” is provided by the player himself or another person.⁵³

The “monetary benefit” can simply be money or, according to current jurisdiction and academic teaching (non-exhaustive list):

- using in-game tokens⁵⁴
- watching an advertisement⁵⁵
- the purchase of certain goods or services in order to be authorized to participate in the game of chance⁵⁶

As stipulated in Section 2(1) No. 2 Gambling Act, the monetary benefit is to be provided *“by the player or others”*. Accordingly, it is irrelevant whether the payment is made by the player himself or by a third party. Particularly in the case of viewing of advertising clips, a multi-person relationship often arises in which the entrepreneur playing the game receives remuneration from advertising partners.⁵⁷

⁵¹ Explanatory remarks to Government Bill No 1067, Parliamentary Records of the 17th Legislative Period, Section 16.

⁵² Section 2 (2) Austrian Gambling Act (GspG).

⁵³ Section 2 (2) No. 2 Austrian Gambling Act (GspG).

⁵⁴ VwGH on April 4, 2021, Ra 2020/17/0052.

⁵⁵ Schmitt, 2018: 192.

⁵⁶ Strejcek/Bresich, Glücksspielgesetz §2 Rz 12.

⁵⁷ Rapani/Kotanko in Zillner, 2021: § 2 GSpG Rz 41.

It is noteworthy that there is an ongoing debate whether the disclosure of personal data constitutes a stake or not,⁵⁸ however, this would go beyond the scope of this work and therefore will be not discussed within this paper.

The last necessary element of Section 2 Gambling act is the possibility to win a **prize**.⁵⁹ Similar to the stake, it has to be a monetary benefit. The prize can also be held out by a player or another person, as the 2008 Amendment of the Gambling Act clarified.⁶⁰ The Austrian Administrative Court ruled that the promise of payment by the player must be coupled to the promise to pay out the prize in accordance with the rules of the game.⁶¹ The court also emphasized that it is essential to the classification as prize whether the promised profit exceeds the actual stake.⁶²

3.1.3 Section 12 Gambling Act - Electronic lotteries:

Electronic lotteries are defined as Draws in the sense of Section 2 Gambling Act where the player participates through electronic media, and the outcome is determined centrally and communicated electronically.⁶³ In contrast, games using gambling machines involve the outcome being determined by a mechanical or electronic device within the machine itself.⁶⁴ Every draw can be played in the form of an electronic lottery. The focus is on the formal method of conducting the game, not the game's content.

⁵⁸ For further information, read *Bajrami/Pachschwöll*, ZIIR 2022, 270 (274).

⁵⁹ Section 2 (3) Austrian Gambling Act (GspG).

⁶⁰ Section 2 (1) No. 3 Austrian Gambling Act (GSpG).

⁶¹ VwGH on July 25, 1990, 86/17/0062.

⁶² VwGH on October 21, 1994, 92/17/0179.

⁶³ Section 12a (1) Austrian Gambling Act (GspG).

⁶⁴ Section 2 (3) Austrian Gambling Act (GspG).

3.1.4 Section 3 & 4 Gambling Act – Gambling Monopoly and Exemptions from the gambling monopoly

According to Section 3 of the Gambling Act, the right to organize games of chance is reserved to the Federal Government of Austria and its bodies. Games that are not organized by the federal government or with a federal license are prohibited.⁶⁵

Federal license holders within the scope of the gambling monopoly are the “Österreichische Lotterien GmbH” (valid license until 30th September 2027) and the “Casinos Austria AG” (valid license until 31st December 2027 and 31st December 2030 respectively).⁶⁶

There are instances where a game of chance is not subject to the gambling monopoly of the state, those instances are:

- “if they are not in the form of a **draw** within the meaning of Section 2 (1), and
- a) are **merely for entertainment** and of **low value**, or
- b) are **non-recurring** for the purpose of **disposing a physical asset**”⁶⁷

A game of chance is played *merely for entertainment*, if the factor entertainment weighs more than the pursuit of a monetary benefit. It depends on what kind of motivation the game can awaken in the player; the subjective attitude of the player is irrelevant.⁶⁸

The Gambling Act does not specify what is meant by the term *low value*. According to *Rapani/Kotanko*, stakes of over €10, - are not to be seen as low value anymore⁶⁹ In older versions of the Gambling Act, this limit was at €0,50 per individual game.⁷⁰ However, with the current version of the gambling act, the wording was adapted to Section 168 of the

⁶⁵ Section 2 (4), Section 3 Austrian Gambling Act (GspG).

⁶⁶ BMF, Konzessionäre und Ausspielbewilligte in Österreich für Lotterien, Online-Glücksspiel, Spielbanken und Landesauspielungen mit Glücksspielautomaten, Available at: <https://bmf.gv.at/themen/gluecksspiel-spielerschutz/gluecksspiel-in-oesterreich/konzessionaere-ausspielbewilligte.html> [last accessed: November 9, 2024].

⁶⁷ Section 4 (1) Austrian Gambling Act (GspG).

⁶⁸ *Rapani/Kotanko* in *Zillner*, 2021: §4 Rz 7.

⁶⁹ *Rapani/Kotanko* in *Zillner*, 2021: § 4 GSpG Rz 11.

⁷⁰ Section 4 (1) Austrian Gambling Act (GSpG).

Austrian Criminal Code.⁷¹ . In literature and case law, it is assumed that this limit applies to each individual game of chance.⁷²

Section 4 (1) lit A Gambling Act (*non-recurring disposal of a physical asset*) is intended to enable the one-off sale of a tangible asset by a private individual. A recurring disposal of items is forbidden and is always assumed, if it is done by an entrepreneur.⁷³

In Section 4 (2-6) Gambling Act, other exemptions from the gambling monopoly can be found. If it is a game of chance within the meaning of Section 1 of the Gambling Act, it does not fall under the gambling monopoly if it is one of the following:

- Regional Draws with gambling machines
- Product Draws with gambling machines
- Life insurance policies
- Lucky harbors, joke games or tombola games if the aggregated gambling capital by the same promoter does not exceed €4000, - per calendar year
- Card games in tournaments that are merely for entertainment⁷⁴

However, in the case of state or merchandise gambling with gambling machines, there may still be provisions by the state legislators which must be considered.

Summary

A game is a game of chance if its outcome is predominantly determined by chance; if this is not the case, it is merely a game of skill. A game of skill is not covered by the Gambling Act, a lot of video games are merely games of skill. The organization of games of chance is subject to the Federal Government's gambling monopoly, but the Federal Government can transfer this authority to private operators subject to strict conditions. In order to determine whether games are games of chance within the meaning of the Gambling Act, the exceptions under Section 4 of the Gambling Act must be examined. Particular attention must be paid to Section

⁷¹ Explanatory remarks to Government Bill No. 658, Parliamentary Records of the 24th Legislative Period, Section 6 (ErläutRV 658 BlgNR 24. GP, S. 6)).

⁷² VwGH on December 14, 2011, 2011/17/0233.

⁷³ Explanatory remarks to Government Bill No. 658, Parliamentary Records of the 24th Legislative Period, Section 6.

⁷⁴ Section 4 (2-6) Austrian Gambling Act (GspG).

2, as Section 4 cannot apply if the game is a “Draw”. Regarding loot boxes, the question arises if the Gambling Act is applicable, as it is not certain whether there is a stake and a prize within the meaning of the Gambling Act. This problem stems from the fact that players often cannot stake real money directly and cannot win real money, but only virtual items.

4. Loot boxes from the perspective of gambling law

4.1 Is the Gambling Act applicable?

In this chapter, the previous findings are applied to the topic of loot boxes in order to analyze whether loot boxes are to be classified as gambling under the Austrian Gambling Act.

Video games are not games of chance and are not covered by the Gambling Act, as the outcome of the game is not reliant on chance and the possibility of a monetary benefit is missing. Loot boxes on the other hand must be examined more closely, as Section 1 (1) Gambling Act could possibly apply, depending on the type of loot box. The similarities between loot boxes and traditional gambling are that loot boxes often are bought with real money⁷⁵, the contents of the loot box are reliant on chance and are offered by entrepreneurs.⁷⁶ Of course, there are many loot boxes and in-game purchase processes that are free of charge, but these are not dealt with in this thesis, as they are not covered by the Gambling Act anyway due to their free nature⁷⁷.

As mentioned in the previous chapter, it is a game in the scope of the gambling act if it is a two-sided contractual relationship in which the amount of the benefit to one of the contracting parties is uncertain at the time the contract is concluded. In the case of opening loot boxes, it is a contract of chance according to Section 1267 Austrian Civil Code.⁷⁸

In order for the second criterion of Section 1 (1) Gambling Act to be fulfilled, the decision on the outcome of the game (opening the loot box) must depend exclusively or predominantly on chance. The player must not be able to have any influence on which items he receives from

⁷⁵ Zendle/Meyer/Harriet 2019: 2-4.

⁷⁶ See Chapter 2.2

⁷⁷ Section 1 (1) Austrian Gambling Act (GspG).

⁷⁸ See also „game“ definition in chapter 3.1.1

the loot box.⁷⁹ If there is no reliance on chance, it is not considered a game of chance and therefore not under the scope of the Gambling Act.⁸⁰ It is noteworthy that it is irrelevant for the classification as a game of chance whether a game of skill precedes or follows the game of chance.⁸¹ In most video games, there is a game of skill (the video game itself) before and after opening the loot box. The fact that in some games, players can choose between different categories of loot boxes, does not change the gambling nature of the game.⁸²

The Regional Court for Civil Law Matters Vienna ruled that packages offered in a computer game with virtual content that is not exactly known to the players prior to purchase and is determined according to a computer-generated random principle constitute gambling within the meaning of Section 1 (1) Gambling Act.⁸³

To summarize it, following the current doctrine and case law, it can be stated that standard loot boxes in video games fulfill the definition of gambling under Section 1 (1) Gambling Act.

4.2 Are loot boxes Draws in the Sense of Section 2 (1) Gambling Act?

In order to determine whether loot boxes are Draws within the meaning of Section 2 (1) Gambling Act, the individual criteria of the legal provision must be examined.⁸⁴

⁷⁹ See also „reliant on chance“ in Chapter 3.1.1

⁸⁰ *Bajrami/Pachschwöll*, ZIIR 2022, 270 (273).

⁸¹ VwGH on August 10, 2018, Ra 2017/17/0570; LGZ Wien on June 27, 2023, 34 R 34/23m S 22.

⁸² *Zaid K.* (2023): The Psychology of Loot Boxes: How Game Developers Exploit Human Behaviour for Profit, Available at: <https://medium.com/@Zaid-Khalid/the-psychology-of-loot-boxes-how-game-developers-exploit-human-behavior-for-profit-5e7afcc6d861> [last accessed: July 9, 2024]., LGZ Wien on June 27, 2023, 34 R 34/23m.

⁸³ LGZ Wien on June 27, 2023, 34 R 34/23m.

⁸⁴ For the analysis of Section 2 (1) Gambling Act, see also Chapter 3.1.2

Section 2 (1) No. 1: Entrepreneurship

In connection with the providers of loot boxes, it can be said that these are video game publishers who are undoubtedly entrepreneurs within the meaning of Section 2 (2) of the Gambling Act. According to the prevailing doctrine, entrepreneurs (video game publishers) which integrated loot boxes into their games, arrange, organize, offer games of chance or make them accessible.⁸⁵

It is irrelevant if one entrepreneur offers the in-game currency while another entrepreneur offers the loot box for the same game and the game gets split up between more parties.⁸⁶

Section 2 (1) No 2: Stake

In order for the loot box opening to be a Draw in the Sense of Section 2 Gambling Act, the players must make a stake, i. e. a monetary benefit in connection with the game of chance. If the player buys the loot box with real money, Section 2 (1) No 2. is undoubtedly fulfilled.

For example: Although a “FIFA” player must first purchase so-called “FIFA Ultimate Team Points” (FUT Points for short) in order to subsequently receive the loot boxes (FUT packs), the courts also agree on the second criterion of the provision of a monetary benefit by the player as a stake - despite the often-heard argument that the loot boxes are not (directly) available against payment with real money, but with a virtual second currency. According to the Floridsdorf District Court, the player was deemed to have made a stake because he paid real money to acquire the FUT points, which can be used to exchange for FUT packs (and were used by the specific player).⁸⁷

The Regional District Court Hermagor followed the same ruling, as well as the Regional Court for Civil Law Matters Vienna.⁸⁸

The disclosure of personal data does not constitute a monetary benefit within the meaning of the Gambling Act. This is because when the player is disclosing personal data, his financial

⁸⁵ *Bajrami/Pachschwöll*, ZIIR 2022, 270 (274).

⁸⁶ LGZ Wien on June 27, 2023, 34 R 34/23m S 26.

⁸⁷ District Court Floridsdorf on November 24, 2022, 5 C 1816/21z-43.

⁸⁸ District Court Hermagor on February 26, 2023, 1 C 16/20x-56, LGZ Wien on June 27, 2023, 34 R 34/23m.

status remains completely unchanged. Loss of capital on the players side would only occur if the data were handled contrary to the provisions of the GDPR (General Data Protection Regulation) - which, however, cannot usually be assumed. In light of the extremely strict regulations of the GDPR, it must be stated that a publisher may only lawfully process data within very narrow limits.⁸⁹

According to *Bajrami/Pachschwöll*, the same principle is applied for the concept of watching advertisements in order to gain access to loot boxes, because the financial status of the player remains the same. He is only “losing” the time he spends watching advertisements. However, when advertising is viewed, a multi-person relationship often arises in which the entrepreneur who runs the adverts in his game receives remuneration from the advertising partner. It is therefore logical to assume that watching adverts does indeed constitute a stake (monetary benefit) within the meaning of the Gambling Act.

Many games use a mixed system with regard to loot boxes: loot boxes can be opened with credits that can be unlocked free of charge in the game as well as with purchased credits. However, the mere possibility of being able to unlock the loot boxes without wagering money does not change the assessment under gambling law: as soon as games even offer the use of money, the criterion of Section 2 (1) No 2 Gambling Act (“stake”) is fulfilled.⁹⁰ This also means if the loot box can only be obtained by playing the video game, there is no stake involved and it is not gambling.

To qualify as a game of chance, it is sufficient if there is a loose reciprocal relationship between the stake and the winnings.⁹¹

To summarize this section, it can be stated that as soon as in-game currency has been purchased with real money or a player has had to watch advertisements in order to obtain the loot box, this constitutes a “stake” within the meaning of the Gambling Act. It does not matter whether there is an alternative way of obtaining the loot boxes in the game by playing the game. However, it does not constitute a “Stake” within the meaning of Section 2 (1) No 2 Gambling Act, if the loot box can only be obtained through gameplay and not in any other way.

Section 2 (1) No 3: Prize

⁸⁹ *Bajrami/Pachschwöll*, ZIIR 2022, 270 (274).

⁹⁰

Bajrami/Pachschwöll, ZIIR 2022, 270 (274).

⁹¹ [VwGH on July 25, 1990, 86/17/0062](#).

In order for loot boxes to be classified as Draws within the meaning of Section 2 of the Gambling Act, there needs to be a prospect of monetary benefit, a prize, for the players.⁹² In the sense of “classic” gambling, it is quite easy to determine whether a prize is offered or not, the reward can be money or a physical item, which always has some sort of monetary value as it can be traded in for money. However, virtual items are intangible and lack a physical form, making it difficult to classify them as traditional "objects" under the Austrian Civil Code (ABGB). Instead, they are often regarded as *sui generis* intellectual property rights that do not necessarily fall under ownership or possession laws⁹³.

Now we have to determine whether or not virtual items have a monetary value.

If said items have monetary value must be assessed from an economic point of view, emotional value concerning the player is irrelevant.⁹⁴

For an item drawn from a loot box to be classified as a "prize" in the sense of Section 2 (1) No 3 Gambling Act, a differentiation in the value of potential outcomes is required. If all items in a loot box have the same likelihood and objective value, it does not meet the definition of a win. This explains why products like collectible stickers are not considered gambling, as the value of each item is predetermined and objectively equal. In digital goods, this distinction can only be achieved through rarity levels, ensuring the differentiation in value necessary for a gain to be considered a true "prize."⁹⁵ Many video game publishers offer loot boxes with content of varying value, and these rare items are usually actively advertised to suggest a high level of value.⁹⁶

There are various court rulings based on different approaches to the issue:

⁹² Section 2 (1) Gambling Act (GspG).

⁹³ *Videogames.org.au* (2019): lootboxes explained and why they are compared to gambling, Available from: [Lootboxes explained and why they are compared to gambling \(videogames.org.au\)](https://videogames.org.au) [last accessed: September 7, 2024]., *Weidinger* (2022): Sind virtuelle Werteinheiten Sachen im Sinne des ABGB?, Available from: <https://www.netidee.at/virtuelle-wachungen-der-insolvenz/sind-virtuelle-werteinheiten-sachen-im-sinne-des-abgb> [last accessed: September 7, 2024].

⁹⁴ *Sumper/Zechner*, RdW 2019, 122 (126).

⁹⁵ *Bajrami/Pachschwöll*, ZIIR 2022, 270 (274).

⁹⁶ *pcgamesn.com* (2018): Here's what we learned from opening 50 Overwatch PTR loot boxes. Available at: <https://pcgamesn.com/overwatch/overwatch-loot-legendary-skin-chance/page/0/1> [last accessed: November 8, 2024].; *derstandard.at* (2017) "Star Wars: Battlefront 2": Mindestens 4.500 Stunden oder 2.100 Dollar, um alle Lootboxen freizuschalten, Available at: <https://derstandard.at/2000067856528/Star-Wars-Battlefront-2-Mindestens-4500-Stunden-oder-2100-Dollar> [letzter Last accessed: November 8, 2024].

The District Court of Hermagor (BG Hermagor) determined that virtual items can be considered as tradable assets in the ordinary course of business if a market exists where these items or game accounts can be traded (the court ruling concerned the FUT-packs). This implies that profit generation is possible. The fact that the sale of these items and accounts may violate the terms of use does not affect the determination that they can be regarded as tradable assets in the ordinary course of business. The court also pointed out that approximately 3% of players (around 600,000 players) use this market, thus conferring economic value on the virtual goods.⁹⁷ In contrast, the District Court of Floridsdorf (BG Floridsdorf) acknowledged the existence of this illegal secondary market but rejected the notion that it constituted regulated gambling, as the defendants (game developers) themselves did not promise any financial gain.⁹⁸ BG Hermagor, however, recognized that it is irrelevant who promises the gain, as long as the possibility of profit exists, aligning with the legal text. Furthermore, the argument that the defendants tried to prevent secondary market trading through terms of service was dismissed by the court, as it lacks a normative legal basis. The Vienna Higher Regional Court (LGZ Wien) similarly held that a prohibition on the resale of FIFA and related accounts cannot be validly agreed upon due to the principle of the exhaustion of rights. The Vienna Higher Regional Court (LGZ Wien) found that even in the absence of a secondary market, the digital contents of FIFA Ultimate Team (FUT) packs still possess economic value. The court argued that the extraordinary time investment required to obtain certain rewards—estimated at around 4,000 hours—makes spending real money on FUT packs the only feasible option for an average player. Based on the "cost of production" or "value-in-use" theory, this significant time-saving creates economic value for the digital contents, thus classifying them as a gain under Section 2 (1) No. 3 of the Austrian Gambling Act.⁹⁹

This interpretation dramatically broadens the scope of gambling regulation, as it suggests that nearly all loot boxes, even those not traded on secondary markets, may now fall under the definition of regulated gambling activities requiring a license. This expansion has far-reaching implications for the gaming industry in Austria.

⁹⁷ District Court Hermagor on February 26, 2023, 1 C 16/20x-56.

⁹⁸ District Court Floridsdorf on November 24, 2022, 5 C 1816/21z-43.

⁹⁹ LGZ Wien on June 27, 2023, 34 R 34/23m.

To summarize this chapter, it can be said that, according to current case law and doctrine, loot boxes are “Draws” within the meaning of Section 2 of the Gaming Act if the following criteria are cumulatively met:

- The loot box was acquired with real money or a real-money equivalent
- Due to the technical design of the game, the items from the loot box can be transferred or traded from one player to another
- The items/loot boxes are offered via online exchanges by the video game publisher itself or third-party providers.

It can therefore be concluded that if the criteria above are met, loot boxes are currently covered by the scope of application of the Austrian Gambling Act. The loot box system has to be analyzed individually in every video game.

However, this current case law has to be viewed critically, as almost any online account can theoretically be sold, which is certainly not in the spirit of the narrow definitions in the Gambling Act, as many game publishers who use the loot box revenue system never intended the players accounts to be exchanged or sold.

Are loot boxes Draws in the form of an electronic lottery in the Sense of Section 12a Gambling Act?

For loot boxes to be considered electronic lotteries, both the player's participation and the determination of the outcome must occur online. Although some games require the installation of client software (as in MMORPGs¹⁰⁰), this software primarily serves functions such as game launching, cheat prevention, and server browsing.¹⁰¹ The acquisition and opening of loot boxes, which constitutes the player's participation, undoubtedly occur online.¹⁰²

The key issue is whether the loot box content is generated on the game server.

Sumper/Zechner argue that it is sufficient if a program code determines the probabilities governing the loot box outcomes. It is likely that this code, controlled by the game developer

¹⁰⁰ Massive Multitplayer Online Role Playing Games such as World of Warcraft®, etc.

¹⁰¹ Example: Epic games store, Available at: <https://store.epicgames.com/de/> [last accessed: November 7, 2024].

¹⁰² *Sumper/Zechner*, RdW 2019/97, 128.

or publisher, dictates how often different virtual goods of varying quality are awarded. Thus, loot boxes meet the requirement of a centrally determined outcome and qualify as electronic lotteries under Section 12a (1) Gambling Act.¹⁰³ This therefore means that loot boxes may only be offered on the basis of a license in accordance with Section 14 of the Gambling Act, unless they are covered by the exceptions in Section 4 of the Gambling Act.¹⁰⁴ However, only ‘Österreichische Lotterien GmbH’ has such a license in Austria.¹⁰⁵

Section 4 Gambling Act: Exemptions from the gambling monopoly?

According to Section 3 Gambling Act, only the federal government and licensed concessionaires are allowed to host Draws or organize gambling (gambling monopoly). Otherwise, it is deemed illegal gambling.¹⁰⁶ However, there are certain exemptions from the gambling monopoly.¹⁰⁷ As discussed in detail in the previous chapters, the vast majority of loot boxes are “Draws” within the meaning of Section 2 of the Gambling Act which means that there can no longer be an exception under Section 4 of the Gambling Act, as the license requirement was introduced primarily to protect against criminal activities.¹⁰⁸

For the sake of completeness, it is essential to evaluate the applicability of Section 4 (1) No. 2 a) of the Gambling Act. This involves determining whether the game of chance is “*merely for entertainment and of low value*”. According to *Schmitt/Steiner*, if a game of chance is played merely for entertainment depends on what kind of motivations the game can awaken in a player. The subjective attitude of the player is irrelevant. They argue that the entertainment character of the loot box is in the foreground, as the benefits of the items obtained through loot boxes only materialize afterwards. The items obtained are used in the game and therefore offer entertainment value.¹⁰⁹ On the other hand, video game publishers deliberately use

¹⁰³ *Sumper/Zechner*, RdW 2019/97, 128.

¹⁰⁴ Section 12a Austrian Gambling Act (GspG).

¹⁰⁵ BMF, Konzessionäre und Ausspielbewilligte in Österreich für Lotterien, Online-Glücksspiel, Spielbanken und Landesausspielungen mit Glücksspielautomaten, Available at: <https://bmf.gv.at/themen/gluecksspiel-spielerschutz/gluecksspiel-in-oesterreich/konzessionaere-ausspielbewilligte.html> [letzter Last accessed: November 7, 2024].

¹⁰⁶ Section 3 Austrian Gambling Act (GspG).

¹⁰⁷ For further details, please see chapter 3.1.4

¹⁰⁸ ErläutRV 658 BlgNR 24. GP 6, Section 3 (1) Z 1 Gambling Act (GspG).

¹⁰⁹ *Schmitt/Steiner*, eolex 2019, 395 (398).

gambling mechanics¹¹⁰ and audiovisual effects to get players to spend money on loot boxes, they are so called dark patterns¹¹¹ and not for entertainment purposes. Furthermore, there are no restrictions on maximum spending, which emphasize the gambling nature of the loot box. In conclusion, it can therefore be said that opening loot boxes with real money is not an activity for mere entertainment.

The Vienna Higher Regional Court (LGZ Wien) ruled that in the case of FUT-Packs (the loot box mechanic of the game FIFA®) the criterion of “low value” of Section 4 (1) No. 2 a) Gambling Act was not fulfilled.¹¹² According to *Schmitt/Steiner*, if the “low value” limit for individual loot boxes is not exceeded, there is no accumulation of the individual stakes. One could argue that the “low value” criterion is met, if it is not a “serial game”. Serial Games are Draws, where Stake and prize correlate via a coherent game principle (for example a slot machine, where there was no possibility to place stakes lower than the “low value” threshold).¹¹³

Regarding loot boxes (in this particular case FUT-Packs), the BG Hermagor ruled that whether a Draw can be considered a “serial game” depends on the framework of the game, created by the entrepreneur. The court hereby referred to the non-existence of spending limits or caps for the purchase of in-game currency with which the loot boxes can be opened.¹¹⁴

It can be concluded from this that the current case law is not only aimed at the individual stakes, but also at how much players spend on loot boxes in a video game overall. This indicates that Section 4 (1) No 1 a) Gambling Act is not applicable, as the act of opening of loot boxes for money is neither for mere entertainment nor of low value.

Section 4 (1) No. 2 b) Gambling Act is also not applicable, as the items drawn from loot boxes are virtual and not physical items.

Because loot boxes are neither regional draws with gambling machines, product draws with gambling machines, life insurance policies, lucky harbors, joke games or tombola games if the aggregated gambling capital by the same promoter does not exceed €4,000, - per calendar

¹¹⁰ See also chapter 2.3

¹¹¹ A dark pattern is a user interface design that manipulates users into taking actions they may not intend to

¹¹² LGZ Wien on June 27, 2023, 34 R 34/23m.

¹¹³ OGH 3.10.2002, 12 Os 49/02; *Legat/Leissler*, *ecolex* 2019/5, 401.

¹¹⁴ BG Hermagor on February 26, 2023, 1 C 16/20x-56.

year or card games in tournaments that are merely for entertainment, the other exemptions from the gambling monopoly are not applicable in this case.¹¹⁵

Loot boxes therefore do not fall under the exceptions to the gambling monopoly of the Austrian Gambling Act.

4.3 Current Case Law and regulatory approaches

In the previous chapter, the current case law in Austria on the subject of loot boxes was already superficially discussed in the course of the legal analysis. This chapter will take a more detailed look. A series of court decisions in Austria have dealt with the issue of loot boxes, culminating in a key ruling by the Regional Court for Civil Matters in Vienna (Landesgericht für Zivilrechtssachen Wien, or LGZ Wien), which categorized loot boxes (in this particular case in the game FIFA) as gambling under the Austrian Gambling Act (GSpG).¹¹⁶ A major point of contention in the following cases was whether the contents of loot boxes had sufficient economic value to be considered a “prize” under the Gambling Act.

The District Court of Hermagor (BG Hermagor) issued the first major ruling on February 26, 2023, in case 1 C 16/20x, declaring FIFA loot boxes illegal under Austrian law. This ruling was groundbreaking not only in Austria but also across the German-speaking world, as it was the first ruling regarding the legal classification of loot boxes. The court classified the loot boxes as an unlawful form of gambling, which led to the recognition that payments made to the game operator could be reclaimed on the basis of unjust enrichment. The Hermagor court concluded that the FIFA Ultimate Team packs (FUT packs) constituted gambling due to the random nature of the contents, which players could not influence, thus meeting the definition of gambling in Section 1(1) of the Gambling Act. The court emphasized that the players’ ultimate goal was not to acquire virtual currency but to obtain the items within the loot boxes, making the purchase of FUT Points a clear form of stake payment. It ruled that the existence of a secondary market for loot box items, albeit an illegal one, was sufficient to prove that the items had economic value. The court found that 3% of FIFA players worldwide engaged in this market, demonstrating that the digital items had real-world value. This decision

¹¹⁵ Section 4 (2-6) Austrian Gambling Act (GspG).

¹¹⁶ *Eibl/Laback*, Zak 2023/547: 307.

established that the random generation of items through the game's mechanics was sufficiently akin to traditional gambling to warrant legal regulation.¹¹⁷

Several months earlier, on November 24, 2022, the District Court of Floridsdorf (BG Floridsdorf) had reached an opposing conclusion in case 5 C 1816/21z. In this case, the court rejected a claim for refunds related to FIFA loot boxes, arguing that the purchase of FUT packs did not constitute gambling under Austrian law. The Floridsdorf court acknowledged the random nature of the contents of the loot boxes but argued that, in this instance, the game developer (Electronic Arts) and platform operators could not be held liable because the digital items obtained did not have sufficient economic value to qualify as a "prize" under the Gambling Act. It focused more on the direct relationship between payment and reward, concluding that since players were not directly purchasing digital items with real money, the transaction did not constitute gambling. The court further argued that Electronic Arts' efforts to prevent secondary market trading of digital items through its terms of service mitigated the possibility of treating these items as economically valuable, and thus, no gambling liability could be attached.¹¹⁸

On June 27, 2023, the Regional Court for Civil Matters in Vienna (LGZ Wien) overturned the Floridsdorf decision in case 34 R 34/23m, in a ruling that significantly advanced the legal discourse on loot boxes. The court classified FIFA loot boxes as a form of gambling requiring a license under the Gambling Act. According to the court, loot boxes fulfilled the criteria set out in Section 2(1) of the Gambling Act, which defines "Draws" as involving the payment of a stake in exchange for a chance to win a prize, where the outcome is determined predominantly by chance. The Vienna court explicitly disagreed with the Floridsdorf decision, holding that the use of virtual currency did not alter the fundamental nature of the transaction. According to the court, the payment of real money for FUT Points, which were then exchanged for loot boxes, fulfilled the criteria for gambling. The court likened this transaction to the purchase of casino chips, which are used in place of real money but still represent a form of stake.¹¹⁹ The Vienna court expanded on the Hermagor court's reasoning, ruling that even in the absence of a secondary market, the sheer amount of time and effort required to obtain certain in-game items imbued them with economic value. The court applied the "cost of acquisition" theory, suggesting that the significant time investment needed to obtain these

¹¹⁷ BG Hermagor on February 26, 2023, 1 C 16/20x-56.

¹¹⁸ BG Floridsdorf on November 24, 2022, 5 C 1816/21z-43.

¹¹⁹ LGZ Wien on June 27, 2023, 34 R 34/23m; Bajrami/Pachschwöll, ZIIR 2022, 270 (276).

items (up to 4,000 hours of gameplay) made them valuable to players. Importantly, the LGZ Wien ruled that the existence of secondary markets for loot box items, even if illegal, indicated that these items had economic value, thus fulfilling the requirement of a "prize" under Section 1(1) Gambling Act.¹²⁰

This appellate decision not only reversed the BG Floridsdorf ruling but also mandated that both the game developer (Electronic Arts) and the platform operator (Sony) be held jointly liable for the repayment of several thousand euros to the plaintiff. The LGZ Wien's ruling emphasized that, under Austrian law, gambling conducted without a proper license is prohibited, and any losses incurred by players in such unlicensed games can be recovered under the principles of unjust enrichment.

While the Floridsdorf court adopted a more conservative approach by dismissing the economic value of loot box contents and the significance of secondary markets, the Hermagor and Vienna courts took a broader view, focusing on the realities of player transactions and the value these virtual items hold in practice.

However, in a recent case led by litigation financier Padronus, the Higher Regional Court (Oberlandesgericht, OLG) of Vienna ruled that loot boxes in *FIFA* do not constitute gambling and are therefore not subject to refunds. According to the Court, the plaintiff did not purchase the virtual items with the intention of reselling them for profit. As a result, the user did not take on an economic risk (placing a stake according to Section 2 (1) No 2 Gambling Act), which is required for an activity to be considered gambling from the Gambling Acts perspective. This provisional decision contrasts with a previous ruling by Vienna's Civil Court of Appeals in 2023, which deemed *FIFA* loot boxes illegal. Padronus, contesting the OLG's ruling, is now preparing an appeal to Austria's Supreme Court (Oberster Gerichtshof, OGH), with a final decision expected in 2025. Until then, legal uncertainty around the status of loot boxes in Austria will persist.¹²¹

4.4 Youth and consumer protection in the context of loot boxes

As analyzed in the previous chapter, loot boxes bear lots of similarities with traditional gambling. As stated in Chapter 1.1 the smartphone is the most popular gaming platform

¹²⁰ LGZ Wien on June 27, 2023, 34 R 34/23m.

¹²¹ *Derstandard.at*, Amos A. (2024), Kampf um die Gaming-Jugend: Lootboxen in „Fifa“ doch kein Glücksspiel, Available at: <https://www.derstandard.at/story/3000000241965/kampf-um-die-gaming-jugend-lootboxen-in-fifa-doch-kein-gluecksspiel?ref=rss>, [last accessed: on November 7, 2024].

among children and young people. Spending money on digital games is now normal for many minors. 55% of pupils in Austria between the ages of ten and 19 state that they have already have already spent money on games, an average of 170 euros per year.¹²² This raises the question on how this particular group is protected from the dangers of those gambling like mechanics and if the current legislation is sufficient.

Most loot boxes can be classified as illegal gambling prohibited by Section 3 Gambling Act, which makes the age of the player irrelevant. However, the concept of a loot box and the dangers of the gambling elements in loot boxes, if no real money is involved, is not covered by the Gambling Act and therefore worth taking a look at. The question that arises is, if the current youth and consumer protection mechanisms in the digital world are sufficient.

The responsibility for youth protection in Austria is not explicitly assigned to either the Federal Government or the states. Therefore, based on Article 15 (1) of the Austrian Federal Constitutional Law (B-VG), both the legislative and executive authority over youth protection fall under the jurisdiction of the states. Although the possibility of transferring legislative power to the federal government by including it in the exhaustive list of Article 11 (1) B-VG has been discussed in the Federal Parliament, no decision was reached due to the principle of discontinuity.¹²³

Although youth protection is primarily under state jurisdiction, the specific division of responsibilities can be further explained. According to *Sommerauer*, youth protection can be divided into a narrow sense and a broader sense. In the narrow sense, youth protection refers to the "youth protection police," which is the authority of the states to impose necessary restrictions on young people who are not yet fully mature and therefore require special legal protection¹²⁴ (For example: Prohibitions on addictive substances like alcohol, nicotine, and other drugs, Controls on harmful media, data carriers, and other youth-endangering items or services or Restrictions on attending public and media-related events, especially those considered harmful to youth). In the broader sense, youth protection also includes matters related to youth welfare and provisions in various state laws, such as event laws. To avoid conflicts over jurisdiction, the youth protection laws in several states (Upper Austria,

¹²² *ÖIAT*, 2024: 6.

¹²³ 1A 1897/A XXIV. GP.

¹²⁴ *Sommerauer*, 2008: 28.

Salzburg, Carinthia, and Tyrol) include a safeguard clause to ensure they do not interfere with federal competencies.¹²⁵

In addition to harmonizing other areas of youth protection, such as alcohol consumption, smoking bans for minors, and curfew times, the Austrian states have also partially aligned their regulations concerning youth-endangering media, objects, and services.¹²⁶ All state laws include a general prohibition on providing certain media under specific circumstances, with most states referencing Section 1 (1) No. 1 of the Media Act (MedienG) to define "media."

The state of Salzburg is the only state to distinguish between "objects and services" and "videotapes and other electronic image data carriers," with the latter being exempt from this regulation. According to Section 1 (1) No. 1 Media Act, media are defined as "any means for disseminating messages or presentations with intellectual content in words, writing, sound, or images to a larger audience through mass production or distribution," which pose a danger to the development of children and youth.¹²⁷ These dangers are categorized into three groups: glorification of violence and criminal acts in a dehumanizing way, discrimination based on race, ethnicity, gender, religion, or disability, and the depiction of sexuality that disregards human dignity.¹²⁸

However, the harmonization of youth protection laws across Austrian states ends after the initial prohibition on providing harmful media. The classification of such media varies, with some states making individualized assessments, such as Vienna, while others delegate the authority to prohibit harmful media through regulations issued by the state government. For example, states like Burgenland, Carinthia, Vorarlberg, and Upper Austria have laws that allow their governments to ban media deemed harmful to youth.¹²⁹ Upper Austria has already

¹²⁵ Sommerauer, 2008: 41.

¹²⁶ *Diepresse.com* (2018), Jugendschutz: Rauchverbot bis 18 kommt, Ausgehzeiten werden verlängert, Available at: <https://www.diepresse.com/5409386/jugendschutz-rauchverbot-bis-18-kommt-ausgehzeiten-werden-verlaengert>, [last accessed: November 7, 2024].

¹²⁷ Section 1 (1) No. 1 Media Act (MedienG).

¹²⁸ Relevant Norms of the states: Section 14 Vorarlberger Kinder- und Jugendgesetz; Section 17 Tiroler Jugendgesetz; Section 37 Salzburger Jugendgesetz; Section 11 K-JSG; Section 9 Oö. JSchG; Section 19 NÖ Jugendgesetz; Section 20 StJG 2013; Section 10 Bgld. JSG 2002; Section 10 WrJSchG.

¹²⁹ Section 10 (5) Bgld. JSG; Section 11 (4) K-JSG; Section 14 (3) Vorarlberger Kinder- und Jugendgesetz; Section 9 (2) Oö. JSchG.

issued a regulation in 2002 prohibiting games that reward players for injuring or killing people, animals, or fantasy creatures, or for destroying property.¹³⁰

In Carinthia and Vorarlberg, the state government can apply these prohibitions to specific age groups. Until 2015, Carinthia used the PEGI rating system for classification.¹³¹ In Styria, youth protection related to media and video games is regulated in §20 of the Styrian Youth Act, allowing individuals to request a legal ruling to determine whether specific media fall under the prohibition.¹³²

Salzburg has a unique regulation in Section 38 of its youth protection law, exempting video games from the general media prohibition outlined in Section 37. Instead, Salzburg relies on the German Youth Protection Act (Sections 11 and 12) and the German USK (Entertainment Software Self-Regulation) for rating video games.¹³³ In Vienna, Section 10 of the Vienna Youth Protection Act requires that video games must carry a PEGI rating, although USK ratings were allowed until January 1, 2013.¹³⁴

Gambling, traditional or in the form of loot boxes, is covered by the Gambling Act. Simulated gambling, however, is not.¹³⁵ Studies showed that the introduction of gambling-like mechanics to minors may lead to a normalization of gambling practices.¹³⁶ Furthermore, loot boxes operate on a reward system designed to trigger the brain's reward centers, similar to the mechanisms behind addiction. For minors, whose impulse control and decision-making skills are still developing, this can lead to compulsive spending on loot boxes in the hope of obtaining rare or desirable items.¹³⁷

A lot of times, loot boxes are designed in a way to specifically appeal to underage players. In a presentation to the Council of Ministers on February 24, 2021, then Finance Minister Gernot

¹³⁰ Oö. Landesregierung über aggressionsfördernde Arten von Spielapparaten und -automaten, LGBl 73/2002.

¹³¹ LGBl. Nr. 69/2015.

¹³² Section 20 (2) StJG.

¹³³ *Sommerauer*, 2008: 105.

¹³⁴ Section 10 WrJSchG 2002

¹³⁵ *Usk.de* (2019), Simuliertes Glücksspiel und Jugendschutz - Unterhaltungssoftware Selbstkontrolle, Available at: <https://usk.de/simuliertes-gluecksspiel-und-jugendschutz/>, [last accessed: November 7, 2024].

¹³⁶ *King/Delfabbro*, 2019.

¹³⁷ *Zendle/Cairns*, 2018.

Blümel highlighted that the integration of gambling-like elements in games designed for young people could have dangerous consequences for their development. He warned that it could lower their inhibitions toward gambling. Blümel called for measures in this area, with a focus on youth protection, involving addiction experts, youth protection specialists, and market participants.¹³⁸

However, to this day, no specific measures by the Federal Government have been taken in order to increase youth protection in the context of loot boxes, and existing individual state law remains insufficient.

Excursus: Conclusion of contracts by minors

It is also worth looking into the legal implications of in-game transactions made by minors, regardless if it is a loot box with a random outcome or a designated virtual item. Because irrespective of the gambling law issue, there is legal protection enshrined in the Austrian Civil Code (ABGB) to protect minors from ill-considered purchases. The ‘pocket money clause’ of Section 170 (3) ABGB.

According to prevailing legal opinion, software usage contracts are generally evaluated under the provisions governing the purchase of goods (Section 1053 ABGB)¹³⁹. The validity of these contracts involving minors must therefore be assessed in light of Section 170 ABGB.

Section 170 ABGB stipulates that minors under the age of 14 cannot engage in legally binding transactions unless there is explicit or implied consent from their legal representatives.¹⁴⁰ Another exception is provided by the "pocket money clause" in Section 170 (3) ABGB, which deems contracts valid if they involve age-appropriate, minor, and routine transactions. The acquisition of an in-game item for a small amount of money may be considered such a transaction for a minor of appropriate age. However, when it comes to the financial impact, an objective standard is applied, focusing on the average minor of that age group, not the individual's specific financial situation. If multiple small transactions form a single, larger transaction, they must be aggregated. For example, Burkowski/Schamberger

¹³⁸ Presentation to the Council of Ministers, Federal Ministry of Finance (Vortrag an den Ministerrat, BMF), 49/13 S 3.

¹³⁹ *Burkowski/Schamberger*, 2015: 9-14.

¹⁴⁰ Section 170 Austrian Civil Code (ABGB).

argue that in-app purchases totaling €3,000 by a minor would no longer be covered under Section 170 (3) ABGB.

Contracts made by minors without adequate legal capacity are deemed voidable until ratified by their legal representatives. Contracts made by children under the age of seven are absolutely void, even with parental consent. Additionally, terms and conditions often stipulate that minors under 13 or 16 years of age cannot enter into user agreements. Although these agreements, such as those offered by platforms like Steam, are typically free, they often include consent to privacy policies that allow companies like Valve to share anonymized data with third parties. This practice is problematic under Art. 8 (1) GDPR, which mandates that minors can only consent to the processing of personal data once they turn 16, requiring parental consent if they are younger.¹⁴¹

4.5 Existing protection mechanisms and their effectiveness

As explained in the preceding chapter, there is no legislation to deal with the problem of loot boxes or simulated gambling, and the Gambling Act can only provide limited relief. Nevertheless, there are various protection mechanisms for young people and consumers in practice, which will be analyzed in this section to determine whether the existing protection mechanisms are sufficient to protect minors. A large part of the tasks involved in the protection of minors in connection with video games is carried out by “independent self-regulation organizations”. Independent self-regulation institutions are non-governmental bodies that evaluate products such as media (like video games) and provide recommendations based on their assessments. Outsourcing this evaluation to non-state institutions has advantages for both video game publishers and the state. For publishers, a pre-evaluation by an independent body ensures acceptance of the results and creates standardized evaluation criteria. Additionally, publishers can actively participate in the self-regulation process, which is often not the case with state-led procedures. For the state, one major benefit is the elimination of costs, as these are borne by the producers. Moreover, by enshrining the validity of recommendations in laws, the state can determine which independent bodies meet its standards.¹⁴² However, a certain degree of state influence remains in terms of organization and evaluation methods. For example, the age classifications used by the German USK (Entertainment Software Self-Regulation Body) are legally defined in the German Youth

¹⁴¹ Article 8 (1) General Data Protection Regulation (GDPR) 2016/679.

¹⁴² Hayes, A. (2024). Self-Regulatory Organization (SRO): Definition and Examples, Investopedia, Available at: <https://www.investopedia.com/terms/s/sro.asp> [last accessed on October 14, 2024].

Protection Act (JuSchG), and a representative from the highest youth authorities is involved in the evaluation process.¹⁴³

Even though the evaluations of independent self-regulation bodies are considered voluntary, they are often de facto mandatory. In Germany, for instance, films and video games must carry age ratings to be distributed to minors. This is why German authors refer to it as "regulated self-regulation."¹⁴⁴ Additionally, retailers' sales conditions often make these ratings practically obligatory.

In Austria, the evaluations of the independent self-regulation bodies PEGI and USK are crucial in the video game sector, as their age classifications are, in some federal states, even legally mandatory.¹⁴⁵

For the sake of completeness, it is noteworthy that in the United States, the ESRB (Entertainment Software Rating Board) is the main independent self-regulation body, however, this thesis focuses on Austrian and European Law, which is why the ESRB won't be further analyzed.

USK & PEGI

The **Entertainment Software Self-Regulation Body (USK)** is a German organization that has been responsible for assessing video games for youth endangerment since 2003, following its inclusion in the **German Youth Protection Act (JuSchG)**¹⁴⁶. It assigns games to predefined age categories, which are:

- Released without age restriction,
- Released from age six,
- Released from age twelve,
- Released from age sixteen,
- No youth releases.¹⁴⁷

¹⁴³ *Junge/Psyk* in Friedrichs/Junge/Sander, 2013: 83f.

¹⁴⁴ *Ibid.*, 96f.

¹⁴⁵ See also Chapter 4.4

¹⁴⁶ *Grundsätze der Unterhaltungssoftware Selbstkontrolle (USK)*, Available at: auf <https://usk.de/die-usk/grundlagen-und-struktur/grundlagen/>, [last accessed: November 7, 2024].

¹⁴⁷ Section 14 (2) d JuSchG.

Before 2003, the USK conducted these assessments voluntarily at the request of game developers.¹⁴⁸ Since the legislative amendment, it operates in partnership with the highest state youth authorities, which are responsible for approving and labeling games. According to §18 Abs. 8 of the JuSchG, video games rated by the USK cannot be indexed by the Federal Review Board for Media Harmful to Minors (BPjS), offering developers of borderline games some protection.¹⁴⁹

However, the system has been criticized for its high costs, making it unaffordable for smaller or foreign developers, who may see their games automatically categorized as "No youth release." Additionally, older games that were not assessed by the USK at the time of their release are also classified as "No youth release," even if they would receive a lower age rating today.

In October 2017, the USK released a statement addressing the issue of loot boxes. While the USK acknowledged the potential problems with loot boxes, it explained that loot boxes do not affect age ratings because the authority to define games as gambling lies with the legislature and courts. Unless loot boxes were classified as gambling under the German Interstate Treaty on Gambling (GlüStV)¹⁵⁰, the USK could not rate games as "No youth release" solely because they contain loot boxes.

In 2023 however, the USK rules were updated to tackle the loot box issue. The new 2023 USK rules, introduced following the amendment of the German Youth Protection Act in 2021, now include criteria that assess the risks associated with loot boxes, in-game purchases, and other online features when assigning age ratings. This change aims to better protect children from potential financial exploitation and addiction risks linked to such features. The USK will now provide additional descriptors for games, highlighting specific concerns such as gambling-like mechanics, including loot boxes, and other risks such as online communication features (e.g., chat functions).¹⁵¹

¹⁴⁸ Decker, 2005: 86.

¹⁴⁹ Ibid., 86f.

¹⁵⁰ Staatsvertrag zum Glücksspielwesen in Deutschland (Glücksspielstaatsvertrag – GlüStV) vom 15. Dezember 2011 (GVBl. 2012 S. 318, 319, 392, BayRS 02-30-I), Available at: <https://www.im.nrw/sites/default/files/media/document/file/Gl%C3%BCcksspielstaatsvertrag.pdf>, [last accessed: November 7, 2024].

¹⁵¹ Gudenrath T. (2022): Neue USK-Regeln: Wegen Lootboxen und Co. werden Altersfreigaben stark überarbeitet, Available at: <https://www.gamestar.de/artikel/neue-usk-regeln-wegen-lootboxen,3387953.html>, [last accessed: November 7, 2024].

These descriptors are part of a broader initiative to ensure that parents and consumers are well informed about the potential risks that go beyond just violence or explicit content. For instance, games with heavy reliance on loot boxes or monetization strategies designed to encourage excessive spending may receive stricter age ratings than before. The USK now also considers technical protective measures, such as parental controls, when evaluating the potential risks of a game.¹⁵²

One of the key motivations behind these changes is to ensure that game developers are transparent about the risks involved in their products, and it also signals a growing awareness of how loot boxes might contribute to gambling-like behaviors in minors. However, the USK is not authorized to classify loot boxes directly as gambling—that responsibility remains with the courts and legislature. Nevertheless, this new regulatory framework is a significant step in addressing the potential harm loot boxes can cause.¹⁵³

Despite the lacking legal classification, the new USK rules already seem to have a measurable impact: The new USK ruleset led to a drop in games without age restrictions, now at 20%, and a rise in USK 12+ ratings to 39.3%. EA Sports FC 24, for instance, received a 12+ rating due to these mechanisms.¹⁵⁴

The Pan European Game Information (PEGI) system was introduced in 2003 by the Interactive Software Federation of Europe (ISFE) to create a unified age rating system across Europe. While its application is not mandatory everywhere, in Austria, for example, PEGI age ratings are only legally required in the state of Vienna. However, PEGI is used in more than 35 European countries, including Albania, France, Portugal, and Cyprus, demonstrating its widespread acceptance.¹⁵⁵

¹⁵² *Gameswirtschaft.de* (2024): Altersfreigaben: USK will Lootboxen in Leitkriterien berücksichtigen, Available at: <https://www.gameswirtschaft.de/politik/usk-altersfreigaben-leitkriterien-lootboxen-060624/>, [last accessed: November 7, 2024].

¹⁵³ *Schindowski N.* (2023); Lootboxen und Jugendmedienschutz, Available at: <https://media-bubble.de/lootboxen-und-jugendmedienschutz/>, [last accessed: November 7, 2024].

¹⁵⁴ *Gameswirtschaft.de* (2024): USK-Statistik 2023: Neue Lootboxen-Regeln schlagen durch, Available at: <https://www.gameswirtschaft.de/wirtschaft/usk-statistik-2023-altersfreigaben-lootboxen/>, [last accessed: November 7, 2024].

¹⁵⁵ *PEGI*: The PEGI-Organisation, available at: <https://pegi.info/de/node/46>, [last accessed: November 7, 2024].

PEGI's organizational structure includes a board of administrators, an expert group, and committees for complaints, legal matters, and enforcement. A unique feature is the PEGI Council, which includes members from government authorities of various states, ensuring that regional interests and expertise are considered. Additionally, a European Commission representative is also part of this council.¹⁵⁶

The PEGI system assigns age ratings and utilizes content descriptors to highlight specific elements relevant to youth protection. The age categories include PEGI 3, PEGI 7, PEGI 12, PEGI 16, and PEGI 18. The content descriptors consist of seven symbols indicating the presence of violence, vulgar language, fear, gambling, sex, drugs, discrimination, and in-game purchases.

The intensity of content, such as the realism of violence or the severity of vulgar language, influences the age rating. According to the PEGI system, content involving ethnic, religious, or national discrimination automatically warrants an 18+ rating due to its harmful nature for younger audiences.¹⁵⁷

So far, PEGI has not issued an official statement on loot boxes. However, in 2017, Operations Director Dirk Bosman explained that PEGI's position is similar to that of the USK. PEGI cannot classify loot boxes as gambling because this authority rests with individual state governments.

The "Gambling" symbol used by PEGI is only applied to games that are legally classified as gambling, such as poker or roulette, based on each state's specific legal definition. For loot boxes to be labeled as gambling, they would need to meet these legal criteria. Nevertheless, PEGI took an initial step to protect minors in 2019 by introducing the "In-game purchases" symbol, allowing parents to easily identify games that include paid content.¹⁵⁸

The evaluation of loot box mechanics by independent self-regulatory bodies, such as the European PEGI and the German USK, demonstrates that the issue of loot boxes has been recognized. However, these evaluations also highlight that the primary responsibility lies with lawmakers, as these regulatory bodies lack the authority to classify loot boxes as gambling.

¹⁵⁶ PEGI: Die PEGI-Ausschüsse, available at: <https://pegi.info/de/node/57>, [last accessed: November 7, 2024].

¹⁵⁷ PEGI: Was bedeuten die Symbole?, Available at: <https://pegi.info/de/node/59>, [last accessed: November 7, 2024].

¹⁵⁸ Derstandard.at (2018): Videospiel-Packungen warnen künftig vor Lootboxen und Co, Available at: <https://www.derstandard.at/story/2000086354363/videospiel-packungen-warnen-kuenftig-vor-lootboxen-und-co>, [last accessed: November 7, 2024].

4.6 Critical Analysis of the legal classification

The Austrian gambling law, codified in the Glücksspielgesetz (GSpG), hinges on the fundamental principle that any game in which the outcome depends solely or predominantly on chance qualifies as gambling. Section 1 of the Gambling Act provides us with a broad definition, classifying games reliant on chance as gambling regardless of whether they involve skill or dexterity, such as in the case of poker or blackjack. This broad definition allows for significant regulatory flexibility but also opens the door to interpretive challenges when applied to modern, interactive digital environments like video games. The reliance on chance is a critical factor in determining whether loot boxes, as a mechanic, meet the legal definition of gambling.

Loot boxes, by their nature, exhibit a reliance on random number generation, which distributes virtual items with varying levels of rarity and in-game value. This randomness aligns closely with the reliance on chance described in the Gambling Act. However, as with any new technological phenomenon, especially concerning the virtual world, the law's ability to adapt is tested. The absence of a clear definition of a "game" within the Austrian Gambling Act, compounded by the fact that video games historically have not been considered games of chance, makes the inclusion of loot boxes under the current legal framework ambiguous. This ambiguity leads to the question of whether loot boxes are merely an entertainment feature, as claimed by game developers, or whether they fall under the purview of gambling legislation.

A key challenge in applying the Austrian Gambling Act to loot boxes lies in their classification as "Draws" under Section 2. The Act defines Draws as games organized by an entrepreneur, involving a monetary stake and the chance to win a prize. This is where loot boxes present the most controversy. While the initial purchase of in-game currency or items might not directly appear to involve real money, the use of microtransactions to acquire loot boxes blurs the line between virtual entertainment and gambling. Courts in Austria, such as the Vienna Regional Court, have already classified loot boxes in games like FIFA as gambling under the Gambling Act, citing the random nature of the rewards and the possibility of real-world economic value through secondary markets.

The economic value of virtual items, which may be tradable or even sold for real money in secondary markets, reinforces their status as "prizes" under the Gambling Act. This point is

contentious, as game developers often prohibit the resale or transfer of virtual items through their terms of service. Nonetheless, courts have increasingly dismissed these terms, recognizing that the existence of a secondary market, whether legal or not, provides sufficient grounds to consider these virtual items as economically valuable. This development expands the scope of gambling regulation and introduces the possibility that nearly all games offering loot boxes could be required to adhere to gambling laws, particularly those regarding licensing and consumer protection. However, this decision can be criticized for being excessive, as the possibility of selling the online account always exists, even if the publishers did not want this. In my opinion, this is not in line with the purpose of the Gambling Act, which primarily aims to prevent anyone other than the state from offering gambling. However, if no gambling is offered at all because the publisher does not want a monetary benefit to be realized, it is certainly not the intention of the legislator to subsume this constellation under the Gambling Act.

One of the most pressing issues with classifying loot boxes as gambling is the absence of a straightforward transactional relationship. Unlike traditional gambling, where money is directly wagered for a chance to win more money or tangible goods, loot boxes often operate in a grey area. Players purchase virtual currency, which is then used to obtain loot boxes, obscuring the monetary value of the items within. This distinction has led some courts, such as the District Court of Floridsdorf, to argue that loot boxes do not meet the gambling definition because the financial exchange is indirect. However, appellate decisions, like the one from the Vienna Higher Regional Court, have overturned such rulings, focusing instead on the broader economic implications of in-game transactions and the time investment required to obtain rare virtual items. This shift toward recognizing the economic value of virtual goods, regardless of whether they are officially tradeable, marks a significant development in the legal treatment of digital goods.

Another point of contention is whether loot boxes should be classified as electronic lotteries under Section 12a of the Gambling Act. Electronic lotteries are defined as games where participation and the determination of outcomes occur online. Since loot boxes are typically acquired and opened through online platforms, they arguably meet the criteria for electronic lotteries. The fact that game developers control the probabilities governing loot box contents further supports this classification. If loot boxes are deemed electronic lotteries, game publishers would be required to obtain a gambling license, which presents a substantial

regulatory hurdle and potentially limits their ability to offer these features without significant legal oversight.

A critical aspect of the loot box debate involves the protection of minors and consumers. Loot boxes, much like traditional gambling, exploit psychological mechanisms designed to trigger addictive behaviors, particularly in younger, more impressionable players. The rewards, often framed by developers with flashy graphics and sound effects, appeal to minors' underdeveloped decision-making abilities, fostering compulsive spending. Despite these risks, current regulatory frameworks offer limited protection. While the Austrian Gambling Act prohibits unlicensed gambling, this does not extend to simulated gambling or loot boxes that do not involve real-money stakes. This loophole leaves minors exposed to potentially harmful gaming practices that, while not technically classified as gambling, operate under similar psychological principles.

Youth protection laws in Austria, primarily governed by individual states, provide a fragmented approach to addressing these issues. While there are prohibitions on harmful media, video games with loot boxes often escape scrutiny because they do not fall under traditional definitions of harmful content, such as those promoting violence or discrimination. The absence of harmonized Federal legislation on youth protection in gaming highlights the inadequacy of the current regulatory environment to safeguard minors from the psychological and financial risks posed by loot boxes.

Independent self-regulatory bodies, such as PEGI and the USK, play a significant role in providing age ratings and consumer warnings for video games. However, these bodies are limited in their ability to classify loot boxes as gambling. PEGI and the USK can only issue content warnings for "in-game purchases" but lack the legal authority to classify these mechanics as gambling. This regulatory gap underscores the need for clearer legal guidelines that explicitly address loot boxes and their potential harm to players, particularly minors. While recent changes to the USK's rating system, which now includes criteria for assessing the risks of loot boxes and in-game purchases, represent a step forward, they do not fully address the broader issues of gambling-like mechanics in gaming.

Self-regulation, while valuable, cannot substitute for comprehensive legal oversight. The effectiveness of these bodies is limited by the lack of enforcement mechanisms and the voluntary nature of their ratings. In the absence of robust legal frameworks, game developers

continue to exploit the grey areas in current regulations, using loot boxes as a lucrative revenue stream while avoiding the scrutiny faced by traditional gambling operators.

The inclusion of loot boxes within the framework of Austrian gambling law presents both legal and ethical challenges. While courts have increasingly recognized the gambling-like nature of loot boxes, particularly in games like FIFA, the legal landscape remains inconsistent. The ambiguity surrounding the economic value of virtual items, the role of secondary markets, and the classification of loot boxes as electronic lotteries all contribute to ongoing legal debates. Furthermore, the current system of youth protection, fragmented across Austrian states, fails to adequately address the risks posed by loot boxes to minors. Without clearer legal definitions and stronger regulatory measures, particularly concerning consumer and youth protection, loot boxes will continue to operate in a legal grey zone, exposing players—especially younger ones—to potentially harmful gambling-like practices.

The rise of loot boxes and similar mechanics in video games calls for a reevaluation of gambling laws and consumer protection measures. Current self-regulatory frameworks, while helpful, lack the legal force necessary to curb exploitative practices effectively. Legislative intervention at both the national and EU levels is needed to ensure that video game developers are held to account for the potentially addictive and financially harmful features they introduce into their games.

5. International Comparison of law

Loot boxes are a controversial topic not only in Austria, but also in other countries. This chapter therefore illustrates how other European countries, the United States and Japan are trying to tackle the issue of loot boxes.

In the European Union, there is no unified regulatory framework for loot boxes, meaning regulation is left to individual Member States. The result is a patchwork of laws, with countries interpreting the legality and consumer protection requirements of loot boxes differently. The European Union (EU) has consumer protection laws that can apply to certain aspects of loot box systems, but these are not harmonized across member states. This fragmented approach presents challenges for both consumers and video game developers, as what is legal in one country may be prohibited in another.¹⁵⁹

Several European countries have adopted their own regulations for loot boxes, often with significant variations in how they classify and regulate the practice. Some of them treating them as a form of gambling, while others focus more on consumer protection. The discussion around loot boxes typically revolves around three main concerns:

- 1) Whether loot boxes should be classified as gambling
- 2) How children and vulnerable populations can be protected
- 3) Transparency and fairness of the loot box system

The following is an non-exhaustive list of different countries that have already taken the first steps towards regulating loot boxes:

Belgium: Belgium was one of the first countries in Europe to take a decisive stance on loot boxes. In 2018, the Belgian Gaming Commission ruled that loot boxes in video games violated its gambling laws. According to Belgian law, gambling is defined by three key elements: (1) a game, (2) a stake, and (3) a chance to win something of economic value. The assessment is therefore based on the same criteria as in the Austrian Gambling Act. The Commission found that loot boxes met all these criteria, especially since players were wagering real money for a chance to win valuable in-game items¹⁶⁰. If publishers violate the

¹⁵⁹ *Covington & Burling LLP* (2023): Upcoming EU Legislation on Loot boxes?, available at: <https://www.lexology.com/library/detail.aspx?g=315f057f-7ad3-442f-9a7e-5ffecf051f76>, [last accessed on November 7, 2024].

¹⁶⁰ *Kansspel Commissie*, 2018: 17.

ban, they face prison sentences of up to five years or fines of up to €800,000, which can be doubled if minors are targeted.¹⁶¹ The decision prompted several game developers, including EA and Blizzard, to remove loot boxes from their games in Belgium¹⁶². The Belgian government's stance has influenced discussions in other countries and established a precedent for classifying loot boxes as gambling.

Netherlands: Like Belgium, the Netherlands has also taken a strict approach to regulating loot boxes. In 2018, the Dutch Gambling Authority ruled that certain loot boxes were in violation of the Betting and Gaming Act, particularly when the items obtained through loot boxes could be traded outside the game for real-world money¹⁶³. The Dutch court further upheld fines imposed on game developers like EA, who initially refused to remove the controversial loot boxes from their *FIFA* games. The Netherlands distinguishes between loot boxes that are purely cosmetic and those that can be monetized in secondary markets, with the latter being more heavily regulated¹⁶⁴.

Germany: Germany has taken a more cautious approach compared to Belgium and the Netherlands, focusing more on protecting minors than on classifying loot boxes as gambling. The German Youth Protection Law was amended in 2021 to include loot boxes, categorizing them as a feature that could potentially lead to addiction or financial harm for children. The amendment requires that games with loot boxes carry an age restriction¹⁶⁵. Germany's approach does not currently classify loot boxes as gambling, but rather seeks to increase transparency and limit their accessibility to younger players. However, discussions about whether loot boxes should be classified as gambling continue, with lawmakers exploring different regulatory paths.

Spain: Spain is on the verge of becoming the first European country to introduce a law specifically targeting loot boxes. The Spanish Ministry of Consumer Affairs introduced a

¹⁶¹ Ibid.

¹⁶² Kerr C. (2019): EA amends FIFA loot boxes in Belgium after regulators increase pressure, Available at: <https://www.gamedeveloper.com/business/ea-amends-i-fifa-i-loot-boxes-in-belgium-after-regulators-increase-pressure>, [last accessed: November 7, 2024].

¹⁶³ Kansspelautoriteit (2018): Some loot boxes in violation of gambling law, Available at: <https://kansspelautoriteit.nl/nieuws/2018/april/artikel-0/>, [last accessed: November 7, 2024].

¹⁶⁴ Id3.com (2023): Loot box regulation worldwide: EU, United Kingdom and more, Available at: <https://www.id3.com/blog/loot-box-regulation-worldwide>, [last accessed: November 7, 2024].

¹⁶⁵ PEGI: Was bedeuten die Symbole?, Available at: <https://pegi.info/de/node/59> [last accessed: November 7, 2024].

draft law in 2022 aimed at regulating loot boxes to prevent their negative impact on players, especially minors. The Spanish government aims to implement safeguards such as requiring games to disclose the odds of winning specific loot box items, restricting loot box purchases by minors, and creating tools to limit spending¹⁶⁶. Spain's move towards a dedicated loot box law sets a potential precedent for other European countries to follow suit.

United Kingdom: While no longer part of the EU, the UK remains an important case study in Europe's regulatory landscape. The UK Gambling Commission currently does not classify loot boxes as gambling, as they argue that loot boxes do not meet the criteria of offering a "prize" with real-world value.¹⁶⁷ However, a growing number of political figures and consumer advocates have called for a change in this classification, particularly in light of studies showing the impact of loot boxes on problem gambling among young people.

A 2020 House of Lords report recommended that loot boxes be regulated under the UK's Gambling Act, signaling a potential shift in the regulatory landscape¹⁶⁸. The department for Digital, Culture, Media and sport announced that it will convene a technical working group to help find solutions to mitigate harm caused by loot boxes.

The European Union's Perspective on Loot Boxes

At EU level, loot boxes are not subject to any specific regulation. However, the EU does have existing consumer protection laws that apply to some aspects of loot boxes. Two key directives are relevant in this context:

The Unfair Commercial Practices Directive (UCPD): The UCPD prohibits unfair business practices, such as misleading advertising and coercive sales tactics. Under this directive, game developers could be required to provide clear information about the contents of loot boxes,

¹⁶⁶ Pinedo, E. (2022): Spain to crack down on videogame 'loot boxes' blamed for pathological behavior, available at: <https://www.reuters.com/world/europe/spain-crack-down-videogame-loot-boxes-blamed-pathological-behaviour-2022-06-01/> [last accessed: November 7, 2024].

¹⁶⁷ UK Gambling Commission (2021): Lootboxes: Advice to the Gambling Commission from ABSG, Available at: <https://www.reuters.com/world/europe/spain-crack-down-videogame-loot-boxes-blamed-pathological-behaviour-2022-06-01/>, [last accessed: on November 7, 2024].

¹⁶⁸ Simmons & Simmons (2023): New loot box gambling regulations 2023, Available at: <https://www.simmons-simmons.com/en/publications/clgm1i0ko0020upv4ipezwfz4/status-of-loot-box-regulations-in-europe-q1-2023>, [last accessed: November 7, 2024].

including the odds of winning specific items¹⁶⁹. This would help ensure that consumers are fully informed before making purchases.

The Consumer Rights Directive (CRD): The CRD establishes a framework for protecting consumers in online transactions, including digital content. In the case of loot boxes, this directive could be used to ensure that players have the right to information about the transaction and that companies provide clear terms of purchase¹⁷⁰.

In January 2023, the European Parliament adopted a resolution titled *"Single Market Framework for Consumer Protection in Online Video Games"*, calling for harmonized regulations across the EU to address consumer protection in the online video game sector. This resolution specifically focused on loot boxes, urging the European Commission to examine the issue more closely and establish uniform standards for consumer protection.

Key aspects of the European Parliament's resolution include:

- **Increased Transparency:** The resolution calls for game developers to disclose the odds of obtaining specific items from loot boxes and ensure transparent pricing for in-game purchases, where the real-money value is clearly indicated.
- **Protection of Minors:** The Parliament expressed concerns about loot boxes' impact on minors and recommended that the default disabling of loot box mechanisms or a potential complete ban for minors should be considered.
- **Misleading Design Practices:** The resolution also addressed problematic practices in the video game industry, such as manipulative designs that encourage excessive spending, and called for measures to protect consumers from such practices¹⁷¹.

Despite these calls, the European Parliament has not introduced binding legislative measures, and regulatory action remains primarily at the discretion of individual Member States.

¹⁶⁹ Art 6 Directive 2005/29/ EC of the European Parliament and the Council of 11 May 2005, "Unfair Commercial Practices Directive", Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>, [last accessed December 16, 2024].

¹⁷⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, "On consumer rights", Available at: <http://data.europa.eu/eli/dir/2011/83/oj>, [last accessed: December 16, 2024].

¹⁷¹ European Parliament (2023). "Resolution on the Single Market Framework for Consumer Protection in Online Video Games." January 2023. No. 15, 22, Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0008_EN.html, [last accessed: November 7, 2024].

The European Parliament's resolution also emphasized the need for the gaming industry to engage in self-regulation. It urged leading game developers to voluntarily adopt standards regarding transparency, consumer protection, and the safeguarding of minors. Furthermore, the EU has encouraged industry stakeholders to proactively address concerns about loot boxes to avoid the need for more stringent legislative measures¹⁷².

While the European Parliament has acknowledged the need for more stringent regulation and has called on the European Commission to study the issue, the regulatory landscape remains fragmented. Individual Member States have taken varying approaches, with some classifying loot boxes as gambling and others focusing on transparency and consumer protection. The EU's focus in the future may shift toward harmonizing these regulations to create a consistent legal framework across all member states.

Legal Situation of Loot Boxes in the United States

The regulation of loot boxes in the United States remains fragmented, with no unified federal law directly addressing their legality. State-level gambling laws, consumer protection statutes, and self-regulatory industry measures define the legal landscape, leading to inconsistencies and ongoing debates about whether loot boxes meet the criteria for gambling.

At the federal level, no specific legislation explicitly addresses loot boxes. However, general consumer protection laws enforced by the Federal Trade Commission (FTC) provide a framework for addressing unfair or deceptive practices. FTC emphasized transparency, urging video game publishers to disclose the probabilities of obtaining specific items in loot boxes.¹⁷³

The classification of loot boxes as gambling varies across states, depending on whether the activity involves consideration (money), chance, and a prize. For example, in Washington State, the Gambling Commission noted that loot boxes could qualify as gambling if their virtual rewards are tradable for real-world money.¹⁷⁴ On the other hand, states like California

¹⁷² Ibid., No. 27, 28, 46.

¹⁷³ *Jdsupra.com* (2020): FTC Public Workshop on Loot Boxes – So What Now?, Available at: <https://www.jdsupra.com/legalnews/ftc-public-workshop-on-loot-boxes-so-37902/>, [last accessed December 18, 2024].

¹⁷⁴ *Washington State Gambling Commission* (2018): Loot Boxes, Available at: <https://wsgc.wa.gov/sites/default/files/2023-10/Loot%20Boxes.pdf>, [last accessed December 18, 2024].

argue that the virtual nature of loot box rewards excludes them from gambling statutes, despite evidence of secondary markets enabling real-world trade.¹⁷⁵

In response to growing criticism, the Entertainment Software Rating Board (ESRB) added an “In-Game Purchases” label in 2018 to inform consumers about loot boxes and similar features. While the industry frames this as a transparency measure, it is noteworthy that it does not mandate disclosure of drop rates or prevent minors from accessing games with loot boxes.¹⁷⁶

U.S. courts have yet to deliver a landmark decision definitively classifying loot boxes as gambling. In *Coffee v. Google LLC* and *Taylor v. Apple, Inc.*, plaintiffs alleged that Apple and Google facilitated illegal gambling by allowing loot box games on their platforms. Both cases, heard in the U.S. District Court for the Northern District of California, concluded in January 2022 that loot boxes and their virtual items lack real-world value, as they cannot be officially cashed out or converted to currency. This ruling aligns with the Ninth Circuit’s precedent in *Kater v. Churchill Downs Inc.* (2018), which held that terms of use prohibiting real-world transactions invalidate claims of value.¹⁷⁷

The *Coffee* court dismissed claims based on gray market sales, citing Google’s Terms of Service, which ban external transactions of in-app content. However, the *Taylor* court noted that Apple’s active role in marketing and distributing loot boxes might support liability if loot boxes are later classified as illegal gambling devices. These rulings highlight the complex intersection of platform liability and loot box mechanics under U.S. law.¹⁷⁸

Legal cases have challenged loot boxes under state consumer protection and gambling statutes, but no definitive ruling has emerged. These cases highlight increasing public and legal scrutiny, which may prompt legislative action in the future.

Japan

¹⁷⁵ *Winston.com* (2023): Loot Box Update: Northern District of California Dismisses with Prejudice “Loot Box” Suit Against Supercell Oy, Available at: <https://www.winston.com/en/blogs-and-podcasts/the-playbook/loot-box-update-northern-district-of-california-dismisses-with-prejudice-loot-box-suit-against-supercell-oy#:~:text=While%20loot%20boxes%20have%20subjective,of%20service%20prohibit%20such%20sales,> [last accessed: December 18, 2024].

¹⁷⁶ *ESRB.com* (2020): Introducing a New Interactive Element: In-Game Purchases (Includes Random Items), Available at: <https://www.esrb.org/blog/in-game-purchases-includes-random-items/>, [last accessed December 18, 2024].

¹⁷⁷ Coraggio G. & Giuffr  V. (2023): Navigating the regulatory maze: A global guide to loot boxes in video gaming, Available at: <https://www.dlapiper.com/en/insights/topics/loot-boxes>, [last accessed: December 18, 2024].

¹⁷⁸ *Ibid.*

In Japan, which is sometimes called the birthplace of the loot box system¹⁷⁹, the legal framework surrounding loot boxes, referred to as "Gacha"¹⁸⁰, addresses concerns over gambling-like mechanics in video games. While simple forms of Gacha are generally permitted, the "Complete Gacha" (Compu Gacha) practice was officially banned in 2012 by the Consumer Affairs Agency. This system, which required players to collect a specific set of items through random draws to obtain rare rewards, was deemed a violation of the Act Against Unjustifiable Premiums and Misleading Representations (AUPMR) due to its resemblance to gambling and the financial harm it caused, particularly among children.¹⁸¹ Developers now must disclose item odds and implement measures to prevent real-money trading of virtual items. These measures apply to both domestic and foreign games targeting Japanese residents.

¹⁷⁹ 1dr.com (2023): A look at the current state of videogame loot box regulation worldwide. Available at: <https://www.1d3.com/blog/loot-box-regulation-worldwide> [Last accessed: December 18, 2024].

¹⁸⁰ Gacha is a monetization mechanic commonly used in video games, inspired by Japanese capsule toy vending machines. Players spend in-game currency (often purchased with real money) to receive random virtual items, characters, or upgrades. The appeal lies in the chance to obtain rare and valuable rewards, though the randomness can encourage repeated spending, sometimes likened to gambling. Definition available at: <https://dictionary.cambridge.org/de/worterbuch/englisch/gacha> [last accessed December 18, 2024].

¹⁸¹ *Straub, N.* (2020): Every Country With Laws Against Loot Boxes (& What The Rules Are), Available at: https://screenrant.com/lootbox-gambling-microtransactions-illegal-japan-china-belgium-netherlands/?utm_source=chatgpt.com, [last accessed December 18, 2024].

5.1 The role of game companies and platform operators

The main part of the thesis deals with the legal assessment of loot boxes from the player's perspective. However, for the sake of completeness, it is important to also consider the role of the game companies and platform operators. They are central to the discussions revolving around loot boxes, as they are the entities responsible for implementing and maintaining loot box mechanisms in their games. Their role in shaping the regulatory landscape is significant, as they can influence both consumer behavior and the overall transparency of these systems.

The gaming industry so far has generally resisted strict regulation, arguing that loot boxes are a legitimate form of monetization that enhances the gaming experience without necessarily constituting gambling. Many companies maintain that loot boxes are a form of in-game purchases, distinct from gambling because the rewards are virtual and often cannot be exchanged for real money outside the game¹⁸². The biggest video game publishers, for example Electronic Arts (EA), Activision Blizzard and Valve have all been involved in debates about loot boxes. The industry's response to regulations or court decisions has often been reactive rather than proactive. As in the previous chapter stated, Belgium has classified loot boxes as gambling, which led companies, in this case EA, to disable loot boxes to comply with national laws¹⁸³. This shows that game companies generally prefer to adapt to local regulations rather than spearheading industry-wide changes in their business models.

In May 2024, the German Games Industry Association released a position paper on "Loot boxes in Games." The paper seems to downplay the risks associated with loot boxes, shifting responsibility for player protection and youth safeguarding—normally expected from gambling operators—onto parents. While parental supervision is important, it seems excessive to place the entire burden of player protection solely on them. The Association denies that loot boxes constitute gambling, asserting that although a random element exists, players never risk a total loss, always receiving a virtual item.¹⁸⁴ However, frequently

¹⁸² McCaffrey, 2023: 136.

¹⁸³ Yin-Poee W. (2019): EA buckles in Belgium, stops selling FIFA Points following loot box gambling pressure. Available at: <https://www.eurogamer.net/ea-buckles-in-belgium-stops-selling-fifa-points-following-loot-box-gambling-pressure>, [last accessed: November 7, 2024].

¹⁸⁴ Raabe/Hentsch., 2024: 6.

distributed items are often deemed unsatisfactory or disruptive by players, potentially cluttering their inventories. A central argument in the paper claims that loot boxes are merely optional, with the “vast majority” of players not purchasing them. Yet, studies suggest otherwise, indicating that approximately 45% of players spend money on loot boxes.¹⁸⁵ Lastly, the paper encourages parents to foster media literacy in children and monitor digital media use. It suggests measures like withholding credit card details to restrict in-game purchases.¹⁸⁶ However, implementing robust age verification at the point of access to loot box mechanics could more effectively prevent children from engaging with these gambling-like elements.

In response to growing public concern, some companies operating in Austria have begun to implement self-regulatory measures. For instance, Sony, which operates the PlayStation and platforms, has integrated parental controls that allow users to restrict or disable in-game purchases, including loot boxes¹⁸⁷. Similarly, Nintendo has introduced mechanisms that limit spending and provide detailed reports on in-game purchases to parents. These self-regulatory practices represent an effort to balance consumer protection with business interests, as game companies recognize the potential reputational and financial risks associated with government-imposed regulations.

The Austrian Interactive Entertainment Association (ÖVUS), which represents the video game industry in Austria, has voiced support for industry-led solutions rather than formal regulation. The association advocates for greater transparency and parental controls in gaming to address concerns without the need for restrictive laws.¹⁸⁸ ÖVUS’s stance is reflective of the broader gaming industry’s preference for self-regulation over government intervention.

¹⁸⁵ Kristiansen/Severin, 2020: 103/106254.

¹⁸⁶ Raabe/Hentsch: 2024: 8.

¹⁸⁷ PlayStation Parental Controls, Available at: <https://www.playstation.com/en-us/support/account/ps5-parental-controls-spending-limits/>, [last accessed: November 7, 2024].

¹⁸⁸ ÖVUS, 2019.

6. Conclusions

The increasing presence of loot boxes in video games has instigated substantial debate within the context of Austrian and broader European gambling laws. As the gaming industry has grown and diversified its revenue streams, loot boxes have emerged as the dominant monetization mechanism. However, their structural and psychological resemblance to traditional gambling poses significant ethical and legal challenges, particularly in terms of protecting minors from potential addiction and financial exploitation.

6.1 Summary of the most important findings

Legal Ambiguity and Interpretation of Gambling Laws

The Austrian gambling law, namely the Gambling Act (Glücksspielgesetz (GSpG)), generally classifies games relying on chance as gambling. Loot boxes, due to their random outcome mechanics, align closely with this definition. However, the ambiguity arises due to the digital and non-monetary nature of the rewards within loot boxes, challenging traditional interpretations of gambling laws. Case law remains divided; while some Austrian courts, such as the Vienna Regional Court, have ruled that loot boxes in games like FIFA constitute gambling, others have opted for a more conservative interpretation, underscoring the complexities in classifying these features within existing legal frameworks.

Economic Value of Digital Items and the Role of Secondary Markets

A key factor in categorizing loot boxes as gambling hinges on the economic value of the items obtained, particularly if these items can be traded on secondary markets. Courts have increasingly recognized the real-world economic value associated with virtual items in certain games, especially when these items are difficult or time-intensive to obtain. This recognition broadens the scope of gambling regulation, implying that even non-tradable digital goods may fulfill the Gambling Act's criteria if they hold value to players. This has to be seen very critically, as it is in my opinion excessive regulation and does not fulfil the protective purpose of the Gambling Act.

Youth Protection and Ethical Concerns

Loot boxes are structured to exploit psychological reinforcement mechanisms similar to gambling, posing a potential risk to minors. Current youth protection laws in Austria, which are fragmented across states, inadequately address the influence of loot boxes on younger players. Minors, often lacking fully developed decision-making skills, may be more susceptible to compulsive spending triggered by loot boxes. Without a unified federal approach, the current system fails to provide comprehensive protection for this vulnerable group.

Role of Self-Regulation and Consumer Transparency

Self-regulatory bodies like PEGI and USK, while providing age ratings and content descriptors, lack the legal authority to classify loot boxes directly as gambling. While self-regulatory measures like parental controls and clearer in-game purchasing information represent a step in the right direction, they cannot substitute for explicit legal definitions and protections. The gaming industry's preference for self-regulation over legal restrictions has limited the impact of these mechanisms.

International Comparisons and Regulatory Trends

European countries exhibit varied approaches to loot box regulation, with Belgium and the Netherlands taking strict stances by classifying certain loot boxes as gambling. Other countries, like Germany and Spain, have opted for measures focusing on consumer transparency and minor protection. The European Union's recent calls for harmonized regulations across Member States underscore the need for a unified approach to loot box regulation.

The Need for Legislative Clarity and Harmonization

In Austria and the broader EU, loot boxes currently operate in a legal grey area. Given the psychological impact on minors and the potential for financial exploitation, there is an urgent need for harmonized regulations. These should focus on consumer transparency, enforceable protections for minors, and clear guidelines on classifying loot boxes as gambling. Only

through coordinated efforts across the EU can comprehensive and effective protections be implemented.

To put it in a nutshell, the evolution of loot boxes necessitates a re-evaluation of gambling and consumer protection laws to address emerging digital monetization models. While the Austrian legal system has made strides in recognizing the potential harms of loot boxes, significant gaps remain. Enhanced legal clarity, consistent youth protection standards, and coordinated European action are essential to protect players, especially minors, from the exploitative potential of loot boxes.

6.2 Proposals for adapting the legal framework

Classifying Loot Boxes as Gambling Under the Austrian Gambling Act

To effectively manage the gambling-like nature of loot boxes, they should be classified as gambling when specific criteria are met. Those criteria are met:

- If loot boxes involve a monetary stake and result in randomized rewards that have a measurable economic value (e.g., items that can be sold or traded in secondary markets).
- If the virtual items acquired in loot boxes have real-world value, a license under the Gambling Act should be required for game publishers.
- Games without direct economic implications (non-tradable, no official secondary market) could remain exempt, but such games should still disclose the odds of obtaining particular items to ensure transparency.

Enhanced Consumer Transparency Requirements

Legislators should mandate transparency measures for all games containing loot boxes, requiring developers to disclose the odds of receiving specific items within a loot box and the maximum potential cost to achieve certain rewards if loot boxes are necessary for significant gameplay advancement. Furthermore, the implementation of a standardized labeling system, including icons or ratings, that clearly indicates when a game includes loot boxes, would enhance consumer transparency, as the current PEGI system does not adequately address the loot box issue.

Age Verification and Parental Controls

To protect minors, a robust age verification system in games containing loot boxes or gambling-like mechanics should be implemented, making age-restricted access mandatory. Publishers should be required to integrate advanced parental controls, such as purchase caps, spending alerts, and the ability to disable in-game purchases. Also, game platforms should be required to provide detailed reports on in-game spending, accessible by parents, especially when accounts are registered to minors.

EU-Level Regulations

A uniform EU regulation could define clear conditions for when loot boxes should be considered gambling and outline standardized consumer protections, such as mandatory disclosure of odds and age restrictions. EU-wide regulation is necessary, as most video game publishers operate throughout the continent. Uniform regulation would also help establish an even playing field across the gaming industry, preventing companies from taking advantage of more lenient national regulations within the EU and fostering fairer market practices.

Regulating Addictive Design Features

A ban on "dark patterns" in loot boxes, prohibiting the use of countdown timers, scarcity signals, and artificial urgency designed to exploit psychological triggers that disproportionately affect younger players could help reducing impulsive buying decisions. Requiring games with loot boxes to implement "cool-off" periods and limiting repeated purchases would encourage mindful spending. Conducting regular audits by regulatory bodies to ensure game designs comply with ethical standards, especially in youth-focused games, could reduce the number of players lured into buying loot boxes.

Education Initiatives for Minors and Guardians

Online resources and guidance tools should be made available to parents, helping them understand the specifics of game mechanics like loot boxes, how to monitor spending of their children, and options to control in-game purchases effectively.

Implementation of Spending Limits and Opt-In Models

For minors and new users, it would be helpful to set a standardized cap on in-game purchases unless explicitly opted out by a parent or legal guardian. Offering a “free trial” period for loot boxes and in-game purchases, limiting early spending would allow players to familiarize themselves with in-game mechanics without the risk of immediate high expenditure.

In adapting these proposals, the Austrian Government would need to consider both the potential enforcement mechanisms and the economic impact on the gaming industry. Relying on industry self-regulation would not lead to a solution in the long term; enforceable measures such as laws and fines for non-compliance are needed.

6.3 Outlook

This analysis of the legal and regulatory frameworks surrounding loot boxes reveals a complex intersection of consumer rights, youth protection, and the economic interests of the gaming industry. While the gambling-like characteristics of loot boxes are evident, particularly through chance-based mechanics, monetary incentives, and psychological reinforcement techniques, the Austrian legal system is inadequate to address the unique challenges posed by these mechanisms. The Austrian Gambling Act partially captures loot boxes, classifying some under its gambling provisions based on recent judicial rulings. However, without a comprehensive framework directly addressing loot boxes' unique traits and risks, this approach remains limited, allowing legal grey areas that game developers can exploit.

International perspectives, as illustrated by Belgium, the Netherlands, and Germany, show a variety of approaches, ranging from outright bans to stricter age ratings. These examples offer potential models for Austria, suggesting that effective loot box regulation might require a more specific focus on consumer protection, transparency, and youth safety rather than solely framing it as a gambling issue. The recent European Parliament resolution advocating for harmonized EU-wide regulations on consumer protection in gaming, along with specific calls for loot box transparency and protections for minors, signals an impending shift toward consistent international standards.

Despite some industry-led measures, such as parental controls and spending limits, self-regulation remains insufficient. Relying solely on parental oversight places an unrealistic

burden on families to counteract potentially exploitative practices. A comprehensive legal framework, ideally coordinated across the EU, could better address these issues by mandating transparency on loot box odds, requiring meaningful age verification, and enforcing spending caps for minors. Austria's fragmented youth protection laws should be consolidated, with Federal oversight to ensure that all minors are consistently shielded from gambling-like risks across digital environments.

Ultimately, loot boxes reflect a transformative revenue model in the gaming industry. Striking a balance between protecting minors and respecting economic freedoms will require a nuanced approach, incorporating regulatory reforms, industry accountability, and increased awareness. Establishing harmonized, enforceable standards would not only safeguard young players but also provide a fair operating environment for developers across jurisdictions. Given the dynamic nature of digital gaming and monetization strategies, ongoing research and policy adaptation will be necessary to sustain effective consumer protection in this rapidly evolving field.

This thesis, through its examination of legal, regulatory, and psychological dimensions of loot boxes, underscores the need for Austria—and the EU as a whole—to implement specific legal provisions that align gaming practices with modern consumer protection and youth safeguarding standards.

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8. Abstract (English)

Loot boxes in video games represent a transformative yet controversial monetization model within the gaming industry. This thesis examines the legal classification of loot boxes, particularly under Austrian gambling law, and their impact on minors. The analysis highlights the psychological mechanisms, such as variable-ratio reinforcement and dark patterns, that resemble traditional gambling and raise concerns regarding addictive behavior and financial exploitation, particularly among vulnerable populations. Through an in-depth review of Austrian and EU law, case law, and international regulatory comparisons, the thesis identifies gaps in existing legislation and youth protection mechanisms. It concludes that loot boxes, when involving monetary stakes and randomized rewards with economic value, fulfill the criteria of gambling under Austrian law. The study proposes a harmonized EU-wide regulatory framework, enhanced transparency requirements, robust youth protection measures, and a reevaluation of manipulative game design features to better protect consumers, especially minors, from potential harm. This thesis contributes to the ongoing discourse on balancing consumer protection with the economic interests of the gaming industry while emphasizing the urgent need for legislative clarity in this evolving digital landscape.

Abstract (German)

Lootboxen in Videospielen stellen ein transformatives, jedoch umstrittenes Monetarisierungsmodell in der Gaming-Branche dar. Diese Masterarbeit untersucht die rechtliche Einordnung von Lootboxen, insbesondere im Rahmen des österreichischen Glücksspielgesetzes, und ihre Auswirkungen auf Minderjährige. Die Analyse beleuchtet psychologische Mechanismen wie variable Verstärkungsraten und manipulative Designstrategien, die traditionellen Glücksspielen ähneln und Bedenken hinsichtlich suchtähnlichem Verhalten und finanzieller Ausbeutung, insbesondere bei gefährdeten Bevölkerungsgruppen, aufwerfen. Durch eine umfassende Betrachtung des österreichischen und EU-Rechts, der Rechtsprechung und internationaler regulatorischer Ansätze werden Lücken in der bestehenden Gesetzgebung und im Jugendschutz aufgezeigt. Die Arbeit kommt zu dem Schluss, dass Lootboxen, die monetäre Einsätze und zufallsbasierte Belohnungen mit wirtschaftlichem Wert beinhalten, die Kriterien des Glücksspiels nach österreichischem Recht erfüllen. Es werden harmonisierte EU-weite Regulierungen, verbesserte Transparenzanforderungen, ein stärkerer Jugendschutz sowie eine Neubewertung

manipulativer Spieldesign-Elemente vorgeschlagen, um Verbraucher, insbesondere Minderjährige, vor potenziellen Schäden besser zu schützen. Diese Masterarbeit leistet einen Beitrag zur aktuellen Diskussion über den Ausgleich zwischen Verbraucherschutz und den wirtschaftlichen Interessen der Gaming-Industrie und betont die dringende Notwendigkeit rechtlicher Klarheit in diesem dynamischen digitalen Umfeld.