Loot boxes: opening up the legal issues

Loot boxes - essentially a game mechanic that allows the player to purchase, or earn via gameplay, a virtual item (the loot box) that, when opened, rewards the player with one of a number of in-game items - featured heavily in the video games and often in the legal press last year, with some high profile industry names enduring a wave of negative press for their use of loot boxes. Given the way 2018 has started, the loot box debate looks set to continue this year. An aspect of the debate revolves around the possible regulation of loot boxes, for example whether gambling legislation is the most appropriate legislation for such purpose. Ben McMeechan of Harbottle & Lewis LLP provides an overview of the legal issues surrounding loot boxes with a focus on the UK perspective, and looks at how certain developments will influence the direction of regulation.

Loot boxes

A ‘loot box’ is essentially a game mechanic that allows the player to purchase, or earn via gameplay, a virtual item (the loot box) that, when opened, rewards the player with one of a number of in-game items. The precise in-game item the player wins is based on chance, with the odds of winning more desirable items generally much lower than less desirable items. The in-game items available can range from cosmetic ‘skins’ to in-game advantages.

What’s the position in the UK?

Gambling

With the use of the words ‘win,’ ‘chance’ and ‘odds’ it was inevitable that loot boxes would pique the interest of gambling regulators across the world, including the British Gambling Commission, and, so far, much of the loot box commentary in the UK has focussed on gambling. The Gambling Act 2005 (the ‘Act’) governs gambling activities in Great Britain and underpins a licensing regime for businesses facilitating gambling.

To be classified as gambling for the purposes of the Act an activity has to fall within the Act’s definitions of ‘gaming,’ ‘betting’ or ‘participating in a lottery.’

The definition of ‘gaming’ (‘playing a game of chance for a prize’) is the one most likely to apply to loot boxes and, on the face of it, loot boxes may seem to be caught by the term ‘gaming’.

However, importantly, to fully satisfy the definition of ‘gaming,’ the prize needs to be ‘money or money’s worth’ and it seems to be this criterion that has saved loot boxes from being automatically classified as ‘gambling’ in Britain.

Taking a look back to where it started, the Gambling Commission’s interest in loot boxes stemmed from a wider interest in the video games industry. The Gambling Commission released a discussion paper in August 2016 covering virtual currencies, eSports and social gaming. While the discussion paper did not focus on loot boxes, it shone a light on the video games industry and was the basis for the Gambling Commission’s follow-up position paper, and subsequent statement, that specifically called out loot boxes.

The position paper and more recent statement demonstrate that the Gambling Commission’s view is that loot boxes operate in a similar way to gaming machines (e.g. jackpot machines) and would constitute gambling if the prize awarded is ‘money or money’s worth.’ When considering whether an in-game item has acquired a ‘money’s worth’ value, the Gambling Commission will look at, amongst other things, whether the in-game item can be converted into cash or can be traded for other items of value. Therefore, if the in-game items awarded in a loot box are successfully restricted for use within the game and are not ‘tradeable’ (i.e. a closed loop system), it is unlikely that such loot boxes will be considered gambling.

However, unauthorised secondary markets do already exist to facilitate the trading of almost all in-game items. Whilst the Gambling Commission has attempted to address the issue of who is responsible for these secondary markets, the Gambling Commission’s focus on whether or not the in-game items have attained a ‘money or money’s worth’ value still leaves games studios and publishers who use loot boxes in their games with a degree of uncertainty.

The reality is that in-game items do have an inherent value to the player, otherwise no-one would purchase the items; however, this does not mean that loot boxes should necessarily be held...

Ben McMeechan
Ben.mcmeechan@harbottle.com
Harbottle & Lewis LLP, London
to be ‘money or money’s worth’ and therefore constitute ‘gambling.’ If loot boxes were to be considered gambling, (a) many games studios and publishers would be required to obtain gambling licences which can be a costly and burdensome process, which would not be practical for most games, and (b) games that included loot boxes could not be offered to children (as gambling in the UK is not (subject to some limited exceptions) permitted for those under the age of 18) - something that would surely see loot boxes disappear altogether.

This may not be an appropriate or proportionate response to the potential harm caused by loot boxes. Most recently, in its recent statement on loot boxes, the Gambling Commission has suggested that it is keen to “share [its] experiences and expertise with others” who have a responsibility to protect children, which may indicate that it does not believe the Act is necessarily the most appropriate legislation to regulate loot boxes and this may lead to other regulators in the UK taking an interest.

Consumer protection

This leads on to one area of law that could have an increasing relevance for loot boxes offered in the UK: consumer protection (particularly in the context of protecting children).

The UK has a number of laws in place that are aimed at protecting consumers and it could be argued that loot boxes are already falling foul of this legislation. For instance, the Consumer Rights Act 2015 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 require traders, amongst other things, to provide consumers with all the main characteristics of the goods, services or digital content before the consumer makes a purchase. Given that many loot boxes do not disclose the odds of winning the prizes prior to purchase, arguably one of the fundamental characteristics of a loot box, it is easy to see how loot boxes may be failing to meet this requirement.

In addition, loot boxes are increasingly being marketed and implemented in a way that impacts gameplay, making these purchases seem like they are a ‘necessary’ purchase rather than an optional one and, in some cases, players/children feel pressured to make such purchases. Where this is the case, such practices may be seen to be unfair, misleading or aggressive practices that could be caught by the Consumer Protection from Unfair Trading Regulations 2008. In fact, a couple of years ago, similar practices were emerging in respect of another prevalent issue in the games industry: monetisation.

This prompted the UK Competition and Markets Authority (then the Office of Fair Trading) to launch an investigation into online and app-based games. This investigation, conducted in 2013, focussed on whether the manner in which some games were implementing in-game purchases was unfair, misleading or aggressive. The CMA’s consultation found a number of practices concerning, particularly where online and app-based games were aimed at children.

To address these concerns, the CMA created a set of eight principles (with practical examples) that outlined the CMA’s view of what the industry needed to do to comply with consumer protection legislation. Generally, these principles have helped companies steer clear of the more obvious pitfalls associated with in-game purchases and, whilst they will already be relevant for most games studios and publishers implementing paid loot boxes, the principles can be used as a useful guide for all companies implementing loot boxes (paid or free).

The CMA’s investigation into monetisation should act as a stark reminder to the industry that when there is an issue that is causing serious harm to consumers (particularly children), the CMA will step in to protect consumer rights. A loot box, like monetisation, is not itself unfair, misleading or aggressive but the manner in which loot boxes operate, for example where players/children feel under pressure to make such purchases, can be. When offering loot boxes, games studios and publishers should aim to be fair, transparent and open with consumers and should be particularly cautious where the games are aimed at children. If companies do not take a responsible approach to their obligations from a consumer rights perspective, the CMA may feel obligated to investigate loot boxes.

Government intervention

One final interesting development in the UK that may have an impact on loot boxes is the Government’s consultation on its ‘Internet Safety Strategy.’ The
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consultation focused on a wide variety of online issues and, whilst it did not specifically highlight loot boxes, it did contain a section that focussed on ‘online games.’ The Government highlighted that it would look to work with the industry to develop an understanding of the existing issues and share guidance on certain best practices to “ensure their consumers - particularly children - can have a safe and enjoyable online gaming experience.” It is quite possible that loot boxes could fall under this review, particularly after they were brought to the Government’s attention via a petition9 and therefore this will be another area that the industry will need to consider.

What are other jurisdictions doing?
Governments and regulators across the world are approaching the issue of loot boxes in a number of ways but it seems that the majority of these jurisdictions have focused on three key areas: gambling, consumer rights and self-regulation.

As in the UK, a recurring theme in a number of jurisdictions is the comparison between loot boxes and gambling, with calls for tighter legislation to regulate the practice. In the US for example, representatives in several states have intimated that loot boxes are akin to gambling and new legislation is required to regulate loot boxes to protect young people. Across the sea, the recent decisions from the Belgian Gaming Commission10 (‘BGC’) and Netherlands Gaming Authority11 (‘NGA’) that some loot boxes are akin to gambling has brought the issue of gambling back into the EU spotlight. With the NGA also indicating that it wishes to work together with other regulators in Europe12, it will be interesting to see if these two decisions mark the start of a sea change in European policy or if we will continue to see countries adopting different national approaches.

Other jurisdictions have turned to consumer rights to tackle the issue of loot boxes. As an example, in South Korea the Fair Trade Commission has relied on consumer rights laws to fine three companies for their misleading promotion of loot boxes. Similarly, China now requires all online publishers to release the probabilities of receiving items in loot boxes, and has introduced a ban on the direct sale of loot boxes for cash.

Another area of focus, particularly in the US, has been on how the relevant industry ratings boards can regulate loot boxes. So far the ratings boards in Europe and the US have refused to take measures that tackle loot boxes directly; however, in response to increasing pressure in the US, the Entertainment Software Ratings Board recently announced that it will begin assigning an ‘In-Game Purchases’ label to all physical (i.e. boxed) games including micro-transactions13. Although some will see this as a step in the right direction, the broad nature of the descriptor means that the impact on loot boxes is arguably diluted.

Finally, another interesting industry development has been Apple’s recent move to regulate loot boxes made available on its platform. Apple now requires that apps incorporating loot boxes must disclose the odds of winning each prize prior to purchase14. This shows that the industry can try to self-regulate and tackle loot boxes without the intervention of statutory or governmental regulators and it will be interesting to see if other platforms follow suit.

Looking ahead
In 2018, the UK’s focus on loot boxes may switch from gambling to consumer rights, as regulators look to find a proportionate remedy to tackle the potential impact that loot boxes can have on consumers (and particularly children). However, the NGA’s and BGC’s recent conclusions show that the comparisons between gambling and loot boxes are unlikely to disappear any time soon. Games studios and publishers will need to be aware of applicable gambling laws across the world and it will be interesting to see how countries’ varying approaches to gambling will impact publishers’ and games studios’ implementation of loot boxes moving forward.

From an industry perspective, loot boxes can provide a vital and valid source of revenue for games studios and publishers seeking to recoup the increasing development costs of their games. By being responsible to consumers, and particularly mindful of the risks posed to children, the games industry has the opportunity to address the main concerns raised by legislators and commentators before more regulators feel compelled to step in. Until this is done on a consistent basis across the industry, it seems unlikely that loot boxes will disappear from the spotlight any time soon.

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9. https://petition.parliament.uk/petitions/201300
14. Section 3.11 of Apple’s App Store Review Guidelines