

Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games

A research report in the framework of the FWO 'Gam(e)(a)ble' Project



Gam(e)a(ble)

This document is a part of the legal work package of the ‘Game(e)(a)ble’ research project. ‘Gam(e)(a)ble’ is a four-year interdisciplinary research project on video gaming and gambling, which is funded by the FWO (Fonds Wetenschappelijk Onderzoek Vlaanderen). The main objective of the ‘Gam(e)(a)ble’ Project is to investigate the blurring lines between online gaming and gambling and its impacts on young people, to ensure that they can be protected from the potential dangers related to gambling within the dynamic and increasingly popular video gaming environment.

The ‘Gam(e)(a)ble’ Project consists of the following partners:

- Ghent University: Research group Law & Technology; Department Developmental Psychology
- KU Leuven: Research Centre for IT and IP Law (CiTiP); Institute for Media Studies (IMS); Play & Game
- UC Leuven-Limburg: Centre for Inclusive Society

For more information regarding the project, visit our website (www.gameable.info) or Twitter (https://twitter.com/gameable_youth).

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Executive summary

Aim. Developments within the rapidly evolving video gaming industry have caused the lines between video gaming and gambling to become increasingly blurred. Aside from the regulatory framework related to gambling or video gaming, a variety of rules exists across different legal domains and different sectors which can be applied to this issue. Therefore, the aim of this report is to provide a structured overview of the relevant provisions against the background of the existing children’s rights framework found at the international and European level.

Method. The report covers a broad spectrum of regulatory instruments that are relevant to gambling in video games. First, the different children’s rights that are relevant to the topic are discussed, with a central role for the United Nations Convention on the Rights of the Child. Second, an exploratory mapping of the relevant legal domains narrowed the scope of the report to five important regulatory frameworks, which are discussed in the subsequent chapters of the report. For gambling regulation, we focus on the role of the European Union as well as on a comparative analysis of three national jurisdictions (Belgium, the United Kingdom and the Netherlands). For the other legal domains, the focus lies predominantly on the legal framework of the European Union; however references are made to relevant policy documents and case law at national, supranational and European levels when relevant and applicable.

Main findings. Video games, where microtransactions such as in-game purchases are increasingly present, are more and more becoming a part of children’s daily lives. Some of the elements in video games use microtransaction or other monetisation mechanisms that resemble gambling (e.g. lootboxes, social casino games). This has caused children to increasingly encounter gambling(-like) elements in video games which may be potentially harmful for them. The outcome of this report is a mapping of the relevant provisions concerning this integration of video gaming and gambling. From the analysis performed, it can be concluded that at this point in time, there is a plethora of regulation applicable to this topic, both in general and for children in particular. At the same time, the legal landscape is fragmented and existing frameworks oftentimes overlap, making it difficult to understand the interrelations between all these provisions in practice. The mapping resulted in the following takeaways (which are also included at the end of each chapter):

CHILDREN’S RIGHTS. The key takeaways regarding children’s rights are:

On the children’s rights framework in general:

- ❖ Children are seen as **active holders of rights** in the digital environment.
- ❖ At the **international level**, the UNCRC (together with the CRC Committee) forms the backbone against which children’s rights policies should be evaluated. Other international institutions with important contributions for children’s rights are UNICEF, the OECD, the UN Human Rights Council and the work of the UN Special Rapporteurs.
- ❖ At the **European level**, the Council of Europe (with the ECHR) and the European Union (with the CFEU) have created their own children’s rights framework, inspired by the UNCRC and further building on its provisions. The Council of Europe has issued a plethora of non-binding instruments that are important in the interpretation of children’s rights and the EU has its own Strategy on the Rights of the Child, in which the digital and information society is one of the pillars.

- ❖ The **digital environment** is a double-edged sword for children’s rights, as it presents both benefits and risks. The 2021 General Comment No. 25 of the CRC Committee on the Rights of the Child in the Digital Environment is a crucial document, that sets out to re-interpret the UNCRC in light of the developments regarding digital technologies.

On the children’s rights principles:

- ❖ The four children’s rights principles in the UNCRC are embedded in separate articles, however they should be read together as part of a **holistic approach** which prioritises both children’s protection and empowerment.
- ❖ The **right to development** has two dimensions: the present (childhood) and the future (the development from childhood into adulthood). A child’s development encompasses its physical, psychological, spiritual, emotional, cognitive, cultural and economic capacities, which are constantly evolving and gradually transition from dependence to autonomy.
- ❖ Children’s development may be at risk when they are exposed to gambling practices through video games in early stage of their lives. States, parents and businesses all have responsibilities to protect children in these situations, which is oftentimes challenging due to the rapidly evolving digital environment.
- ❖ The **right to non-discrimination** is relevant in situations where children are profiled in video games based on their personal characteristics such as age or gender, or when video games use stereotypes.
- ❖ The **best interests of the child** requires a flexible interpretation taking into account the context and circumstances of each situation, where children’s interests are given a primary consideration. This principle has to be interpreted in a complementary manner to the other principles (development, right to express views) and both States and businesses need to uphold the best interests of the child throughout their policies, for example by using child-rights impact assessments.
- ❖ The **right of the child to express his or her views** requires that children can actively participate in the promotion, protection and monitoring of their rights, and that they have the opportunity to provide their perspectives and experiences based on their age and maturity (the child’s views are not necessarily conclusive or determinative; they should be given due weight). In the video game environment, it is particularly relevant to engage with children and give them a voice when it comes to their experiences and expectations.

On the children’s rights applicable to gambling(-like) elements in video games:

- ❖ In the digital environment, a **central role** is played by the right to seek and receive information. We are living in the age of information abundance, in which an overwhelming amount of beneficial and harmful information is readily available for children. The protection of children against harmful content is an important policy goal.
- ❖ Additionally, there is a **wide variety of commercial practices used by the business sector** (including video game companies), which again may be both beneficial and harmful. In certain instances, such practices threaten a variety of children’s rights.
- ❖ Within the **right to seek and receive information** and to freedom of expression, an important aspect is children’s access to content and information based on their age (age-appropriate information). Here, the balancing exercise between protection and empowerment of the child is important, as it aims to reconcile the protection of children required when navigating the digital

environment, with the autonomy children should develop when they grow older, are increasingly able to make their own choices and are aware of the risks presented to them.

- ❖ The **right to freedom of thought** may be violated when commercial practices include manipulation techniques (nudges) or other ‘dark patterns’ that change the decisions they might have made, for instance when players are encouraged to spend more money in-game than planned.
- ❖ The **right to privacy** and data protection is significantly challenged in the digital environment. Practices such as automated decision-making, profiling, (behavioural) targeting, or surveillance are all said to potentially interfere with the child’s rights to privacy and data protection due to their potentially harmful or dangerous character; age-verification, age-appropriate design, information filtering and privacy-by-design are all included under the umbrella of possible solutions, each accompanied by various challenges. States are obliged to make information about privacy tools and settings available, accessible, meaningful and age-appropriate for children.
- ❖ The **right to have access to a diversity of mass-media sources** to choose from is closely related to the right to seek and receive information. Video gaming platforms and companies can be seen as included under the scope of ‘mass media’, especially taking into account the recent evolution of integration of online platforms (e.g. video game platforms and social media platforms). States must encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.
- ❖ The **right to health** in the context of this report refers to the mental health aspects of video gaming and gambling. As such, it is closely linked with the right to development, both for young children whose development could potentially be harmed if they experience early exposure to gambling(-like) elements in video games, and for adolescents who are susceptible to developing mental health problems such as video gaming or gambling disorders. It is important to distinguish these types of disorders, as scientific evidence is not conclusive on the video game disorder (whereas it is on gambling disorders), and the topic of this report provides a unique combination of both, where gambling(-like) elements are present in video games and are therefore certainly relevant to analyse in the context of mental health. It is the responsibility of States to assure that the private sector contributes to the realisation of the right to health.
- ❖ The **right to education** is important for all other rights and aims to ensure that children have the required competences to navigate the digital environment and the resilience to cope with its risks (digital literacy), which includes the risks related to commercial practices used by video game companies. Furthermore, video games can be beneficial for education and can help children to learn both formally and informally.
- ❖ The **right to play** is oftentimes the first right that comes to mind when discussing the topic of video games. It can be argued that video games can be brought under its definition, which is also shown by the increasing amount of research on video games as a way for children to play. In addition, digital forms of play can improve children’s skills and competences, however they can also expose children to risks, such as persuasive or manipulative video game design features as described above.
- ❖ The **right to protection against economic exploitation** can be interpreted as requiring protection of children from certain commercial practices described in this chapter (e.g. manipulative or persuasive practices, behavioural targeting, profiling and personalisation of in-game purchases).
- ❖ Procedural rights include important concepts such as **access to justice and effective remedies**. There are several obstacles for children to exercise this right, such as their legal standing, legal

capacity, conflicts of interests, the complexity of the judicial system, or children's lack of knowledge. Child-sensitive and child-friendly justice can tackle these issues, where children's rights are respected and implemented and where the justice system takes into account the child's needs and views (due consideration based on the child's age and maturity) and recognises the child's legal standing if remedies are sought. Furthermore, it implies for video game companies that they must provide complaint mechanisms, and it implies for States that national institutions should exist to investigate complaints and provide effective remedies to children.

GAMBLING REGULATION. The European Union has limited competences in the field of gambling regulation, although the European Court of Justice has expressed itself on gambling matters as such. The most important rules are found in the national jurisdictions of the Member States, which naturally causes variations and different interpretations of relevant terms or concepts, including those of the gambling(-like) elements in video games. Different approaches exist regarding the latter in different countries and the classification of these video game features as gambling depends on the national definitions of what constitutes gambling. This has led to a situation nowadays where in some countries these elements are seen as gambling and in other countries they do not fall under the scope of gambling regulation. The key takeaways on gambling regulation are:

The role of the European Union:

- ❖ Gambling regulation throughout the EU is highly **fragmented**: the lack of harmonisation on EU level has resulted in different regulatory frameworks per country, leading to several obstacles for consumers, gambling authorities and gambling companies in light of cross-border provision of gambling services, e.g. different definitions of what constitutes gambling and no mutual recognition. For a comparison of rules in three jurisdictions (i.e. Belgium, the UK and the Netherlands);
- ❖ Even though there is no sector-specific law on gambling services in the EU, EU law is still relevant to a certain extent. Member States must always take the binding supranational framework regarding the internal market into account. **Primary EU law (i.e. TEU and TFEU)** grants Member States a wide margin to set their national gambling policies, from monopolies, over licensing conditions to market foreclosure, as long as they are in line with the rules on the internal market as established by the TFEU and as interpreted by the CJEU;
- ❖ The **CJEU** plays a prominent role in the EU regulation of gambling as interpreter of the TFEU provisions on the freedom of services and the freedom of establishment. Within its case law, it has recognised gambling services as peculiar economic services, indicating that many cultural, religious and moral differences exist in the Member States. This is an important hurdle in light of EU harmonisation of the rules on gambling;
- ❖ The European Commission has been taking some initiatives towards harmonisation, however, willingness on behalf of the Parliament and Council is lacking. Considering that the road to EU harmonisation of gambling regulation seems to be paved with too many obstacles, the EU institutions have turned to **soft law instruments**. Within these instruments, the institutions have particularly recognised the need for cooperation between national gambling authorities to facilitate information exchange, but also leave the door open for harmonisation efforts in the future. However, for now, Member States keep holding on to their discretionary power mainly by referring to the subsidiarity principle.

Gambling regulation in Belgium:

- ❖ Belgium’s gambling policy is based on a prohibition to exploit games of chance and gambling establishments, unless a license has been obtained (‘channelling policy’). Belgium makes use of a **closed licencing system**, which implies that providers of video games containing elements that qualify as gambling under the Gaming and Betting Act will have to obtain a licence to legally provide their video games on Belgian territory. Elements which are gambling-like but do not meet the definition of ‘game of chance’ under Belgian law, do not require a licence.
- ❖ An interesting aspect to the Belgian gambling law is that licences for the provision games of chance online are not stand-alone licences: in order to obtain such a licence, **there always already needs to be a licensed fixed establishment in Belgium**. In light of game developers active on a global level, this is a very burdensome requirement.
- ❖ The Gaming and Betting Act does not specifically regulate gambling(-like) elements in video games, however, the Belgian Gaming Commission – supervising compliance with the Gaming and Betting Act – has **acknowledged the potential dangers** of gambling elements in the video game context:
 - First of all, it played a pioneering role by qualifying **lootboxes** as gambling under the condition that they are – directly or indirectly – paid for by real money. Since it seems difficult to subject lootboxes to one of the current licences under Belgian law, they are illegal on Belgian territory according to the Gambling Commission, even though a strict law prohibiting them is no in force at this time.
 - The Gaming Commission has also taken account of the growing popularity of **Esports betting**. It treats this type of betting as betting on events (for the moment).
- ❖ The Gaming Commission has publicly expressed its **need for more financial and human resources** to be able to effectively enforce the Gaming and Betting Act in light of the extensive offer of games of chance online, as well as to investigate and act against new gambling phenomena.

Gambling regulation in the United Kingdom:

- ❖ One of the **key objectives** throughout the history of UK gambling regulation is the **protection of children** and vulnerable persons. It was one of the reasons why gambling regulation in the UK evolved into the Gambling Act 2005 and is now one of the reasons why the Gambling Act is under review again. Children in the Gambling Act are those aged 16 and under, whereas young persons are those aged 16-18.
- ❖ The **UK Gambling Commission** issues licences for gambling activities based on the licencing objectives (which include the protection of children). Therefore, the Gambling Commission has the potential to play an important role concerning gambling(-like) elements in video games.
- ❖ In the UK, **playing a game of chance for a prize is gambling**. Applied to lootboxes, the problem is situated at the level of the ‘prize’ criterium, which is defined as ‘money or money’s worth’: only when items obtained through lootboxes are convertible into cash or are tradeable they will attain real-world value and thus be seen as money or money’s worth.
- ❖ However, this approach has been criticised over the last few years, which culminated in a report by the House of Lords in 2020 in which **it is argued that lootboxes should be regulated as gambling due to their resemblance to gambling activities**. A call for evidence was

subsequently released by the Government and it remains to be seen whether new regulatory initiatives will develop in the near future.

- ❖ For social casino games, according to the House of Lords, there is at this time **no persuasive case to pursue further regulatory action**, however it was recognised that some elements resemble gambling and that therefore further research is needed.
- ❖ In Esports and outside, the **skin betting activities are seen as gambling** (i.e. the use of virtual items acquired in a game as a method of payment for a stake in external, oftentimes unlicensed gambling).

Gambling regulation in the Netherlands:

- ❖ **Remote gambling** (online gambling) has only been regulated in the Netherlands from 1 October 2021, by including remote gambling activities under the scope of the Gaming and Betting Act via a Decree.
- ❖ According to the Gaming and Betting Act, it is forbidden to provide facilities to **compete for a prize** in which the winner is decided by **any form of chance**, over the result of which the participants generally do not have substantive control. The **minimum age is set at 18** for all gambling activities.
- ❖ The **prevention of addiction** to gambling activities is directly integrated in one of the Articles of the Gaming and Betting Act and was also highlighted in the preparatory works.
- ❖ The licencing system in the Netherlands is specified for each of the gambling activities, with the **Gambling Authority** competent for granting licences, set conditions for licences and revoke licences. In addition, the Gambling Authority has to promote the prevention of addiction, give information about gambling and its risks, and has a variety of tools to combat illegal online gambling.
- ❖ **Lootboxes** are only included under the scope of the ‘prize’ criterium of the gambling definition if their content is transferable outside of the game (i.e. economic value), even though no additional clarification is given on what a ‘prize’ is.
- ❖ However, it has been stated that due to the **risk-potential of lootboxes for addiction** (due to stimulating effects, unlimited opening potential, near-miss effect...), they can still be contrary to the objective in Dutch law of preventing addiction. According to a Council of State ruling of March 2022, lootboxes in FIFA’s Ultimate Team game mode cannot be seen as games of chance under Dutch gambling regulation.
- ❖ For **social casino games**, there is no need for further regulation, but it is recognised that these types of games still blur the lines between gaming and gambling and that therefore further research is needed.
- ❖ In the Netherlands, **betting on Esports is prohibited, as well as skin betting**.

VIDEO GAME REGULATION. ‘Video game regulation’ as such is scarce; relevant provisions are spread throughout other legal domains such as consumer protection, data protection or intellectual property regulation, the majority of which are included in the discussion of this report. Moreover, the video game landscape influenced by self-regulatory frameworks. The key takeaways on video game regulation are:

On video game rating systems:

- ❖ The PEGI system provides **age labels and content descriptors** for video games, by assessing the appropriateness of these video games for players of different age categories based on the content in the video games.
- ❖ PEGI has descriptors with a pictogram for in-game purchases and gambling, however for the descriptor **‘includes random items’** (e.g. lootboxes) only a text-version exists.
- ❖ The **PEGI Code of Conduct** includes a variety of relevant obligations for its signatories, although it has to be noted that oftentimes non-obligatory language is used (‘best efforts’, ‘recommends’). Gambling(-like) elements in video games could be brought under the scope of the provisions of ‘illegal content that might permanently impair the development of minors’ or ‘unsuitable content’.
- ❖ In the US and Canada, the **age-rating system of the ESRB** includes two components of gambling: real gambling and simulated gambling. These do not offer a sufficient solution for the different types of gambling(-like) elements, and whilst there is additional clarification given by the informative descriptors on e.g. in-game purchases, these descriptors ultimately have no influence on the age-rating, which raises questions on its practical effectivity.
- ❖ In Australia, legislation was introduced to include all video games with lootboxes under the R 18+ rating, which would make them prohibited for children. However, further research is needed before applying the legally restricted content categories to these video games.

On European video game organisations:

- ❖ The **ISFE** focuses on video game publishers and aims to raise the bar on harmonised self-regulation and to build awareness and understanding of video games throughout Europe.
- ❖ The **EGDF** focuses on video game developers and aims to improve the understanding about video games for policy makers and to improve communications between local industries in the EU. One of its core objectives is the protection of players, which is particularly relevant for this report.

CONSUMER PROTECTION. The key takeaways on consumer protection regulation are:

General takeaways:

- ❖ The consumer protection framework is relevant to look at as an **additional framework for protection**, for example when gambling(-like) elements would not fall under the scope of gambling regulation.
- ❖ The **full legal capacity of children to enter into contracts is set at the age of 18**, but is accompanied by uncertainty concerning in-game purchases (related to gambling(-like) elements in video games). It cannot be generally accepted that for example the purchase of a lootbox constitutes an ‘everyday contract’, a concept present in the private law rules of different EU Member States.
- ❖ When discussing consumer protection in the context of video game contracts, three types of **policy documents from video game companies** are important: the End-User Licence Agreement, the Terms of Service/Use and the Privacy Policy. These documents include for example the contract terms decided by the company to its users, as well as the information the company is required to give to the users of its services.

- ❖ The **legal status of virtual goods and currencies** is unclear at this point in time. Many video game companies include a provision in their policy that in-game content is only licensed to the users and that there is no transfer of ownership. On the other hand, it is argued that in-game purchase contracts resemble digital contracts and that users may still have some rights regarding these contracts, based on the concept of reasonable expectations.
- ❖ The **EU Consumer Protection Cooperation network** is a useful mechanism for future regulation of gambling(-like) elements in video games through cooperation of national consumer protection organisations.

On the European consumer protection Directives:

- ❖ The **Consumer Rights Directive** includes general information obligations related to clearly informing consumers about the main characteristics of the gambling(-like) elements, on the filing of complaints, the duration of the contract, or the use of personalisation of pricing based on automated decision-making. Furthermore, **digital content includes content used within the different gambling(-like) elements** and it is required that consumers are informed about in-game purchase mechanisms.
- ❖ The **Directive on the supply of digital content and services** broadened the definitions of a contract and a trader, as well as removed the requirement of payment of a price for contracts, all of which are relevant for contracts related to gambling(-like) elements in video games. Furthermore, the Directive includes provisions on purpose-fitness of digital content, its standard of quality, the accessibility of the contract, or potential remedies and enforcement.
 - In the video game context, we have seen that **these provisions can be challenging for in-game content**, for example because there are no quality standards for virtual goods based on their unclear legal status (content is not owned by players), or for example because they are classified as non-refundable by video game companies and as such are difficult to enforce or obtain remedies for in case of contractual violations.
- ❖ The **Unfair Contract Terms Directive** includes two central concepts: unfairness and transparency. The general **unfairness** test means that if a contract term is contrary to good faith and causes a significant imbalance in parties' rights and obligations, the term will be deemed unfair. **Transparency** means that consumers need the ability to become acquainted with the contract before its conclusion, in plain and comprehensible language, and be able to evaluate the economic consequences stemming from the contract.
 - **In the video game context**, commercial practices such as nudging, manipulation/persuasion or behavioural targeting could be contrary to the good faith requirement. The significant imbalance in the video game context may be caused by the unilaterally decided video game contracts by video game companies. Regarding transparency, (child) consumers need to be informed about existing gambling(-like) elements before accessing the game, in an understandable way for them that takes into account their capacities.
- ❖ The **Unfair Commercial Practices Directive** states three types of unfair commercial practices: (1) contrary to professional diligence and materially distorting, (2) misleading; or (3) aggressive commercial practices. They all refer to consumers making transactional decisions they would not have made otherwise due to commercial practices by the company.
 - **Materially distorting** has two components: contrary to professional diligence (which refers to good faith and honest market practices) and the practice is likely to distort

the decisions of the average consumer (which for children, due to their increased vulnerability and lesser capacities, requires a higher level of protection).

- **Misleading** commercial practices are practices that are likely to deceive consumers, or cause consumers to make transactional decisions that would otherwise not have been made. Here, the main characteristics of the items are important, in the example of lootboxes this could be how they work mechanically, what their risks are, or the probability disclosures. Further, misleading omissions can be relevant when commercial intent is hidden by the company, for example in free-to-play games.
 - **Aggressive** commercial practices are practices that are likely to impair the consumer's freedom of choice or conduct, where the manipulative commercial practices or other techniques involving dark patterns can influence this freedom of choice of consumers.
 - The UCPD includes a **blacklist** with provisions that are deemed unfair in all circumstances, with some of its provisions applicable to gambling(-like) elements in video games (e.g. direct exhortations to children to make purchases).
 - The UCPD is equally relevant regarding **online platforms**, when commercial practices are performed by third parties (e.g. video game companies) on social media or other online (video game) platforms.
- ❖ The **E-Commerce Directive** can be applied to (features of) video games if they are classified as information society services, which is likely for the majority of video games. Difficulties with this classification exist due to the different types of video games, which sometimes make it challenging to universally include them under the scope of information society services, for example in applying the conditions of remuneration or individual request.
- For those video games that fall under the scope of the E-Commerce Directive, applicable provisions relate to obligations regarding the **removal of illegal content**, i.e. when the service provider has knowledge about the existence of illegal content on the service.

DATA PROTECTION. The key takeaways on data protection regulation are:

General takeaways:

- ❖ The right to data protection is a **fundamental right in the EU**. The potentially harmful character of many commercial practices or marketing techniques used in the digital environment is linked to the collection and processing of children's (personal) data.
- ❖ The **privacy policies of video game companies** include provisions on the collection (via cookies) of different types of data (e.g. account data, gameplay data, user-provided data), its purposes (e.g. communication, understand user preferences, personalise experiences, ensure security), and its sharing with third parties (e.g. between social media platforms and video game companies).
- ❖ These policies show the **potentially far-reaching consequences for children** and how their (personal) data is handled, where it should be noted that children are often not aware of what happens with their data, where it is kept, or with whom it is shared.

On the GDPR:

- ❖ Due to the **cross-border character of video games**, it is important to note that the territorial scope of the GDPR includes processing of EU residents' personal data by controllers and processors not established in the EU.

- ❖ The **data processing principles** of lawfulness, transparency, fairness, purpose limitation, data minimisation, storage limitation, accuracy, integrity and confidentiality must be respected when personal data is processed related to gambling(-like) elements in video games.
- ❖ Children enjoy a **higher level of data protection** under the GDPR, due to their lesser awareness of the risks, consequences, safeguards and their rights in relation to processing of personal data. This protection is especially applicable to personalisation or profiling of children when they use services offered directly to them, which is very relevant in the video game context.
- ❖ Data processing in the video game environment will oftentimes be based on the grounds of necessity for the performance of a contract or processing for the purposes of the legitimate interests pursued by the video game company. As this may not always be justified based on the purposes of the data collection/processing, it is equally relevant to look at consent as a lawful ground for processing.
- ❖ Consent of children for the processing of their data is different from agreeing with the terms and conditions or EULA of the video game company, which include other provisions that are not related to data collection and processing. In some cases, agreeing to the company's privacy policy implies consent for data processing, however this is not always the case.
 - For example, the privacy policy is oftentimes included as a part of the terms and conditions, however taking into account the separate consent required for the different purposes of data processing this can be contrary to Article 7 GDPR.
- ❖ **Consent** needs to be freely given, informed and unambiguous.
 - On **'freely given'**, for example, if consent is bundled up as a non-negotiable part of terms and conditions, it will be invalid. Another example is when children are unable to refuse or withdraw consent without detriment. Separate consent needs to be given to different data processing operations.
 - On **'informed'**, the child needs to be clearly informed about identity of the controller, the purposes of data processing, the types of data collected or if automated decision-making techniques are used. This information needs to be easily understandable for children, and communication needs to be adapted to the audience (cfr. transparency).
 - On **'unambiguous'**, this means a clear and affirmative act (e.g. not silent consent or pre-ticked boxes)
- ❖ The **age threshold** for children to independently give their consent for processing of their personal data when information society services are offered directly to them is not unified in the EU and varies between 13-16 years, which has been subjected to criticism.
 - For children below this age, parental consent is required. How this consent is obtained is subject to a risk-based proportionality exercise, which for video games is interesting due to different aspects of video games (e.g. signing up for a video game is low-risk, whereas high-risk processing such as personalisation or profiling would need more 'proof' of parental consent).
 - This parental consent and the age threshold are also directly linked to the concept of age-verification.
- ❖ The lawful processing ground of **'necessary for the performance of a contract'** is particularly interesting in the video game context, based on what was written about video game contracts and the unilateral presentation of video game companies of the contract terms. For example, processing related to gameplay activities could be seen as necessary, whereas processing for the purposes of tracking, behavioural targeting, cookies, or building profiles could be seen as not necessary to provide the video game service.

- ❖ **Automated decision-making** (including profiling) is generally prohibited under the GDPR if the decision is solely based on automated processing and if there are legal or similarly significant effects for the data subject (exceptions exist).
 - **‘Solely’** means no human involvement in the process, where the human involvement requires meaningful oversight which is carried out by someone who has the authority and competence to change the decision.
 - **‘Legal or similarly significant effects’** could include both the violation of children’s rights under the UNCRC (legal) as well as processes which influence the child’s choices and behaviours (e.g. nudging, behavioural targeting or other persuasive/manipulative practices) (significant effects).
 - For children, even though a strict prohibition does not exist, there is no *carte blanche* for the profiling of children and organisations are recommended to refrain from profiling them for marketing purposes.

On the E-Privacy Framework:

- ❖ The E-Privacy Framework has limited relevance for gambling(-like) elements in video games specifically, due to its focus on electronic communications and its inapplicability to the processing of location data by information society services (see discussion on how video games can likely be classified as ISS in chapter 5).
- ❖ The E-Privacy Regulation Proposal introduces a few relevant provisions, for example the **consent-threshold** as included in the GDPR for the (prohibition of) placement, storage, use and accessing of **cookies** in general and on end-user terminal equipment.
- ❖ The Proposal includes **no reference to children**, as opposed to the GDPR which does recognise the vulnerable position of children.

MEDIA LAW. The key takeaways on media regulation are:

- ❖ The AVMSD is of **rather limited relevance** for gambling(-like) elements within video games, as both video games and gambling services *in se* are excluded from the scope of the AVMSD.
- ❖ Nevertheless, the AVMSD can be relevant when game streamers are concerned. The latter are covered by the Directive when they meet all six criteria set out above. If so, they will have to comply with the relevant provisions on content and commercial communication (which is the subject of the second report).
- ❖ It remains to be seen whether game streamers and video-sharing platforms could be held accountable in light of gambling(-like) elements in, or relating to, video games they are streaming: can such content be considered harmful in the sense of the AVMSD?
- ❖ In some countries, game streamers have to take into account the Kijkwijzer system (or another classification system). Even though there is no gambling icon, the violence and bad language icons could be relevant for game streaming.

CONCLUSIONS. The regulation of gambling(-like) elements in video games is fragmented, with relevant provisions found both at the national and supranational level. First, should the different types of gambling(-like) elements be classified as gambling under national definitions, then the protective framework is provided by the gambling regulation of different countries. These national frameworks have different interpretations and provisions, which may cause issues due to the cross-border nature of video games. However, the classification of gambling(-like) elements in video games as gambling is subjected to a more fundamental discussion regarding its terminology. Discussions exist on the definitions of the different types of gambling(-like) elements and on the difficulties to universally

include them under the scope of (national) gambling regulation. Therefore, secondly, a protective framework is provided by the European Union regulation on consumer protection, data protection and media. The provisions within this framework can be seen as a secondary layer of protection against gambling(-like) elements in video games. Third is the protective framework provided by self-regulatory instruments in the video game environment, which play an important role in the accessibility of video games for different age categories and the labelling of their content. Finally, all of these frameworks are discussed against the background of the existing children's rights framework at the European and international level, with important children's rights and principles being *inter alia* the right to play, the right to development, or the right to protection against economic exploitation. As such, this report provides an overview of the existing regulatory framework on gambling(-like) elements in video games, which is a necessary first step towards the next objective, namely the analysis of the different gambling(-like) elements within this framework and their impact on children.

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List of abbreviations

ACB	Australian Board of Classification
AVMSD	Audiovisual Media Services Directive
BEUC	European Consumer Organisation
CEN	European Committee for Standardisation
CERO	Computer Entertainment Rating Organisation
CFEU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPC	Consumer Protection Cooperation network
CRC Committee	UN Committee on the Rights of the Child
CRD	Consumer Rights Directive
CWA	CEN Working Agreement
DG	Directorate General
DigComp	EU Digital Competence Framework
DLC	Downloadable Content
DSA	Digital Services Act
EEA	European Economic Area
ECHR	European Convention on Human Rights
ECTHR	European Court on Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EGBA	European Gaming and Betting Association
EGDF	European Games Developers Federation
ESRB	Electronic Software Rating Board
EU	European Union
EULA	End-User Licence Agreement
FPS	First-Person Shooter
GDPR	General Data Protection Regulation
GREF	Gaming Regulators European Forum
IARC	International Age-rating Coalition
IARG	International Association of Gaming Regulators
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICO	Information Commissioner's Office
IMCO	Internal Market and Consumer Protection (European Parliament Committee)
ISFE	Interactive Software Federation Europe
ISS	Information Society Service
JRC	Joint Research Centre on Science for Policy (European Union)
MMO	Massive Multiplayer Online Game
MMORPG	Massive Multiplayer Online Role Playing Game
MOBA	Multiplayer Online Battle Arena

NGO	Non-Governmental Organisation
OECD	Organisation for Economic and Social Development
PEGI	Pan-European Game Information
RNG	Random Number Generator
RPG	Role-Playing Game
RTS	Real-time Strategy
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations International Children’s Emergency Fund
US	United States

Chapter 1 – Context of the report

Section I – Background

RISE OF THE VIDEO GAMING INDUSTRY. Throughout the 21st century, the video gaming industry has grown exponentially and has equally risen in popularity. In 2020, it was estimated that the global video gaming industry was worth over 150 billion USD, its major regions consisting of North-America (\pm 40 bn.), the Asia-Pacific region (\pm 70 bn.) and Europe (\pm 23 bn.).¹ The number of video game players is equally on the rise, increasing from around 2 billion players in 2015 to 3 billion players estimated by the end of 2021.² Moreover, this rapid growth is not expected to slow down in the coming years. Predictions are that by 2025, the video gaming industry will exceed a value of 250 billion USD and could reach a value of close to 300 billion USD by 2027, with a number of players between 3 and 3.5 billion worldwide.³ At present, video games cover a wide array of platforms (PC, consoles, mobile) and game types (free-to-play, single player, multiplayer) with multiple categories (such as First-Person Shooters (FPS), Massive Multiplayer Online (Role-Playing) Games (MMO/MMORPGS), Role-Playing Games (RPG), Real-Time Strategy games (RTS) or Multiplayer Online Battle Arena games (MOBA)). In addition, the video gaming industry has developed its own competitive format, known as electronic sports or Esports, which is similarly rapidly rising in popularity.⁴

Children are avid video game players. For example, in Europe, 68% of children aged 6-10 and 79% of children aged 11-14 play video games⁵; in the United Kingdom, 93% of children play video games on a regular basis⁶; in the United States, 76% of children are video game players.⁷ In Flanders (Belgium), statistics from 2020 indicate that as much as 86% of children play games, in comparison to 75% in 2018.⁸ These statistics show that video games have become – and will most likely remain – a part of the daily lives of many children around the world.

MICROTRANSACTIONS. A recent important development in the video gaming environment concerns the introduction and rise of microtransactions.⁹ Microtransactions have changed the video gaming market and are one of the key reasons why the lines between video gaming and gambling are blurring (*infra*). Before the emergence of microtransactions, video games had several business models to generate income. Examples are the physical media model, where a fixed price is paid in exchange for a physical medium containing all the in-game content and unlimited playing time; the subscription model, where the game itself is free and the players pay periodic fees to keep playing; the DLC (downloadable content) model, where after releasing the first version of the game, expansion packs with additional content are released for purchase; or the ‘freemium’ model, where the game is free-to-play, but

¹ NewZoo, *Global Games Market Report: the VR & Metaverse Edition*, 2021; TechJury, *How Much is the Gaming Industry Worth in 2022*, 2022.

² NewZoo, *Global Games Market Report: the VR & Metaverse Edition*, 2021; Statista, *Number of video gamers worldwide from 2015 to 2023*, 2021.

³ WePC, *Video game Industry Statistics, Trends and Data in 2021*; Grand View Research, *Video Game Market Size, Share & Trends Analysis Report by Device, by Type, by Region, and Segment Forecasts, 2020-2027*, 2020; Statista, *Global video game market value from 2020 to 2025*, 2021.

⁴ The topic of Esports will be discussed in one of the following reports of the ‘Gam(e)(a)ble’ Project.

⁵ ISFE & EGDF, *Key Facts 2020 – The year we played together*, 2021; Of the age group 15-24, 72% play video games; in 2020, this was 73% of children aged 6-10, 84% of children aged 11-14 and 74% of children/adults aged 15-24.

⁶ Parent Zone, *The Rip-Off Games – How the new business model of online gaming exploits children*, 2019.

⁷ Entertainment Software Association, *Essential facts about the video game industry*, 2021.

⁸ Apestaartjaren, *Digitale leefwereld van jongeren*, 2020 and *Digitale leefwereld van kinderen*, 2020.

⁹ See UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 23-24.

players can make in-game purchases.¹⁰ The latter is directly related to microtransactions and several popular mobile games use this model, such as Candy Crush, Pokémon GO or Clash of Clans.

Microtransactions allow players to purchase virtual content, items or currencies with real-world money, and were quickly adopted as the new standard within business models with a lot of potential growth for the video gaming industry.¹¹ The introduction of microtransactions has caused a shift in mentality in the video gaming market, which started to view video games as services ('GaaS') instead of as goods.¹² This refers back to the change in business models: where in the past developers would deliver a finished product, nowadays developers offer a more continuous experience (which is more profitable).¹³ For the purposes of this report, this evolution caused by microtransactions is important to put the blurring lines between video gaming and gambling into context. This is because:

- Microtransactions have changed the way in which video games are designed, nowadays focussing much or more on releasing additional content on top of the original video game;
- Microtransactions have changed the attitude of players towards the video games they play, as conditioning the release of additional content to paying a price can both negatively or positively affect the experiences of the players.¹⁴

Different types of video games include different forms of microtransactions. For example, in Triple-A video games – the video games developed with the highest budgets such as Grand Theft Auto, Call of Duty or Assassin's Creed – microtransactions are mostly used for smaller content, such as cosmetic upgrades, weapons, or avatar skins. In mobile games, aside from these cosmetic upgrades and weapons, microtransactions can include the purchase of additional lives, resources, virtual goods such as gemstones, or in-game currencies. Here, the importance lies in the distinction between microtransactions which provide in-game benefits (i.e. gaining an advantage over other players by paying money) and microtransactions which provide cosmetic benefits only (i.e. having no advantage over other players). The former has already caused severe backlash from the gaming community in the past. It was argued that video games offered extreme versions of the notorious 'pay-to-win' microtransaction system, where players get additional bonuses or make progress in the video game based on money expenditure.¹⁵ The most well-known example is Electronic Arts' game Star-Wars: Battlefront II; other examples are Middle-earth: Shadow of War, NBA 2k18 and Destiny II. These 'scandals' in 2017 and 2018 were the starting point for an international debate on microtransactions and their potential dangers.¹⁶

BLURRING LINES BETWEEN VIDEO GAMING AND GAMBLING. The combination of the expanding video gaming industry and the rise of microtransactions has caused the lines between video gaming and gambling to

¹⁰ TOYAMA, M., FERRATTI, G. and CORTES, M., *Analysis of the Microtransaction in the Game Market: A Field Approach to the Digital Games Industry*, 2019, 6-7.

¹¹ ZENDLE, D., MEYER, R. and BALLOU, N., *The changing face of desktop video game monetisation: An exploration of exposure to lootboxes, pay to win, and cosmetic microtransactions in the most-played Steam games of 2010-2019, 2020*; SCHWIDDESEN, S. and KARIUS, P., *Watch your lootboxes! – Recent developments and legal assessment in selected key jurisdictions from a gambling law perspective*, in *1 Interactive Entertainment Law Review* 17, 2018.

¹² BALL, C. and FORDHAM, J., *Monetisation is the Message: A Historical Examination of Video Game Microtransactions*, 2018, 2.

¹³ TOYAMA, M. et al (n 10), 9.

¹⁴ *Id.*, 10; KING, D., DELFABBRO, P., GAINSBURY, M. et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behavior* 131, 2019, 132-133.

¹⁵ SCHWIDDESEN, S. and KARIUS, P. (n 11), 19.

¹⁶ SCHWIDDESEN, S. and KARIUS, P. (n 11), 22.

become blurred. This is because certain types of microtransactions that are used in video games resemble or share characteristics with gambling and therefore constitute what we call ‘**gambling(-like) elements**’ in video games (see also *infra* on this terminology choice). The first category is the popular ‘lootbox’, where a virtual chest – or derivatives such as packs or crates – is opened to obtain randomised in-game content. The second category is what is commonly referred to as ‘social casino games’ or ‘virtual casino games’, where gambling is simulated with virtual currencies that can be earned through playing, or bought with real money. The last category is a little less clearly defined and is known as ‘skin betting’, which is the wagering of in-game items on the outcome of video games played within a competitive multiplayer environment. Skin betting is closely related to Esports and online sports betting and is therefore also affected by the legal framework applicable to those activities. The difference between skin betting and the other two categories of gambling(-like) elements is that lootboxes and social casino games are examples of an element *inside* a video game, whereas skin betting relates to using video game items *for the purposes of* gambling. Note that combinations of these categories are commonplace, for example when the items you want to wager in a skin betting situation are obtained from lootboxes (as is the case in the popular shooter game Counter-Strike: Global Offensive). Further reports in the Gam(e)a)ble project will include specific case-studies analysing the applicability of the legal framework to these categories of gambling(-like) elements in video games. The goal of the present report is to establish and describe the legal framework which may be applicable to such gambling(-like) elements.

THE PROTECTION OF MINORS. Children are increasingly exposed to gambling(-like) elements in video games because of the blurring between video gaming and gambling. (Online) gambling has been widely accepted as a dangerous and potentially problematic practice – especially for children¹⁷ – and has been regulated at both the national and supranational level.¹⁸ The integration of gambling(-like) elements in video games raises questions about exposing children to dangers associated with gambling, such as addictive behaviour development, overspending, impulse-buying, reward sensitivity, or the normalisation of gambling in their daily lives.¹⁹ It also potentially threatens the (legal) position of children as vulnerable consumers of video games for all three categories of gambling(-like) elements: **lootboxes**²⁰, **social casino games**²¹ and **skin betting**²². To illustrate the increasing awareness of parents regarding monetisation in the video gaming environment, in 2021 the Interactive Software Federation Europe (‘ISFE’) together with the European Games Developers Federation (‘EGDF’) released its key

¹⁷ United Nations Committee on the Rights of the Child, *General Comment No. 25 on children’s rights in relation to the digital environment*, 2021, 19.

¹⁸ For a comprehensive overview of gambling legislation in 44 non-European industries, see International Association of Gaming Regulators, *Gambling Regulation: Global Markets (2018-19)*, ; for the EU, see European Commission, *Evaluation of Regulatory Tools for Enforcing Online Gambling Rules*, 2018.

¹⁹ HOLLINGSHEAD, S. et al, *Motives for playing social casino games and the transition from gaming to gambling (or vice versa): social casino game play as harm reduction?*, in 46 *Journal of Gambling Issues*, 2021; KING, D. and DELFABBRO, P., *The convergence of gambling and monetised gaming activities*, in 31 *Current Opinion in Behavioural Sciences*, 2020; DE BRUIN, D. (Kansspelautoriteit), *Gamers en gokkers – Literatuurverkenning naar de risico’s en schadelijkheid van gamen in relatie tot gokken* (Dutch), 2018; GAINSBURY, S., KING, D., ABARBANEL, B. et al, *Convergence of gambling and gaming in digital media*, 2015.

²⁰ European Parliament, *Lootboxes in online games and their effect on consumers, in particular young consumers*, 2018; GRIFFITHS, M., *Is the buying of lootboxes in video games a form of gambling or gaming?*, in *Gaming Law Review* 22, 2018; DRUMMOND, A. and SAUER, J., *Video game lootboxes are psychologically akin to gambling*, 2018.

²¹ GAINSBURY, S. et al, *Virtual addictions: An examination of problematic social casino game use among at-risk gamblers*, in 64 *Addictive Behaviours* 334, 2017; DEREVENSKY, J. and GAINSBURY, S., *Social casino gaming and adolescents: Should we be concerned and is regulation in sight*, in 44 *Int’l Journal of Law and Psychiatry* 1, 2016; HOLLINGSHEAD, S. et al (n 19).

²² WARDLE, H., *The same or different? Convergence of skin gambling and other gambling among children*, in 35 *Journal of Gambling Studies* 1109, 2019.

facts on the EU video gaming market in 2020. Some relevant statistics are *inter alia* that 97% of parents use some form of method to manage or monitor their children’s in-game spending, and 58% of parents have an agreement with their children to ask permission prior to making an in-game purchase.²³

LEGAL CHALLENGES. The rise of microtransactions and gambling(-like) elements gives rise to particular legal challenges. Even though there is little to no legislation specifically targeting gambling(-like) elements in video games, there is a variety of regulatory frameworks at different levels (i.e. international, European, national and even regional) that may apply to these elements. These frameworks include both legislative and self-regulatory instruments, which may or may not overlap or conflict, and may or may not focus on (the protection of) children specifically. Several legal domains are relevant in this context, most notably video gaming and gambling regulation itself, but also consumer protection regulation,²⁴ data protection regulation,²⁵ and media regulation. Aside from the blurring lines between gambling and video gaming, which constitutes a legal challenge in and of itself, the potentially overlapping frameworks are not clearly mapped, distinguished or described concerning gambling(-like) elements in video games. This leads to legal uncertainty for video game providers on the hand, and could endanger the position of children in certain situations, on the other hand.

Section II – Aim and scope

AIM. The aim of this report is to map the current regulatory framework applicable to gambling(-like) elements in video games. This firstly entails an analysis of the existing children’s rights framework, which will serve later on as a lens for looking at the patchwork of rules across different legal domains and sectors relevant for the research topic. A structured overview is needed of these rules, especially since regulation specifically addressing the combination of gambling and video gaming is scarce. Therefore, secondly, this report aims to provide an overview of the rules within these legal domains applicable to gambling(-like) elements in video games.

GENERAL SCOPE. This report considers different legal frameworks that contain rules that may apply to gambling(-like) elements. First, the **children’s rights** framework is established, with a focus on the international and European framework. Second, the report focuses on different legal domains at both the national and European level and including both legislative and self-regulatory instruments. Aside from (1) **gambling regulation**, which is central to the discussion, the following domains are included: (2) **video gaming regulation**; (3) **consumer protection regulation**; (4) **data protection regulation**; and (5) **media regulation**. Due to the Gam(e)(a)ble project’s focus on the protection of consumers (in particular children) within the integrated gambling and video gaming environment, legal domains related to financial aspects such as tax law or money laundering legislation are not included in the scope of the research. In the present report, advertising regulation also falls outside of the scope as a second Gam(e)(a)ble report will focus on this particular aspect.

TERRITORIAL SCOPE. Geographically, the report focuses on the regulatory frameworks of the United Nations, Europe (the EU and other regional organisations such as the Council of Europe and the Organisation on Economic Cooperation and Development), and the national frameworks of Belgium,

²³ ISFE & EGDF, *Key Facts 2020: the year we played together*, 2021, 12.

²⁴ The question arises, for instance, whether certain gambling(-like) elements and the way they are presented in a video game could be classified as unfair commercial practices.

²⁵ For instance, when personal data of children is collected and used to personalise microtransactions in video games.

the United Kingdom and the Netherlands (see *infra* for the selection criteria). Where relevant, this report will consider other (non-)EU countries to illustrate current practices or new developments.

Section III – Methodology

METHODOLOGY. This report is descriptive in nature and maps the different regulatory instruments that are relevant in the context of the integration of gambling(-like) elements in video games.

As a first step, in chapter 2 the **children’s rights framework is established** using the existing international and European frameworks, which includes international conventions, European legislation, policy documents, regulatory instruments, legal doctrine and research reports. Central to the framework is the United Nations Convention on the Rights of the Child (‘UNCRC’) and the related work of the UN Committee on the Rights of the Child (‘CRC Committee’). Additionally, the EU Charter of Fundamental Rights (‘CFEU’) and the European Convention on Human Rights (‘ECHR’) are used as complementary sources, as well as the work on human and children’s rights by organisations such as UNICEF or the Council of Europe (‘CoE’). The children’s rights framework serves as a normative backbone in light of which the existing regulatory framework will be analysed at a later stage of the research.

As a second step, in chapters 3-7 the **different legal domains** applicable to gambling(-like) elements in video games are **mapped** in a systematic manner. Sources used for the mapping of the frameworks of these legal domains are EU or national legislative instruments, documents of national authorities (such as gaming or gambling commissions, or data protection authorities), European and national case law, policy documents at the national, international and European level and self- or co-regulatory instruments, although not all sources are relevant for each domain.

It is important to distinguish gambling regulation from the other relevant legal domains, because of the lack of harmonisation of gambling law at the EU level. Therefore, chapter 3 first analyses the role and competences of the EU institutions in gambling matters, and subsequently maps the national legislation of three countries (i.e. Belgium, the United Kingdom and the Netherlands). These were chosen due to their clear but opposing views regarding certain gambling(-like) elements in video games, such as lootboxes. Belgium was chosen due to its prohibitive approach vis-à-vis lootboxes; the United Kingdom because of its permissive approach, taking into account the ongoing debate which puts this approach under pressure; and the Netherlands was chosen due to its approach somewhere in between, where gambling(-like) elements are prohibited if certain conditions are met. This comparative approach allows us to form a clearer view on the different ways and the extent to which gambling(-like) elements in video games could be regulated nationally through gambling regulation in the strict sense. Second, regarding the domain of video gaming regulation in chapter 4, the focus lies on the self-regulatory framework of the video gaming industry in Europe and other countries around the world. The *ratio* for this is the special status of video gaming regulation and the absence of specific EU or national law on video games. Third, the remaining relevant legal domains are then each covered in one of the remaining chapters: consumer protection regulation in chapter 5, data protection regulation in chapter 6 and media regulation in chapter 7. For each of these domains the relevant provisions (potentially) applicable to both gambling(-like) elements in video games specifically and the protection of children in general are mapped. Regulation in these domains is to a large extent harmonised at the EU level and therefore we do not zoom in on legislation at the national level.²⁶ The

²⁶ For Belgium, the relevant additional rules for consumer protection can be found in the *Wetboek Economisch Recht [Code on Economic Law]*, for data protection in the *Wet betreffende de bescherming van natuurlijke personen met betrekking tot*

focus of the mapping lies on the European legislative framework (i.e. primary and secondary EU law); references to policy documents are made where relevant to the topic of this report.

Section IV – Definitions

1 Definition of a child

NO UNIFORM LEGAL DEFINITION. Different notions are used in research related to children, such as ‘minors’, ‘adolescents’, ‘youth’, ‘young people’ or simply ‘children’. One of the most well-known definitions is the one provided by the UNCRC, which has opted for the notion ‘child’ and defines it as “*every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”.²⁷ Although references to children were already included in other international conventions (e.g. in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights), the UNCRC was the first to offer a definition.²⁸ This definition sets the legal age of majority at 18, whilst still allowing majority to be reached earlier under specific national legislation for the acquisition of rights, such as the age of sexual consent, the age required to marry or for a more recent example, the age of consent to processing of personal data.²⁹ Aside from the UNCRC, the Council of Europe’s Cybercrime Convention uses the notion ‘minor’ to refer to all persons below the age of 18.³⁰ As argued by LIEVENS, there is no real clarification or definition to explain the alternate use of the worlds child or minor.³¹ It can be stated in general that ‘minor’ is mostly linked to the legal discourse and the age of majority, and ‘child’ is more universally used in different contexts.³²

DIFFERENT GROUPS OF ‘CHILDREN’. In legal matters (and in society in general), the distinction between a child and an adult is oftentimes made on the basis of a person’s age, and this could be interpreted as arbitrary, as it assumes a clear line that divides all adults from all children and presumes all children to be immature and vulnerable to the same degree.³³ In reality, however, this is not the case, and considering all children as part of the same group ignores the modern interpretation of childhood as an independent, dynamic stage of life.³⁴ Here, the concept of evolving capacities of the child entails that in addition to the child’s age, also the child’s maturity should be influential in matters affecting the child.³⁵ The gradual transition of children into adulthood means that it is hard to divide children in different, clear-cut age groups, for instance for providing guidance on the age-appropriateness of certain video games.³⁶ The difficulty lies in finding a balance between the protection and

de verwerking van persoonsgegevens [Data Protection Law] and the media regulation is further specified in for example the Vlaams Mediadecreet (Flemish Media Decree).

²⁷ Article 1 UNCRC.

²⁸ ARCHARD, D. and TOBIN, J., *Commentary to Article 1 UNCRC: The Child*, in TOBIN, J. TOBIN, J., *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019), 21-22.

²⁹ See e.g. European Union Agency for Fundamental Rights, *Mapping Minimum Age Requirements Concerning the Rights of the Child in the EU*, 2017.

³⁰ Council of Europe, *Convention on Cybercrime*, 23 November 2001, ETS No. 185.

³¹ LIEVENS, E., *Protecting Children in the Digital Era: The Use of Alternative Regulatory Instruments* (Martinus Nijhoff, 2010), 27.

³² VERDOODT, V., *Children’s Rights and Advertising Literacy in the Digital Era – Towards an Empowering Regulatory Framework for Commercial Communication*, 2018, 11.

³³ ARCHARD, D. and TOBIN, J. (n 28), 38.

³⁴ *Ibid.*, 33-37.

³⁵ See Chapter 2; *Ibid.*, 33-37.

³⁶ In the video gaming environment, the age categories issued by PEGI are worth mentioning. PEGI rates video games based on their content and decides what age would be required to be allowed to play these games. At the moment, their age categories are 3, 7, 12, 16 and 18. See <<https://pegi.info/>> for more information; see also *infra* Chapter 4.

empowerment of the child, where on the one hand children are in need of special safeguards due to their physical and mental immaturity, but on the other hand as they grow older such special safeguards might hinder their development and resilience-building.³⁷ In the context of this report, this means for example finding the balance between protecting (younger) children from harmful content such as gambling in video games, and empowering children as they grow older by informing them about this content to enable them to assess the dangers themselves. Nevertheless, it can be useful to have some form of age categorisation, for example in the context of policymaking for children as a group, where it is often difficult to make individual assessments.³⁸ In relation to this, the Gam(e)(a)ble project will study the effects of gambling(-like) elements in video games on children of different ages. These results will be carefully considered when developing recommendations for the regulation and design of gaming environments.

USE OF NOTIONS. For the purposes of this report and future reports, the notions ‘child’, ‘young person’, and ‘adolescent’ are used interchangeably. Where the age is of particular importance to the topic that is discussed, this will be emphasised and explained.³⁹

2 Definition of video gaming, gambling and gambling(-like) elements in video games

VIDEO GAMING. It is important to note that oftentimes, the word ‘gaming’ is used to refer to gambling practices. This is due to the commonly used notion of ‘games of chance’⁴⁰, which refers to situations where gambling is performed through activities that involve playing a game (e.g. a game of poker, a game of roulette). However, in this report, we clearly distinguish between what is meant by ‘gaming’ and what is meant by ‘gambling’. With the former, we solely refer to the playing of video games, regardless of the medium of play (e.g. PC, console, mobile). In this report, ‘video games’ are not limited to online (i.e. multiplayer) video games. This approach allows for the inclusion of every video game with digital characteristics, even if the gameplay itself is not online *per se*. For example, UNICEF defines ‘online gaming’ as “*playing any type of single- or multiplayer commercial digital game via any Internet-connected device, including dedicated consoles, desktop computers, laptops, tablets and mobile phones*”.⁴¹ This definition broadens the meaning of the word ‘online’ to any digital aspect of a video game in an online (i.e. connected to the internet) environment.⁴² In practice, *de facto* all video games have an ‘online’ (i.e. connected to the internet) aspect, however it is important for the sake of completeness to include also those video games that do not have an online component.⁴³

³⁷ HODGKIN, R. and NEWELL, P. (UNICEF). *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 2007, 1; ARCHARD, D. and TOBIN, J. (n 28), 33-36.

³⁸ For instance, in different General Comments, the CRC Committee distinguishes between ‘early childhood’ as the period between 0-8 years of age, and ‘adolescence’ between 10-18 years of age. United Nations Committee on the Rights of the Child, *General comment No. 7 on Implementing child rights in early childhood*, 2005; United Nations Committee on the Rights of the Child, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016; VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S., *Children’s rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar, 2021), 50-51.

³⁹ As stated, the insights from other disciplines within the project will be beneficial for the discussion on this matter.

⁴⁰ In Dutch: ‘*kansspel*’; e.g. in the EU, the organisation representing the leading online gaming and betting operators is called the European Gaming and Betting Association, see <<https://www.egba.eu>>.

⁴¹ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 5.

⁴² Apps and games with in-game purchase options are included in this scope, as the digital aspect here refers to the online purchase of virtual content. Video games downloaded via the internet are also ‘online’.

⁴³ For example single player games purchased via compact disk in a physical store.

GAMBLING. Throughout the Gam(e)a)ble project, we will analyse and critically evaluate the existing definitions for gambling in light of current practices in the digital environment. Therefore, the definition given to gambling here is preliminary and subject to changes based on future insights throughout the research project. At present, there is no general agreement of what constitutes gambling, and its definitions differ throughout jurisdictions.⁴⁴ For example in Belgium, ‘gambling’ as such is not defined and instead the concepts of ‘games of chance’ and ‘betting’ are used to determine the scope (see *infra* chapter 3). In the UK, ‘gambling’ is seen as ‘gaming’ or ‘betting’ and the term ‘gaming’ is defined as ‘playing a game of chance for a prize’.⁴⁵ It is difficult to provide a short, comprehensive definition for what ‘gambling’ means. However, the term gambling as such is broader than what is relevant for this research, as it includes for example lottery or betting on horse races, as well as physical gambling facilities in the researched national jurisdictions (see chapter 3). One possibility+ is to look at how ‘games of chance’ are defined and establish common aspects. These aspects are that something of value needs to be staked (1) in a game of chance (2) with the possibility of winning a prize (3). These three aspects, also called consideration (1), chance (2) and prize (3) are nowadays central to the debate of whether gambling(-like) elements in video games can be classified as (illegal) gambling. This is further discussed in chapter 3, where the definition of gambling in the national regulation of Belgium, the UK and the Netherlands is applied to the different gambling(-like) elements in video games.

GAMBLING(-LIKE) ELEMENTS. Finding a comprehensive definition of the elements in video games which resemble gambling is a difficult task and at the same time one of the research objectives of the ‘Gam(e)a)ble’ project. For this report, the concept of ‘gambling(-like) elements’ means the elements, features and practices in the video game environment which resemble or show similarities with real-life gambling activities or practices. Other frequently used terms are ‘simulated gambling’ or ‘gamble-play’.⁴⁶

The term ‘gambling(-like) elements’ encompasses the duality which exists in the legal landscape regarding the classification of these elements and related difficulties. Either they are seen as gambling and thus fall under the scope of national gambling regulation, or they are not seen as gambling, in which case they are not ‘gambling elements’ and other protective frameworks may apply. However, as we will see in this report, there is a wide range of scientific research hinting at the similarities of these elements with gambling activities, causing them to feel ‘gambling(-like)’ or ‘akin to gambling’. Therefore, the term ‘gambling(-like) elements’ encompasses both the situation where they are seen as gambling, and the situation where even though they are not seen as gambling, it is still relevant to point out the resemblance to gambling for the purposes of analysing the required level of protection.

⁴⁴ Specific definitions for the mentioned gambling(-like) elements (lootboxes etc.) will be provided in a future report of the project, which includes an assessment for each of the different gambling(-like) elements as well as a discussion of the components relevant to the construction of a definition.

⁴⁵ In Chapter 3, this is discussed in detail.

⁴⁶ The specific taxonomical divisions are currently researched within the project. See e.g. DUPONT, B. et al, *It all starts with a name: mapping the terms used by researchers to describe gambling(-like) elements in digital games* (forthcoming 2022).

Chapter 2 - Children's rights framework

AN OVERARCHING FRAMEWORK. As the Gam(e)able project focuses on children, the objective of this chapter is to set out the children's rights framework applicable to the subject at hand. This children's rights framework will serve as a lens to look through for the remainder of the research. Firstly, before discussing specifically which children's rights are important to the topic of gambling in video games, it is necessary to look at the fundamentals of the children's rights framework, both at the international level and the European level. In addition, an introduction is given to children's rights in the digital environment, considering both the increasing digitisation of children's worlds and the nature of the project's subject. Secondly, this chapter discusses the role of children's rights in the regulation of gambling(-like) elements in video games. The fundamental principles of the United Nations children's rights framework are identified, and an assessment is made on how these principles are understood in the context of the integration of gambling(-like) elements in video games. Furthermore, the specific rights of children relevant to gambling(-like) elements in video games are discussed. This includes a brief examination of the positions and responsibilities of the different actors relevant for the realisation of children's rights in this context.

Section I – Introduction to the children's rights framework

1 Children's rights at the international level

CHILDREN AS ACTIVE RIGHTS HOLDERS. As opposed to the dominant vision in the past that children were merely vulnerable subjects in need of protection, children are now seen as active rights holders.⁴⁷ Several children's rights included in the UNCRC, such as the child's right to be heard, illustrate that children in the modern world are not only subjects in need of protection, but also need to have the possibilities for participation and active involvement in matters important to them throughout their development.⁴⁸ The provisions included in the UNCRC demonstrate the strengths and capacities of children as holders of rights, which is more generally formulated in Article 5 which refers to "*the exercise by the child of the rights recognised in the present Convention*".⁴⁹ This vision has been confirmed by the CRC Committee, and has become the general approach in European policy instruments as well (*infra*).⁵⁰

THE UN CONVENTION ON THE RIGHTS OF THE CHILD. The UNCRC was adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990.⁵¹ In addition to its legally binding force for the signatory States, it commands a level of moral force because of its status as the most ratified

⁴⁷ VERHELLEN, E., *Convention on the Rights of the Child – Background, motivation, strategies, main themes* (Garant, 2005), 11-16.; RUXTON, S., *What about us? Children's Rights in the European Union, next steps*, 2005, 105.

⁴⁸ These different rights of the child will be discussed *infra* and include the right of the child to express his/her views (Article 12), the evolving capacities of the child (Article 5), or the right to development (Article 6); see e.g. LANSDOWN, G., *The Evolving Capacities of the Child*, 2005, 3, 5; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on EU law related to children's rights*, 2015, 17.

⁴⁹ HODGKIN, R. and NEWELL, P. (n 37), 149.

⁵⁰ United Nations Committee on the Rights of the Child, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 16; European Commission, *Communication COM(2021)142 on the EU strategy on the rights of the child*, 2021, 3.

⁵¹ United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1557 UNTS 3.

international instrument to date.⁵² The UNCRC is without a doubt the core piece of regulation within the international framework on children's rights.⁵³ As the foundation for children's rights, it "*invites a lively and dynamic discussion about the meaning of [the children's] rights*" due to their broad formulation.⁵⁴

Even though the provisions of the UNCRC have direct effect in most States in theory, in practice the implementation of the provisions into national legislation is the optimal approach.⁵⁵ This was confirmed by the CRC Committee⁵⁶, stating that it "*welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights*".⁵⁷ Moreover, this implementation is linked to the periodic report requirement of Article 44 UNCRC, which requires States to give an overview of the measures they have adopted and the progress they have made giving effect to the rights enshrined in the Convention. Broadly speaking, these measures include the reform of national laws to ensure better children's rights protection, the provision of administrative guidance and resources towards compliance with the UNCRC, the development of awareness-raising and training programmes, or the monitoring of the impact of legislation on children's rights.⁵⁸

One of the greatest values of the UNCRC is that it can be seen as a comprehensive legal framework against which legislative or self- and co-regulatory proposals that directly or indirectly affect children should be evaluated.⁵⁹ Thus, the principles and provisions of the UNCRC serve as inspirational guidelines for children's rights policies, such as the EU Strategy on the Rights of the Child.⁶⁰ Specific aspects of these policies are for example national action plans on children's rights and child impact assessment strategies.⁶¹ The UNCRC has, besides its many positive aspects, been the subject of some criticism. These 'weaknesses' will be further elaborated upon in the second section when the different principles and rights of the UNCRC are discussed. They mostly refer to the vagueness of the provisions and terms used in the UNCRC, or to the standards being too minimalistic to ensure sufficient protection.⁶² Finally, the procedural rights linked to the UNCRC are discussed at the end of this chapter.

UN AND OTHER INSTITUTIONS. Several institutions of the UN have come forward with (non-binding) documents concerning children's rights. The most important is the aforementioned Committee on the

⁵² KILKELLY, U., *The Best of Both Worlds for Children's Rights – interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, in *23 Human Rights Quarterly* 308, 2001, 310; note that the United States have not ratified the UNCRC; VERHELLEN, E. (n 47), 84 and 147.

⁵³ For the history of international children's rights treaties preceding the UNCRC, see e.g. VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 2-6.

⁵⁴ TOBIN, J., *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019), 3.

⁵⁵ This is linked to the discussion on the direct effect of international law in national frameworks. Most common law States need specific national legislation to provide binding provisions and have no direct effect (dualist), whereas for the majority of civil law States the UNCRC becomes part of the national framework upon ratification (monist). See e.g. LUNDY, L., KILKELLY, U. et al., *The UN Convention on the Rights of the Child – a study of legal implementation in 12 countries*, 2012, 15-17.

⁵⁶ More information about the UNCRC Committee, see e.g. VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 404-408.

⁵⁷ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 7.

⁵⁸ *Ibid.*, 3, 6.

⁵⁹ RUXTON, S. (n 47), 28.

⁶⁰ European Commission, *Communication COM(2021)142 on the EU strategy on the rights of the child*, 2021.

⁶¹ LUNDY, KILKELLY et al (n 55), 22-27; EUFRA and Council of Europe, *Handbook for policy makers on the rights of the child in the digital environment*, 2020, 19-22.

⁶² See e.g. TOBIN, J. (n 54), 6.

Rights of the Child, which has provided additional guidance on several children’s rights through its General Comments.⁶³ Furthermore, various guidelines, principles, recommendations and reports have been issued by other institutions, most notable UNICEF, the UN Human Rights Council, or the UN Special Rapporteurs, all discussing children’s rights in a general or specific manner.⁶⁴ Their contributions will be referred to in the following subsections that discuss children’s rights in the context of gambling(-like) elements in video games.

OTHER INTERNATIONAL TREATIES. In addition to the UNCRC, there are other international treaties on human rights, such as the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. However, these treaties are not directly aimed at children and their relevance for gambling in video games is only limited. Therefore, any relevant rights or provisions in these treaties will be discussed together with the different children’s rights of the UNCRC in the next section.

2 *Children’s rights in Europe*

Children’s rights law in Europe revolves around the work of the Council of Europe and that of the European Union (‘EU’). Their frameworks were and still are significantly inspired by the international children’s rights framework, and provide further specifications and interpretations on the different children’s rights. As such, the regulatory instruments adopted by the EU and CoE oftentimes contain binding provisions for their Members that have to be interpreted in light of the UNCRC.⁶⁵

THE COUNCIL OF EUROPE FRAMEWORK. The flagship of the CoE is the ECHR of 1950, protecting democracy and human rights.⁶⁶ The CoE Member States are bound by the provisions included in the ECHR. To ensure compliance with the obligations enshrined in these provisions, the ECHR established the European Court of Human Rights (‘ECtHR’), one of the most important human rights courts up until today.⁶⁷ Although it is a Convention on *human* rights and contains only a few express references to children’s rights, its provisions are equally relevant for children and must be interpreted in light of the UNCRC.⁶⁸ In addition to the ECHR and its case law, the CoE has adopted legal instruments for the protection or interpretation of (specific) children’s rights, most notably regarding their economic and social rights, and their right to protection against sexual exploitation.⁶⁹ However, specifically interesting for the purposes of this report, the CoE has also developed several non-binding instruments relevant for children. They cover a variety of topics, such as the relation between businesses and

⁶³ The Committee is part of the Office of the High Commissioner for Human Rights.

⁶⁴ E.g. UNICEF, *Guidelines for Industry on Child Online Protection*, 2014; OECD, *Recommendation of the Council on Children in the Digital Environment*, OECD/LEGAL/0389, 2021; United Nations Office of the High Commissioner for Human Rights, *Guiding principles for business and human rights*, 2011; CANNATA, J. (Human Rights Council), *Report of the Special Rapporteur on Artificial Intelligence and privacy, and children’s privacy*, A/HRC/46/37, 2021, 14; see more in general the EU Kids Online Project.

⁶⁵ EUFRA Handbook (n 48), 27-28.

⁶⁶ European Convention on Human Rights, CETS No. 005 1950.

⁶⁷ The ECtHR is composed of 47 judges, one judge brought forward by each of the State Parties, and it has extensive case law on multiple human (including children’s) rights.

⁶⁸ EUFRA (n 48), 28; ECtHR, *Harroudj v. France*, No. 43631/09, 4 October 2012, para 42; KILKELLY, U. (n 52), 311 and 313.

⁶⁹ CoE, European Social Charter, ETS No. 163 1996; CoE, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), CETS No. 201, 2012.

human rights⁷⁰, human rights on the internet⁷¹, children’s rights in the digital environment⁷², or human rights in online games.⁷³ Their provisions are discussed more in-depth in the next subsection. Finally, the CoE has adopted a Strategy on the Rights of the Child, in which it is acknowledged that growing up in a digital world poses new and complex challenges regarding children’s rights.⁷⁴

THE EUROPEAN UNION FRAMEWORK. Even though the EU is not a party to the UNCRC, all its Member States have ratified it.⁷⁵ In this regard, the EU Commission has stated in its 2021 Strategy on the Rights of the Child that “*the UNCRC continues to be our guidance in this field*”⁷⁶, which is a logical follow-up on their statement in the 2011 Agenda on the Rights of the Child that “*standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child.*”⁷⁷ In the EU, it was not until the year 2000 that a treaty on fundamental rights was adopted. The CFEU covers a whole range of civil, political, economic and social rights of EU citizens and, more importantly, contains the first specific references to children’s rights at the EU constitutional level.⁷⁸ The key reference is found in Article 24 CFEU, which is a dedicated provision to children’s rights inspired by the UNCRC.⁷⁹ The CFEU received the same legal value as the Treaty on the (Functioning of the) European Union (‘TEU’ and ‘TFEU’) with the entry into force of the Lisbon Treaty in 2009.⁸⁰ This milestone in the history of the EU brought forward important institutional, procedural and constitutional changes, however for this report the most important change was the inclusion of children’s rights protection as a general objective of the EU in Article 3(3) of the TEU.⁸¹ Furthermore, the Court of Justice of the EU (‘CJEU’) has recognised in its case law that children’s rights need to be protected and requires EU law to respect the provisions of the UNCRC.⁸² Lastly, as already stated, the EU has adopted a Strategy on the rights of the child, which confirms the protection and promotion of children’s rights as a core objective of the EU’s work within and beyond its borders.⁸³

It should be noted that the EU may only legislate where it is given competence by Articles 2-4 TEU. For children’s rights, this depends on a case-by-case basis, and EU legislation already exists in several areas relevant for children’s rights, e.g. data and consumer protection, asylum and migration, or cooperation in civil and criminal matters.⁸⁴ Article 6(1) TEU, which gives the CFEU its legal value, also states that the

⁷⁰ CoE, *Recommendation CM/REC(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, 2014.

⁷¹ CoE, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on Human rights and Businesses*, 2016.

⁷² CoE, *Recommendation CM/Rec(2018)7 of the Committee of Ministers on Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, 2018.

⁷³ Council of Europe and Interactive Software Federation Europe, *Human rights guidelines for online games providers*, 2008.

⁷⁴ Council of Europe, *Strategy for the Rights of the Child (2016-2021)*, 2016, 9.

⁷⁵ The same can be said for the CoE; CANETTA, E., MEURENS, N., MCDONOUGH, P. and RUGGIERO, R. (European Parliament), *EU Framework of Law for Children’s Rights*, 2012, 9.

⁷⁶ EU Strategy on the Rights of the Child (n 50), 1.

⁷⁷ European Commission, *Communication COM(2011)60 on an EU Agenda for the Rights of the Child*, 2011, 3.

⁷⁸ European Union, *Charter of Fundamental Rights of the European Union*, 2012.

⁷⁹ See *infra*; other provisions are e.g. Article 14(2) on the right to education, Article 21 on a prohibition of discrimination based on age, or Article 32 on a prohibition of exploitative child-labour.

⁸⁰ European Union, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007, Article 6(1).

⁸¹ EUFRA (n 48), 21.

⁸² CJEU, *European Parliament v Council of the European Union*, C-540/03, 27 June 2006, ECLI:EU:C:2006:429, para. 37; CJEU, *Dynamic Median Vertriebs GmbH v. Avides Media AG*, C-244/06, 14 February 2008, ECLI:EU:C:2008:85, paras. 42 and 52; CANETTA, E. et al. (n 75), 17.

⁸³ EU Strategy on the Rights of the Child (n 50).

⁸⁴ EUFRA (n 48), 22.

CFEU does not extend the competences of the EU. This implies that the CFEU provisions are legally binding for the Member States only within the scope of EU law.

3 Children's rights in the digital age

THE DIGITAL ENVIRONMENT AS A DOUBLE-EDGED SWORD. Having established the general children's rights framework, the next step is to discuss children's rights in the digital age. First, it is by now generally accepted that human rights apply equally offline and online.⁸⁵ The CRC Committee has stated in its most recent General Comment 25 - which is one of the most influential and important documents in this area - that "*the rights of every child must be respected, protected and fulfilled in the digital environment.*"⁸⁶ Even though certain rights can have different dimensions or interpretations, there would be no reason to disregard them in an online environment. It cannot be denied that the digital environment has become more and more prominent in children's lives.⁸⁷ On the one hand, there are many benefits brought by digitisation. Examples are the use of digital tools to help children with learning difficulties, connecting and communicating with others⁸⁸; the globalisation of communication and new ways for children to express themselves freely⁸⁹, participate and engage in society⁹⁰; or new ways to increase and improve children's knowledge and awareness about their rights and how to experience them.⁹¹ More **specific to the topic of this report**, it has been stated that playing video games can support young people's literacy, creativity and empathy, makes them connect and communicate better with different people, and could help their mental well-being.⁹² On the other hand, however, the rapid increase in information and communication technologies is also accompanied by a wide variety of potential risks and harms for children. Known examples are children's increased exposure to harmful or illegal content (e.g. pornography, online hate-speech) and contacts (e.g. cyber-grooming, cyberbullying, online harassment), the increased potential for children to engage in risky or inappropriate behaviours that create negative repercussions for others and themselves; and risks related to online privacy and the collection, processing and usage of their (personal) data.⁹³ In any event, there is a consensus that it is necessary to ensure that the digital environment is one where children can develop safely, which means protecting them from risks, yet

⁸⁵ CoE, *Recommendation CM/REC(2014)6 of the Committee of Ministers to member States on a Guide to human rights for internet users*, 2014, 3; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 8; Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion – Digital media and children's rights*, 2014, 10.

⁸⁶ CRC Committee, *General comment No. 25* (n 17), 1.

⁸⁷ See e.g. Ofcom (2020), *Children and parents: Media use and attitudes report 2020-2021*; Joint Research Centre Science and Policy Reports, *Young Children (0-8) and Digital Technology*, 2015; CHAUDRON, S., DI GOIA, R. and GEMO, M., *Young Children (0-8) and Digital Technology – A qualitative study in Europe*, 2018; ZAROUALI, B. et al (2014), *Mediabezit En – Gebruik Bij Minderjarigen. Een rapport in het kader van het AdLit onderzoeksproject*; International Telecommunications Union (2016) *ICT facts and figures 2016*; LIVINGSTONE, S., CARR, J. and BYRNE, J., *One in Three: Internet Governance and Children's Rights* (Global Commission on Internet Governance), 2016.

⁸⁸ EU Strategy on the Rights of the Child (n 50), 15.

⁸⁹ Report of the 2014 Day of General Discussion – Digital media and children's rights (n 85), 4.

⁹⁰ European Commission, *Communication COM(2012)196 on a European Strategy for a Better Internet for Children*, 2012, 3.

⁹¹ THIRD, A. et al. (2014). *Children's rights in the digital age: a download from children around the world*, 12-14.

⁹² See e.g. VERDOODT, V. et al, *Esports and the platforming of child's play during COVID-19*, in *Int'l Journal of Children's Rights*, 2021, 10; RICHARD, G., *Video games, Gender, Diversity, and Learning as Cultural Practice: Implications for Equitable Learning and Computing Participation Through Games*, in *57 Educational Technology* 36, 2017; JOHANNES, N., VUORRE, M. and PRZYBYLSKI, A., *Video game play is positively correlated with well-being*, in *R. Soc. Open Sci.* 8, 2021; EGDF and ISFE, *Position paper – consultation on the rights of the child*, 2020, 4 (referring to research by the UK National Literacy Trust); see *infra* for application of children's rights to video games and gambling.

⁹³ EU Strategy on the Rights of the Child (n 50), 15-17; OECD, *Children in the digital environment – revised typology of risks*, 2021, 13-36; UNICEF *Guidelines for Industry on Child Online Protection* (n 64), 7; BYRNE, J., KARDEFELT, D., LIVINGSTONE, S. and STOILOVA, M., *Global Kids Online Research Synthesis 2015-2016*, 2016, 19-20 for children's own views on online opportunities and risks, see *Better Internet for Kids, How to make Europe's Digital Decade fit for children and young people*, 2021, 32-38.

not overprotecting them to still allow for optimal development through exploration of the digital environment.⁹⁴

GAMBLING IN VIDEO GAMES. There has been an increase in awareness regarding the integration of gambling(-like) elements in video games. Aside from the specific children's rights relevant in this context, several regulatory instruments issued at the European and international level by *inter alia* the EU, UNICEF, CoE or the OECD have touched upon the topics of in-game purchases, lootboxes⁹⁵, or more generally on age-labelling and content classification.⁹⁶ References to these instruments will be included in the analysis below.

Section II – Children's rights and principles in the context of gambling(-like) elements in video games

INTRODUCTION. This section investigates the role of the children's rights framework in regulating gambling(-like) elements in video games. First, the general principles underpinning the UN children's rights framework are identified and discussed in the specific context of the integration of gambling(-like) elements in the video gaming environment. Second, the different children's rights applicable to the topic are elaborated upon and briefly analysed. This includes a discussion of the role and responsibilities of the relevant actors for realising children's rights in this context.

1 *Overarching principles of the children's rights perspective*

FOUR BASIC PRINCIPLES. Within the framework of the UNCRC, it is up to the States to fulfil obligations related to each of the children's rights. For this, States need to develop a child rights perspective which engages all actors of society (including children) and is adopted throughout the government, the parliament and the judiciary.⁹⁷ Important elements of this perspective are the four key principles of the UNCRC, which form the basis for interpreting the other provisions.⁹⁸ These principles are found in Article 2: non-discrimination; Article 3(1): the best interests of the child; Article 6: the development of the child; and Article 12: the child's right to express his or her views freely. As we will see, it is no longer sufficient to discuss these principles as separate values; instead, they are interacting elements of a holistic approach.⁹⁹

⁹⁴ Global Kids Online Research Synthesis 2015-2016 (n 93), 9, 83; OECD, *Recommendation of the Council on Children in the Digital Environment* (n 64), 4; Guidelines for Industry on Child Online Protection (n 64), 10-11.

⁹⁵ OECD, *Children in the digital environment – revised typology of risks*, 2021, 10-13, 12: “[Children] may not, for example, fully understand disclosures about in-game microtransactions or lootboxes. Children may also not understand the relationship between real currency and game currency.”; Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (NL), *Code voor kinderrechten [Code for children's rights]*, 2021, 6: “Principle 8: (...) Prevent design of digital services aimed at exploitation, such as the encouraging of in-game purchases, the use of gambling elements and targeted data-driven marketing.”; European Commission, *European Strategy for a Better Internet for Children* (n 90), 12 (overspending on virtual goods and seeking out online gambling sites is stated as a risk in the digital environment).

⁹⁶ UNICEF Guidelines for Industry on Child Online Protection (n 64), 25-28; EGDF and ISFE, *Position paper – consultation on the rights of the child*, 2020; CoE and ISFE, *Human rights guidelines for online games providers*, 2008.

⁹⁷ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 2-3.

⁹⁸ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 8-11.

⁹⁹ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 6.

1.1 Children’s development as the central concept

CENTRAL BUT NOT CLEARLY DEFINED. The right to development is enshrined in Article 6 UNCRC, which encompasses the right to life and survival.¹⁰⁰ Nevertheless, it has been generally accepted that Article 6 is much broader than life or survival and should be interpreted in a comprehensive manner:

“The Committee reminds States parties (and others concerned) that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play (arts. 24, 27, 28, 29 and 31).”¹⁰¹

Even though the notion is not clearly defined, this holistic interpretation is key when discussing the child’s right to development, as it *“embraces the child’s physical, mental, spiritual, moral, psychological and social development.”*¹⁰² As such, it is no surprise that several other Articles of the UNCRC refer to development, e.g. Article 18 on parental responsibilities, Article 29 on the aims of education, or Article 32 on the protection against economic exploitation. Moreover, it explains why the right to development must be read in conjunction with other general principles such as the best interests of the child and the child’s evolving capacities. Indeed, Article 6 is understood as the platform for other fundamental principles and rights enshrined in the UNCRC.¹⁰³

THE PROCESS OF DEVELOPMENT. According to PELEG, the right to development should be understood as a positive right that aims to ensure the child’s transformation into an adult.¹⁰⁴ However, as argued by TOBIN, development must not be reduced to merely the transformation from childhood to adulthood, as this approach reflects a conception of children as human *‘becomings’* rather than human *beings*.¹⁰⁵ As such, these two statements illustrate the two dimensions of development, namely in the present (childhood) and in the future (development into adulthood). Childhood can be seen as a *“socially constructed conception that changes over time and among societies, in accordance with shifting views about inter alia family, gender roles, the labour market, crime and punishment, and religion”*.¹⁰⁶ Furthermore, childhood is the subject of research within sociology and is related to the aforementioned change in how children are perceived in modern societies.¹⁰⁷ This perception has abandoned the vision of children as vulnerable beings in need of protection, or childhood as the *‘absence of adult qualities’*.¹⁰⁸ In that regard, it has been argued by PELEG that children should be seen

¹⁰⁰ Which does not imply that the right to development is less important. See e.g. PELEG, N., *The Child’s Right to Development* (Cambridge University Press, 2019), 2: *“when the right to development is mentioned or debated, it is usually as a derivative of other rights of the child, while its articulation in human rights is overlooked [which should not be as it is one of the four general principles].”*

¹⁰¹ CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 4.

¹⁰² CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 4.

¹⁰³ LANSDOWN, G. (n 48), 16; UNCRC, *General comment No. 1 on Article 29(1): the aims of education*, 2001.

¹⁰⁴ UNCRC *General comment No. 7 on Implementing child rights in early childhood*, 2005, 8; PELEG, N. (n 100), 88.

¹⁰⁵ PELEG, N. & TOBIN, J., *Commentary to Article 6 UNCRC*, in TOBIN, J., *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019), 226.

¹⁰⁶ PELEG, N. (n 100), 3.

¹⁰⁷ For the sociology of ‘childhood’ and its relation with children’s rights, see the contribution of MAYALL, B. in VANDENHOLE, W., DESMET, E., REYNAERT, D. and LEMBRECHTS, S., *Routledge International Handbook of Children’s Rights Studies* (Routledge, 2015), 77-90 and also 412-420.

¹⁰⁸ PELEG, N. (n 100), 4.

as human beings and as human ‘becomings’, having autonomy in the present so they can have a say about their future.¹⁰⁹

The process of transformation into adulthood is complex and is influenced by the child’s evolving capacities (*infra*). According to LANSDOWN, child development is a product of specific economic, social and cultural processes, influenced by *inter alia* parents’ expectations, societal demands, or the child’s own life experiences.¹¹⁰ As a concept, it is important to keep in mind the desired result of the process of development, namely the fulfilment of the child’s human potential.¹¹¹ Aspects of a ‘healthy’ development are for example adequate nutrition, intellectual stimulation, opportunities for play, social interactions and emotional care and security.¹¹² Again, all this shows the importance of reading the concept of development together with the other principles and rights of the UNCRC: enabling children to reach their full potential requires the fulfilment of e.g. the right to information, the right to leisure and play, or the right to education, all within the holistic approach of children’s evolving capacities, prioritising their best interests and respecting their views in matters affecting them. Similarly, it shows why special consideration is given to stages in the child’s life that are subject to dynamic growth and are important for its development.¹¹³ For example, it is stated by the CRC Committee that “*young children’s earliest years are the foundation for their physical and mental health (...), and developing competencies*”¹¹⁴; that “*positive early childhood interventions and experiences facilitate optimal development as young children become adolescents*”¹¹⁵; and that there should be a “*commitment to building optimal environments to guarantee the rights of adolescents and support the development of their physical, psychological, spiritual, emotional, cognitive, cultural and economic capacities*”.¹¹⁶ Finally, the CRC Committee emphasises that children should be able to develop the necessary life skills to face the challenges they can expect to be confronted with in real life, including the ability to make balanced decisions, resolve conflicts peacefully, or be a critical thinker.¹¹⁷

THE IMPORTANCE OF EVOLVING CAPACITIES. Although Article 5 UNCRC is not recognised as a general principle *in se*, it can be argued that it is relevant for all other provisions of the UNCRC anyway, therefore becoming a general principle, or an umbrella principle.¹¹⁸ It is central to the embodiment of children as active rights holders in the UNCRC (*supra*). The CRC Committee has defined evolving capacities as:

*“[a]n enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.”*¹¹⁹

¹⁰⁹ PELEG, N. (n 100), 189, stating that “*growing up is something that children do, but it is not the only thing they do, nor can it be the only thing that defines them*”.

¹¹⁰ LANSDOWN, G. (n 48), 9-14.

¹¹¹ Article 29(1) UNCRC; see also VERDOODT, V. *Children’s Rights and Advertising Literacy in the Digital Era*, 2018, 77-78: “*To achieve this result, there is no one ‘right’ method: every child has different experiences and will develop in different ways*”.

¹¹² LANSDOWN, G. (n 48), 16.

¹¹³ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 94-96; PELEG, N. (n 100), 115-120; CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005; CRC Committee, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016.

¹¹⁴ CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 3.

¹¹⁵ CRC Committee, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 5.

¹¹⁶ *Ibid.* 6.

¹¹⁷ CRC Committee, *General comment No. 1 on Article 29(1): the aims of education*, 2001.

¹¹⁸ VARADAN, S. and TOBIN, J., *Commentary on Article 5 UNCRC*, in TOBIN, J.(n 54), 162.

¹¹⁹ CRC Committee, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 6.

Importantly, it is inextricably linked to the child’s development, as the different stages of development are a result of the evolving capacities of the child. As stated by VARADAN and TOBIN:

“The development of all a child’s capacities—physical, cognitive, moral, social, emotional, and spiritual—does not automatically transform from complete dependence to complete autonomy upon attaining the age of majority. On the contrary, in the normal course of events, it tracks an evolving, albeit not necessarily linear, path as a child ages.”¹²⁰

From a scientific perspective, it cannot be denied that there are universal stages of growth (e.g. in body and mind). However, especially concerning the development of the brain, the knowledge is not consistent enough to decide on clear indications of differences between the phases of growth.¹²¹ Hence, at its core, the concept of evolving capacities is about finding a balance between the capacities of children to already take up responsibilities on one hand, and their need for protection if they are unable to do so on the other hand.¹²² Adolescence, in this regard, is the phase where finding this balance is especially challenging: adolescents are still considered as children (i.e. below the age of 18), for whom protection is needed, however, adolescence is also a period where children are trying to forge a new identity, take on more risks, and acquire more competences and responsibilities.¹²³ According to FORTIN, a successful transition to adulthood also requires opportunities for children to practice their decision-making skills and providing them with a dry-run of adulthood.¹²⁴ Finally, in addition to its importance for the right to development, the concept of evolving capacities also affects and is affected by Article 12 UNCRC, which grants children a right to express their views in any matter that affects them. This relationship is explained below in the part specifically dedicated to Article 12.

DEVELOPMENT IN THE CONTEXT OF GAMBLING IN VIDEO GAMES. In its General Comment 25 on children’s rights in the digital age, the CRC Committee highlights that *“States parties should pay specific attention to the effects of technology in the earliest years of life (...) when the social environment is crucial to shaping children’s cognitive, emotional and social development”*.¹²⁵ The commercialisation of the video game industry (with new business models based on microtransactions) and the integration of gambling(-like) elements in video games can have a direct impact on the child’s right to development, as gambling and economic exploitation can be seen as risks to children’s development.¹²⁶

RESPONSIBILITIES FOR STATES AND PARENTS. Safeguarding the development of the child is a responsibility of parents and the State. First, Article 18(1) UNCRC states that parents have common *and* primary responsibilities for the upbringing and development of the child.¹²⁷ For States, Article 18(2) UNCRC provides that they shall render appropriate assistance to parents in the performance of their child-rearing responsibilities. In general, the child’s development and evolving capacities have to be read in conjunction with the child’s best interests (*infra*).¹²⁸ As we have seen, the concept of evolving

¹²⁰ *Ibid.*, 173.

¹²¹ LANSDOWN, G. (n 48), 5. Other factors include context, gender, culture, and of course, age.

¹²² LANSDOWN, G. (n 48), xiii, 3; UNCRC, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 6.

¹²³ LANSDOWN, G. (n 48), 32.

¹²⁴ FORTIN, J., *Children’s Rights and the Developing Law* (Cambridge University Press, 2012), 10-11.

¹²⁵ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 3.

¹²⁶ *Id.*; UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 19-20.

¹²⁷ See e.g. VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 203-207; HODGKIN, R. and NEWELL, P. (n 37), 231-248.

¹²⁸ Article 18(1) UNCRC states that parents will have children’s best interests as their basic concern, linking back to Article 3 UNCRC.

capacities of the child refers to the different stages of development, which in turn have an effect on the role of parents and the State. More specifically, Article 5 UNCRC implies that it is the role of parents to offer appropriate direction and guidance in the exercise by the child of his rights under the Convention.¹²⁹ However at the same time, Article 5 is about recognising the changing relationship between parents and children as they grow up. As children acquire more competences, the need for parental ‘direction and guidance’ is reduced and replaced by a greater autonomous capacity to take responsibility for decisions affecting their lives.¹³⁰ Furthermore, Article 5 uses the words ‘appropriate’ direction and guidance, meaning that there is no *carte blanche* for parents to decide which guidance to give, and that *inter alia* the child’s best interests have to be taken into account.¹³¹ In this regard, the concept of evolving capacities could be seen as an enabling principle, meaning that parents should continually adjust the levels of support given to the child, and not use it as an excuse for practices restricting children’s autonomy.¹³² Second, regarding the role of States, it has been argued that using the words ‘best efforts’ in Article 18(2) UNCRC reflects an acknowledgement that the most that can be expected of States is that they take all reasonable measures within the scope of their available resources to raise awareness and educate parents about their common responsibilities, and create a regulatory framework and social system with appropriate incentives for parents to exercise their parenting responsibilities.¹³³ Finally, the State has a critical role in assisting and supporting parents in the development of their children.¹³⁴

CHALLENGES OF PARENTING IN THE DIGITISED WORLD. According to the CRC Committee and UNICEF, States should facilitate educational programmes for parents to enhance their knowledge of children’s rights in relation to the opportunities and risks associated with digital products and services.¹³⁵ This is important, as parents often feel insecure due to the complexity of digital technologies¹³⁶, or have insufficient knowledge about digital technologies to keep up with their children.¹³⁷ If parental supervision is limited, children have to independently explore the digital environment, which potentially exposes them to more risks and harms.¹³⁸ At the same time, new risks can threaten children’s safety before parents are aware of them or prepared for them.¹³⁹ In the video gaming environment, this means that if parents have insufficient knowledge about video games or features within them (e.g. microtransactions), children can be exposed to risks and harms related to these

¹²⁹ CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 8.

¹³⁰ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 81-83; LANSDOWN, G. (n 48), 5.

¹³¹ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 83.

¹³² UNCRC, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 8; VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 84-85.

¹³³ SEOW, F. and TOBIN, J., *Commentary on Article 18 UNCRC*, in TOBIN, J. (n 54), 650-652.

¹³⁴ *Ibid.*, 668-677.

¹³⁵ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 6 and 14; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 12 and 16; Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion – Digital media and children’s rights*, 2014, 20: “States should also provide adequate training and support to parents (...) to enhance their technical skills, inform them about risks and potential harm, learn about how children use technology and be able to support children in using digital media and ICTs in a responsible and safe manner.”

¹³⁶ LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V., *Children’s Rights and Digital Technologies* (Springer, 2018), 19.

¹³⁷ Council of Europe (n 61) , 28; Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion – Digital media and children’s rights*, 2014, 8.

¹³⁸ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 4.

¹³⁹ Council of Europe (n 61) , 56.

features (e.g. overspending or addiction).¹⁴⁰ This illustrates the importance of Article 18(2) UNCRC on the State's duty to assist parents, which also applies to children's rights in the digital environment.¹⁴¹

RESPONSIBILITIES FOR BUSINESSES. Both the video gaming and the gambling industries may have an important impact on children's development, and hence also play an important role in respecting and promoting children's rights within their activities. The CRC Committee has acknowledged these responsibilities and underlines that it is up to the State to ensure that the industry meets them.¹⁴² Regarding the digital environment, it has stated that:

*"States parties should require all businesses that affect children's rights in relation to the digital environment to implement regulatory frameworks, industry codes and terms of services that adhere to the highest standards of ethics, privacy and safety in relation to the design, engineering, development, operation, distribution and marketing of their products and services."*¹⁴³

In other words, States should ensure that existing rules or industry codes which apply to gambling(-like) elements in video games are implemented by businesses and these rules/codes have to adhere to the highest standards of privacy and safety. The latter is important if new provisions or codes are adopted on the topic of gambling(-like) elements in video games.

1.2 The right to non-discrimination

CHARACTERISTICS. The second guiding principle of the UNCRC is enshrined in Article 2, which ensures the protection of all rights without discrimination of any kind.¹⁴⁴ The key message of the UNCRC is that children have fundamental rights and freedoms equal to all humans and should not be discriminated against simply because they are children or on any other basis (e.g. race, sex, religion).¹⁴⁵ As such, discrimination under the UNCRC implies an unfavourable treatment, on a prohibited ground, which is unjustifiable.¹⁴⁶ In general, States are to respect the rights within the UNCRC for each child within their jurisdiction without discrimination of any kind, and are recommended to revise or rescind legislation where necessary to prevent or eliminate forms of discrimination.¹⁴⁷ In that regard, it should be emphasised that *"the application of the non-discrimination principle of equal access to rights does not mean identical treatment."*¹⁴⁸ Thus, States are to take on an active role, not only by implementing non-discrimination into their legal framework, but also by performing national studies on forms of

¹⁴⁰ See for Europe e.g. ISFE, *Key facts of the EU video gaming industry 2020*, 2020, 16-17. For the UK, see Office of Communications, *Children and parents media use and attitudes report 20/21*, 2021, at 24, noting that pressure to spend in-game is the most prevalent concern for parents; and at 35-36, where around half of the parents stated that they concerned about either their child's in-game spending, the collection of the child's data by companies, or the amount of time their child spends online.

¹⁴¹ For a related example, see e.g. Council of Europe, *Parenting in the Digital Age: Positive parenting strategies for different scenarios*, 2020.

¹⁴² CRC Committee, *General comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 2013.

¹⁴³ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 7.

¹⁴⁴ Non-discrimination is also found in other human rights instruments, e.g. the ICCPR, ICESCR, CEDAW or UDHR.

¹⁴⁵ SHEAHAN, F., *Translating the Right to Non-Discrimination into Reality*, 2008, 9.

¹⁴⁶ For more information see BESSON, S. and KLEBER, E., *Commentary on Article 2: Non-discrimination*, in TOBIN, J. (n 54), 60-64.

¹⁴⁷ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 57.

¹⁴⁸ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 4. This means that special measures can be needed to eliminate conditions that cause discrimination. Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the Convention.

discrimination, organising information and awareness-raising campaigns, and involving political and religious leaders in the discouragement of discrimination.¹⁴⁹ Furthermore, all grounds of discrimination are equally important under the UNCRC, in contrast to the existing ‘qualified discrimination’ within the case law of the ECtHR for example, which requires a particularly solid justification.¹⁵⁰

NON-DISCRIMINATION IN THE CONTEXT OF GAMBLING AND VIDEO GAMES. Although not necessarily the most impactful principle for the topic of this report, there are some relevant takeaways related to the principle of non-discrimination. In the digital age, discrimination includes digital exclusion, as well as discrimination related to automated processing that results in profiling (e.g. personalisation and stereotyping in video games), information filtering, or decision-making based on biased data concerning a child.¹⁵¹ First, non-discrimination requires equality of children’s access to the digital environment, as it is an important gateway for exercising their participation rights, including their right to play.¹⁵² It has been argued that social interaction is a valuable aspect of playing video games, whether it occurs inside the game, or outside the game on forums or streams:

“Studies of online social interaction indicate that gaming can enhance a child’s social relationships, as those who play together are sharing experiences that can lead to strong connections and contribute to developing teamwork skills. In this sense, games can be seen as a digital space where children can pass time, develop relationships, learn, and participate in many important aspects of life.”¹⁵³

The CRC Committee requires States to actively identify those (large) groups of children for whom digital access is a problem and who need special measures to realise their rights.¹⁵⁴ Thus, States’ policies should be adaptable or flexible to address the needs of all children so that they can access the digital environment. It is furthermore crucial to educate children about non-discrimination in a digital context, by providing them with tools and skills to deal with the harms that may come from online discrimination.¹⁵⁵

Second, there is the phenomenon of personalisation and application of consumer profiles. Here, the issue is related to social sorting (i.e. systematically categorising and classifying individuals for purposes of identification or risk assessment). VAN DER HOF states that *“social sorting can create and reinforce social differences, for instance, by excluding the economically deprived from commercial services or by targeting certain minority groups in society.”¹⁵⁶* In the context of this report, this could result in personalised microtransactions offered in video games based on the specific consumer profiles, including differences in offers based on gender¹⁵⁷ or age; differences in price to be paid to take part in the gambling(-like) processes; differences in which types of gambling(-like) elements are offered,

¹⁴⁹ HODGKIN, R. and NEWELL, P. (n 37), 21-24.

¹⁵⁰ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 56; ECtHR, *Bah v. United Kingdom*, App. No. 56328/07, 2011, para. 37.

¹⁵¹ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 2.

¹⁵² LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 5.

¹⁵³ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 16.

¹⁵⁴ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 4, read in conjunction with UNCRC, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 2.

¹⁵⁵ LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 5.

¹⁵⁶ VAN DER HOF, S., *I agree... or do I? – A rights-based analysis of the law on children’s consent in the digital world*, in *Wisconsin Int’l Law J.* 102, 2017, 118.

¹⁵⁷ E.g. the gender gap in Esports. UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 16.

thereby restricting consumer choices¹⁵⁸; or (predatory) differences based on nudging child-consumers towards the gambling(-like) practices they are most vulnerable to, based on their consumer profile. To illustrate the latter, an excerpt from a study by KING ET AL. reads:

“One such case, in 2015, involved an anonymous game producer for a ‘free-to-play’ game company who disclosed that their games employed various sales and manipulation tactics to encourage certain players to spend more money in their game. These strategies involved, for example, searching the company’s player metrics to identify highly active players and then developing monetised in-game content tailored and offered to these players. In-game content was personalised based on these players’ unique interests and preferences (e.g., game items that match the colour of their favourite sports team), which involved using information gathered from players’ linked social network pages (e.g., Facebook page).”¹⁵⁹

This statement is one example of personalisation in video games that can be far-reaching in terms of the information and personal data used to construct detailed consumer profiles. Additionally, it shows that non-discrimination can be directly linked to the right to protection against economic exploitation, as well as to the right to data protection in the digital environment, the latter discussed more in detail in section II.

Third, stereotypes and potentially discriminatory messages still frequently occur both in advertising of video games and in the video games themselves. Video games oftentimes use popular characters which serve as role-models for children, making them vulnerable to the messages they convey (through learning by imitation and mimicking).¹⁶⁰ Moreover, the characters used in video games are subject to common stereotypes, such as muscular, bearded men to convey strength, or exaggerated curves in female characters to convey femininity.¹⁶¹ These examples illustrate the importance of the responsibilities of States and video game developers regarding stereotyping.

1.3 The best interests of the child as a primary consideration

A THREEFOLD CONCEPT. Article 3 UNCRC requires that the best interests of the child shall be a primary consideration in all actions concerning children. It includes an obligation for governments and public and private bodies to conduct child impact assessments and evaluate the impact of any proposed law, policy or decision on children’s rights.¹⁶² There is no definition for the concept of best interests, although this is not necessarily desirable, since a human rights-based approach needs flexibility and discretion¹⁶³ and best interests is seen as a dynamic concept that requires an assessment appropriate to the specific context.¹⁶⁴ According to the CRC Committee, the concept is threefold: (1) *“a substantive right for the child to have his or her interests assessed and taken as a primary consideration when different interests are being considered”*¹⁶⁵; (2) *“a fundamental, interpretative legal principle requiring*

¹⁵⁸ See also Chapter 5; see in general VAN DER HOF, S. and PRINS, C., *Personalisation and its influence on identities, behaviour and social values*, in HILDEBRANDT, M. and GUTWIRTH, S., *Profiling the European Citizen* (Springer, 2008), 122.

¹⁵⁹ KING, D., DELFABBRO, P., GAINSBURY, S. et al. (n 14), 2.

¹⁶⁰ European Parliament, *Report on How Marketing and Advertising Affect Equality between Women and Men*, 2008/2038(INI), 2008.

¹⁶¹ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 16.

¹⁶² UNCRC, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 4.

¹⁶³ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 63.

¹⁶⁴ UNCRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 3, 12-17.

¹⁶⁵ This implies Article 3(1) UNCRC to be directly applicable and therefore it can be invoked directly before a court.

that if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be selected"; and (3) a procedural guarantee that "whenever a decision has to be made affecting a specific child or a group of children, the decision-making process must include an assessment of the impact of the decision on the child or children concerned".¹⁶⁶ There is some discussion around the notion of 'primary consideration' as stated in Article 3(1) UNCRC. In general, 'primary' means that when different interests are at stake, the child's interests are to be given a high priority and not just be one of several considerations.¹⁶⁷ However, the CRC Committee emphasised that, in order to find a suitable compromise balancing the interests of all parties involved, there is a need for a degree of flexibility, since the child's interests can conflict with other interests or rights (e.g. of other children, parents, companies, or the public).¹⁶⁸ In that regard, EEKELAAR and TOBIN argue that the child's best interests can only be displaced by reasonableness and necessity, meaning that any such displacing measure needs to have a legal aim and be necessary and proportionate to achieve this aim.¹⁶⁹ At the same time, the concept of best interests is complementary to the development and evolving capacities of the child (*supra*), and the right of the child to express his or her views (*infra*).¹⁷⁰ The circumstantial interpretation of the best interests of the child supplements the other factors within the holistic approach, such as the context, the needs of individual children, or the age and maturity of the child (e.g. the degree to which the child can express its views on the matter).¹⁷¹

RESPONSIBILITIES IN THE VIDEO GAMING CONTEXT. First, in general, States should ensure that the best interests of the child is a primary consideration in all actions regarding the digital environment.¹⁷² This includes judicial and administrative decisions, as well as policies and legislation concerning children.¹⁷³ Furthermore, States should establish mechanisms to assess the impact of government actions or the activities of the business sector on children, and take these results into account when adopting new policies or legislation. Child-rights impact assessments ('CRIAs') help with predicting these impacts and need to be built into government processes at all levels.¹⁷⁴ Second, the responsibilities of the business

¹⁶⁶ CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 4.

¹⁶⁷ CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 10; SCHMAHL, S., *United Nations Convention on the Rights of the Child: Article-by-Article Commentary* (Nomos, Beck & Hart Publishers, 2021), 73-74; VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 66-68. It is stated that the child's interests have no absolute priority, however at the same time they have to prevail over other interests and only in strict situations this can be overruled. See e.g. cases by the ECtHR, *Sahin v. Germany*, App. No. 30943/96, 2003, para. 66; *Neulinger and Shuruk v. Switzerland*, App. No. 41615/07, 2010, para. 134; *Haase v. Germany*, App. No. 11057/02, 2004, para. 89.

¹⁶⁸ EEKELAAR, J. and TOBIN, J., *Commentary to Article 3 UNCRC*, 96, in TOBIN, J. (n 54); CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 10.

¹⁶⁹ EEKELAAR, J. and TOBIN, J. (n 168), 97. Proportionality implies a connection between the measure and the legal aim as well as the fact that there are no alternatives to reach this aim; CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 20.

¹⁷⁰ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 71-72. For example a tension with Article 12 is when other people are better placed to decide what is best for the child and it conflicts with the child's opinion (see *infra*).

¹⁷¹ CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 11, 18-19; CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 6; EEKELAAR, J. and TOBIN, J. (n 168), 85, 90; LANSDOWN, G. in Council of Europe, *The best interests of the child – A dialogue between theory and practice*, 2016, 32.

¹⁷² CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 1-2.

¹⁷³ HODGKIN, R. and NEWELL, P. (n 37), 39. CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 5.

¹⁷⁴ CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 20; CRC Committee, *General comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 2013, 6.

sector are similar and are formulated in light of States' responsibilities: "[States] should require such businesses to maintain high standards of transparency and accountability and encourage them to take measures to innovate in the best interests of the child".¹⁷⁵ The CRC Committee has also formulated this more generally:

*"[States have] [t]he obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the **private sector**, including those providing services, or any other private entity or institution making decisions that concern or impact on a child."*¹⁷⁶

These provisions have several implications in the context of video games. States are to take into account the child's best interests and give them primary consideration, and businesses have to consider the child's best interests in for example their CRIAs.¹⁷⁷ This implies that in the process of adopting new measures concerning video games or gambling – whether it concerns legislation, codes of conduct, administrative measures or other regulatory instruments – the dangers related to gambling and the vulnerable position of children will have to be given the required attention through CRIAs or otherwise. The balancing exercise inherent to a best interests approach specifically means balancing the child's interests with the commercial interests of the video gaming industry actors and those of adult video game players.¹⁷⁸ Here, the interaction with the child's evolving capacities is important, due to the differences in maturity and resulting attitudes and perceptions by children of different ages regarding gambling(-like) elements in video games.¹⁷⁹

1.4 The right of the child to express his or her views

CONCEPT AND INTERACTION WITH THE OTHER PRINCIPLES. The fourth guiding principle of the children's rights framework is found in Article 12 UNCRC, which states that children that are capable of forming their own views should be able to express these views freely in matters affecting them. According to the CRC Committee, "*the views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.*"¹⁸⁰ This is also referred to as 'participation', which means "*an information-sharing and dialogue between children and adults in which children can learn how their views and those of adults are taken into account and shape the outcome of ongoing processes*".¹⁸¹ Basically, States have the obligation to listen to the views of the child in all matters affecting them, and give them due weight according to the child's age and maturity.¹⁸² Giving children the opportunity to express their views can

¹⁷⁵ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 7.

¹⁷⁶ CRC Committee, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 5.

¹⁷⁷ CRC Committee, *General comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 2013, 21; note that the obligations of businesses are not always directly included in the UNCRC, but rather through States' implementation measures regarding their own obligations under the UNCRC.

¹⁷⁸ See e.g. Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (NL), *Code voor kinderrechten*, 2021, 11.

¹⁷⁹ Where age-limits are imposed within the digital environment, variations in individual children's understanding of certain digital practices can be overlooked adopting the same age-threshold for all children for certain actions. Examples are the age of consent in the GDPR for personal data processing or the inclusion of a minimum age requirement in the terms & conditions of a company when no adequate age-verification mechanism is present. See LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 6 or Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (NL), *Code voor kinderrechten*, 2021, 15.

¹⁸⁰ CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 7, 11.

¹⁸¹ *Ibid.*, 5.

¹⁸² *Ibid.*, 8. Note that 'in all matters affecting them' includes public and private spheres, as well as matters directly affecting them (e.g. family) as well as indirectly affecting them (e.g. transport, healthcare or media).

be helpful for their development, autonomy, confidence, communication skills, critical thinking and decision-making.¹⁸³ Further, this demonstrates the interaction of Article 12 with the other principles and their roles in the holistic approach as mentioned above.¹⁸⁴ For example, the CRC Committee states that there can be no correct application of Article 3 (best interests) if the components of Article 12 are not respected, as the former establishes the objective and the latter provides the methodology.¹⁸⁵ However, it is not sufficient that legislation and other policy measures establish this right to be heard; children must be actively made aware of this right as well.¹⁸⁶ Thus, Article 12 is seen as the ‘lynchpin’ of the UNCRC because it demands a shift in the perception and treatment of children, towards being active participants in decision-making processes.¹⁸⁷ Importantly, the child has to be ‘free’ in giving his or her opinion. This implies that there can be no influence or pressure exerted on the child, or no fear of rebuke or reprisal, and that the child is given a safe space with all relevant information needed to express its views.¹⁸⁸ It also implies that the child is given the choice to express its views, but is not obliged to do so.¹⁸⁹ Furthermore, in accordance with the principle of evolving capacities, it means that the child’s view is not necessarily determinative or conclusive.¹⁹⁰ The child’s view must be given ‘due weight’ depending on the child’s age and maturity, and this weight will vary in different situations.¹⁹¹ Finally, Article 12(2) UNCRC contains the obligation to provide the opportunity for children to be heard in judicial and administrative proceedings, which requires effective remedies to enable children in a child-friendly manner to redress violations of their rights in all matters affecting them.¹⁹²

ARTICLE 12 IN THE DIGITAL ENVIRONMENT. The digital environment has afforded new ways for children to express their views and can help children’s participation at the different levels.¹⁹³ However, in practice this remains difficult. For example, in the EU Strategy on the Rights of the Child it is noted that “*too many children do not feel considered enough in decision-making*”.¹⁹⁴ Similarly, the Better Internet for Kids Policy Map of 2018 concluded that whilst most countries consulted children, only a third indicated that children were given the opportunity to be actively involved in policy design.¹⁹⁵ Related specifically to the topic of video gaming, a UNICEF report has stated that “*children are rarely consulted in studies on gaming-related harms as other than research subjects, nor are they consulted on policies to restrict gaming activities.*”¹⁹⁶ Children are most often represented in policymaking by e.g. Non-Government Organisations (‘NGOs’) or Children’s Ombudsmen, however they are “*not generally involved in an*

¹⁸³ CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 11.

¹⁸⁴ It is stated, for example, that children’s levels of understanding are not uniformly linked to their biological age, and that maturity is difficult to define.

¹⁸⁵ CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 18. Another example is what has been written above about the gradual reduction of parental guidance and direction as the child matures and is able to express its views better.

¹⁸⁶ HODGKIN, R. and NEWELL, P. (n 37), 152.

¹⁸⁷ LUNDY, L., PARKES, A. and TOBIN, J., *Commentary to Article 12: The right to be heard*, in TOBIN, J. (n 54), 398.

¹⁸⁸ *Ibid.*, 407; VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 146-147.

¹⁸⁹ CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 10.

¹⁹⁰ LUNDY, L., PARKES, A. and TOBIN, J. (n 187), 407, 411.

¹⁹¹ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 150-151; CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 11. The CRC Committee mentions ‘serious consideration’ of the child’s view, and how ‘serious’ depends on the age and maturity of the child and the circumstances of the case. In other words, the significance of their view must reflect their level of understanding the issues of the case.

¹⁹² CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 11-12; HODGKIN, R. and NEWELL, P. (n 37), 156-158.

¹⁹³ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 3.

¹⁹⁴ EU Strategy on the Rights of the Child (n 50), 4. Note that this is not only in the digital environment, and that the EU’s response of creating (in the future) an EU Children’s Participation Platform aims to resolve these complaints.

¹⁹⁵ O’NEILL, B. and DINH, T., *The Better Internet for Kids Policy Map*, 2018, 10.

¹⁹⁶ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 10.

*active and meaningful way in the actual policymaking process.*¹⁹⁷ Indeed, young children’s views are frequently overlooked due to their perception as undeveloped and lacking the capacities to communicate or make choices.¹⁹⁸ In the video game environment, it could be productive to take into account the views of (younger) children, as they are the ones playing the video games. Similarly, adolescents form an important target group for gambling(-like) practices in video games (e.g. due to age-ratings).¹⁹⁹ It is therefore important to take into consideration the right to be heard of all children, which was confirmed by the CRC Committee:

*“When developing legislation, policies, programmes, services and training on children’s rights in relation to the digital environment, States parties should involve all children, listen to their needs and give due weight to their views.”*²⁰⁰

This policy objective also includes actively engaging children in the design and implementation of initiatives aimed at *“fostering safe use of digital media and ICT, including online safety”*, which is again especially relevant regarding gambling(-like) elements in online video games.²⁰¹ It has been recognised that allowing children to express their views on matters in the digital environment is valuable²⁰², which can therefore also be applied to the video game environment.

2 Children’s rights applicable to gambling(-like) elements in video games

OVERVIEW. In addition to the four fundamental principles of the UNCRC, different children’s rights are relevant in the context of gambling(-like) elements in video games, implying responsibilities for different actors (States, parents, the business sector). These rights are discussed below, taking into account the holistic approach of the four general principles. Together, they serve as the foundation for analysis and evaluation of the gambling(-like) elements in video games in future reports.

2.1 Freedom of expression and the right to receive information (Article 13 UNCRC, Article 10 ECHR, Article 11 CFEU)

ARTICLE 13 IN THE DIGITAL AGE. The first right that is relevant for gambling(-like) elements in video games is the right to freedom of expression and the right to receive information, a fundamental right in any democratic society and classified as one of the basic conditions for its progress and for the development of every human.²⁰³ It has been included in legal frameworks at the international, European and national levels.²⁰⁴ Article 13 UNCRC phrases this right as:

¹⁹⁷ LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 8.

¹⁹⁸ CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 7.

¹⁹⁹ In that sense it is noted that participation is important for adolescents to negotiate and advocate for the realisation of their rights, and to hold States accountable. CRC Committee, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 8.

²⁰⁰ *Id.*

²⁰¹ Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion – Digital media and children’s rights*, 2014, 14 and 21.

²⁰² See for example the report by 5Rights Foundation, *Our Rights in a Digital World*, 2021, which discusses children’s opinions on their digital rights and provided the foundations for General Comment 25 by the CRC Committee.

²⁰³ ECtHR, *Perna v. Italy*, App. No. 48898/99, 2003, para. 39.

²⁰⁴ At the international level: Article 19 UDHR, Article 19 ICCPR; at the European level: Article 10 ECHR, Article 11 CFEU; at the national level: e.g. Articles 19, 25 and 150 of the Belgian Constitution.

“The child shall have the right to freedom of expression. The right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

The right to freedom of expression and to receive information has become a significant aspect of the digital environment. Indeed, the internet has become one of the principle ways through which individuals exercise their right to freedom of expression and information.²⁰⁵ Children express themselves and receive information through social media accounts, groups and pages, blogs, video-sharing platforms, and online counselling.²⁰⁶ Therefore, as stated by former UN Special Rapporteur LA RUE, “States have a positive obligation to promote or facilitate the right to freedom of expression and the means necessary to exercise this right, which includes the internet.”²⁰⁷ Moreover, States should guarantee that children can hold and express views and opinions on matters of importance to them through the media of their choice and irrespective of how States or other stakeholders receive these views.²⁰⁸ In the context of video games, participation in e.g. multiplayer video games may facilitate children’s enjoyment of their right to freedom of expression, enabling children to explore creative and communicative opportunities, form cross-cultural bonds with other gamers, and learn through educational video gaming environments.²⁰⁹ However, the right to freedom of expression and information is not an absolute right and can be restricted. The CRC Committee states that restrictions should be lawful, necessary and proportionate.²¹⁰ Under Article 10 ECHR, restrictions should (1) be prescribed by law, (2) have a legitimate aim and (3) be necessary in a democratic society.²¹¹ Restrictions are possible, for instance, to protect children against certain online content that can be harmful for them because of their age (for example gambling) (see *infra* at 2.4).²¹² In any event, States have to ensure that children are informed of these restrictions in an appropriate manner and have to provide them with guidance on remedies against the restrictions.²¹³

RIGHT TO RECEIVE INFORMATION IS KEY. In the digital environment, the right to receive information has become particularly important for children. In this regard, there is a link with Article 17 UNCRC on the right to have a diversity of mass-media sources to choose from, which is discussed later. As argued by TOBIN and PARKES, children require relevant, appropriate and timely information which recognises the differences in understanding among them and is tailored to their age level and evolving capacities.²¹⁴ The information should be of high quality, easily accessible and provided to children in a manner understandable for them according to their age and maturity.²¹⁵ The right to receive information can be seen as a prerequisite for the realisation of the child’s right to express views in Article 12 UNCRC.²¹⁶

²⁰⁵ ECtHR, *Yildirim v. Turkey*, App. No 3111/10, 2012, para. 54.

²⁰⁶ Council of Europe, *Handbook for policy makers on the rights of the child in the digital environment*, 2020, 40.

²⁰⁷ LA RUE, F. (UNGA), *Report on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the internet*, A/66/290, 2011, 18.

²⁰⁸ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 14; this is part of the negative obligation of States to refrain from interference in the expression those views.

²⁰⁹ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 10.

²¹⁰ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 10.

²¹¹ See also Council of Europe (n 61), 40; prescribed by law means that the law has to be accessible, precise and sufficiently clear; necessary means proportional to the aim and no reasonable alternatives.

²¹² HANDSLEY, E. and TOBIN, J., *Commentary to Article 17 UNCRC*, in TOBIN, J. (n 54).

²¹³ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 15.

²¹⁴ PARKES, A. and TOBIN, J., *Commentary to Article 13 UNCRC*, in TOBIN, J. (n 54), 454; CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 9.

²¹⁵ VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 162; Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 14-15 and 78.

²¹⁶ CRC Committee, *General comment No. 12 on the Right of the child to be heard*, 2009, 19.

In this regard, according to the Council of Europe, it is up to the States not only to ensure the access to information, but also to make all media outlets aware of their role as an important source of information for children in the digital environment and to remind them of the European and international standards in existence.²¹⁷

BALANCING PROTECTION AND PARTICIPATION IN THE VIDEO GAME ENVIRONMENT. According to the CRC Committee, media must be regulated appropriately to protect children from harmful information, while recognising children's right to information and freedom of expression.²¹⁸ The information available to children can lack diversity, be overly commercialised²¹⁹ or can be provided in a child-unfriendly manner due to algorithm bias or personalisation of children's profiles.²²⁰ Furthermore, the video game environment can include information encouraging children to engage in unlawful or harmful activities²²¹, including gambling behaviour. Therefore, restrictions can be put in place to regulate the access of children to certain types of online content, including in video games. These restrictions can be materialised in e.g. filtering systems, age-limits and age-verification systems, or content labelling based on age-appropriateness or trustworthiness.²²² However, these restrictions can become unduly restrictive when children's capacities to navigate the digital world develop.²²³ Laws and policies restricting children's access to certain types of media content should therefore be justified and evidence-based, in order to avoid that they unnecessarily impact the exercise of the child's right to freedom of expression and information.²²⁴ A responsibility to respect also exists for (video game) companies, who have to ensure that technologies and policies developed to protect children from online harm do not have the unintended consequence of suppressing their participation rights or preventing them from accessing information important to their development.²²⁵ This concept of (access to) age-appropriate information is relevant in the context of gambling(-like) elements in video games, as it takes into account the differences in capacities of children of different age groups related to potentially harmful gambling-related content in video games (see *supra* on evolving capacities and the balancing exercise between protection and empowerment).²²⁶

2.2 Freedom of thought (Article 14 UNCRC)

AUTONOMOUS DEVELOPMENT OF THOUGHTS. The right to freedom of thought is part of the broader right enshrined in Article 14 UNCRC on the freedom of thought, conscience and religion. The concept of freedom of thought is linked to the child's right to express his or her views (Article 12), the right to education (Articles 28 and 29), and the right to privacy (Article 16); its implementation is related to the

²¹⁷ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 28.

²¹⁸ CRC Committee, *General comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 2013, 16; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 7; see also LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 9.

²¹⁹ VERDOODT, V., *Children's Rights and Advertising Literacy in the Digital Era – Towards an Empowering Regulatory Framework for Commercial Communication*, 2018, 11.

²²⁰ Council of Europe (n 61), 41.

²²¹ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 9.

²²² *Ibid.*, 10; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 15 and 28. For example, app stores are recommended to provide content labels and clearly inform about available content and applicable age-ratings/restrictions, and restrict access to content (e.g. by not letting games be purchased or installed) through parental control tools.

²²³ UNICEF, *Industry Toolkit: Children's Online Privacy & Freedom of Expression*, 2018, 9.

²²⁴ Council of Europe (n 61), 32.

²²⁵ UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 13.

²²⁶ For example in 2008, the CoE and ISFE issued *Human rights guidelines for online games providers*, including the guidelines to help inform gamers and their parents by using easily recognisable labels for sensitive content (including gambling) which are clearly indicated and visible.

right to receive information of all kinds (Articles 13 and 17).²²⁷ While in practice the majority of the debate revolves around the freedom of religion, for the purposes of this report the discussion will be limited to the freedom of thought. More specifically, the focus lies on the consequences of certain commercial practices present in video games which may impede the child's capacity to autonomously develop thoughts and therefore the child's freedom of thought.

First, State obligations include the adoption of measures to prevent State and non-State actors from unlawful interference with the child's right to freedom of thought, as well as measures to actively promote this right.²²⁸ Second, freedom of thought means that every child has a right to autonomously develop thoughts and a conscience free from impermissible influence.²²⁹ Children, especially when they are younger, are influenced by their parents or other members of their family and community, which is recognised in for example Articles 5 and 14(2) UNCRC. However, in the digital environment, it has been argued that children's thoughts can also be influenced by commercial practices performed by business entities (such as social media and video game companies). These commercial practices include encouraging certain behaviour or manipulating behaviours and emotions, or shaping children's preferences and interests²³⁰, by predetermining options and choices available for children.²³¹ In the video game environment, this behavioural targeting or manipulation can, for instance, lead to children being subconsciously encouraged to make in-game purchases ('nudging') or make other decisions that may affect them.²³² The OECD has recognised the potential manipulative character of these commercial practices in its 2018 Toolkit for Protecting Digital Consumers²³³ and the CRC Committee has confirmed their risky character as well:

*"The Committee encourages States parties to introduce or update data protection regulation and design standards that identify, define and prohibit practices that manipulate or interfere with children's right to freedom of thought and belief in the digital environment, for example by emotional analytics or inference. Automated systems may be used to make inferences about a child's inner state. They should ensure that automated systems or information filtering systems are not used to affect or influence children's behaviour or emotions or to limit their opportunities or development."*²³⁴

²²⁷ HODGKIN, R. and NEWELL, P. (n 37), 186.

²²⁸ DONE, S. and TOBIN, J., *Commentary to Article 14: The Right to Freedom of Thought, Conscience and Religion*, in TOBIN, J. (n 54), 479-480.

²²⁹ *Ibid.*, 484, referring to NOWAK, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel Publishers, 2005), 406-36.

²³⁰ VERDOODT, V. and LIEVENS, E., *Targeting Children with Personalised Advertising: How to Reconcile the Best Interests of Children and Advertisers*, in VERMEULEN, G. and LIEVENS, E., *Privacy and Data Protection under Pressure: Transatlantic tensions, EU surveillance, and big data* (Maklu, 2017).

²³¹ CANNATA, J. (n 64), *Report of the Special Rapporteur on Artificial Intelligence and privacy, and children's privacy*, A/HRC/46/37, 2021, 14.

²³² UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 29. These commercial practices are further discussed *infra*. See *supra* (n 159) the excerpt of KING under the right to non-discrimination; see also in general LUPIANEZ-VILLANUEVA, F. et al (European Commission), *Study on the impact of marketing through social media, online games and mobile applications on children's behaviour*, 2016.

²³³ OECD, *Toolkit for Protecting Digital Consumers*, 2018, 77.

²³⁴ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 11.

2.3 Right to privacy (Article 16 UNCRC, Article 8 ECHR, Articles 7 and 8 CFEU)

PRELIMINARY NOTES. The right to privacy is a broad right, which is significantly challenged in the digital environment. As this report contains a chapter dedicated to the legal framework on data protection, the discussion here will be limited to the right to privacy as a part of the general children’s rights framework. More specifically, this part tackles the right to privacy under different legal instruments in the digital environment, and in the context of gambling(-like) elements in video games.

THE RIGHT TO PRIVACY UNDER DIFFERENT LEGAL INSTRUMENTS. Article 16 UNCRC protects children from arbitrary or unlawful interferences with their privacy, family, home, correspondence and attacks on their honour and reputation. The right to privacy has gained increasing attention in recent years – especially in the digital environment – and is considered an important right in any democratic society.²³⁵ In addition to the UNCRC, the right to privacy is enshrined in Article 8 ECHR, on which the ECtHR has stated that the obligations of the State “*involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.*”²³⁶ Interferences with the right to privacy are possible, but cannot be arbitrary or unlawful. Arbitrary in this regard means that the interference is not reasonable and proportionate.²³⁷ Further, measures which may restrict children’s right to privacy must be carried out in accordance with the law, pursue a legitimate aim, be necessary in a democratic society and be proportionate to the legitimate aim pursued.²³⁸ Finally, the CFEU not only includes the right to private and family life (Article 7), but also establishes the right to data protection in Article 8, thereby elevating its status to that of a fundamental right.

PRIVACY IN THE DIGITAL ENVIRONMENT. Although the rights to privacy and data protection are separate rights, they are inextricably linked in the digital environment.²³⁹ Digital practices such as automated data processing, profiling, behavioural targeting, mandatory identity verification, information filtering and mass surveillance are becoming routine and could lead to arbitrary or unlawful interference with children’s rights to privacy and data protection with adverse consequences possibly affecting them throughout different stages of their lives.²⁴⁰ Therefore, according to the CRC Committee, “*States should take legislative, administrative and other measures to ensure that children’s privacy is respected and protected by all organizations and in all environments that process their data.*”²⁴¹ One materialisation of this recommendation is that States should adopt legislation to ensure that the child knows about information stored about him/her and why it is stored, has access to this information, and is able to

²³⁵ The right to privacy is also included in Articles 7 and 8 CFEU, Article 12 UDHR, Article 17 ICCPR and Article 8 ECHR, although not all of these instruments acknowledge the right to ‘privacy’ as such and are sometimes limited to ‘private life’, such as the ECHR. For an in-depth analysis of children’s right to privacy and right to data protection, see MILKAITE, I. and LIEVENS, E., *Children’s Rights to Privacy and Data Protection Around the World: Challenges in the Digital Realm*, in 10 EJLT, 2019.

²³⁶ ECtHR, *X and Y v. the Netherlands*, App. No. 8979/80, 1985, para. 23.

²³⁷ The assessment of arbitrariness of the measure is follows the conditions of (1) a legitimate aim, (2) necessity of the measure to achieve this aim, and (3) no alternatives to achieve the aim; see FIELD, S. and TOBIN, J., *Commentary to Article 16 UNCRC*, in TOBIN, J. (n 54), 556-558.

²³⁸ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 62), 17.

²³⁹ European Commission, *Report COM(2021) 819 from the Commission on Protecting Fundamental Rights in the Digital Age – Annual Report 2021 on the Application of the CFEU*, 28; see also MILKAITE, I. and LIEVENS, E. (n 235).

²⁴⁰ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 11-12; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 7.

²⁴¹ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 12. Examples are legislation which includes safeguards, transparency, independent oversight, access to remedies and privacy-by-design for products affecting children. See also LIEVENS, E., LIVINGSTONE, S., MCLAUGHLIN, S., ONEILL, B and VERDOODT, V. (n 136), 10.

challenge its contents.²⁴² This general provision is further specified for all relevant actors through recommendations by *inter alia* international institutions such as UNICEF or the CoE. Even though these documents are not legally binding as such, they oftentimes serve as an authoritative interpretation for States. First, States should ensure that easily accessible, meaningful, child-friendly and age-appropriate information about privacy tools, settings and remedies is made available to children.²⁴³ Second, States as well as the private sector should take into account a privacy-by-design approach as well as age-appropriate child safety by design.²⁴⁴ One aspect of this approach is that information about guidelines, privacy policies, and terms and conditions has to be easily accessible and visible, and that these topics are highlighted and worded in an understandable manner for both children and parents.²⁴⁵ Third, parental control tools need to be proportionate to the child's evolving capacities and views, because children desire and require privacy as they mature.²⁴⁶ Finally, States should have a legal framework on practices such as profiling, behavioural targeting and age-verification. Such frameworks are further discussed in chapter 6.

PRIVACY AND DATA PROTECTION IN THE VIDEO GAMING CONTEXT. In the video game environment, the rights to privacy and data protection are linked and are influenced by the different practices stated in the previous paragraph. One example is that children create avatars or pseudonyms that protect their identity and can thus be important in protecting children's privacy.²⁴⁷ Another example is linked to profiling, behavioural targeting or personalisation practices, which illustrate the importance of data protection as an aspect of children's privacy. It should be noted that data-driven business models that allow for the ability to collect gameplay data are important for video game companies. They allow them to for example make video games that are free-to-play, and to provide access to digital culture for all players, including children, regardless of their socio-economic background.²⁴⁸ Video game companies collect data to improve the game experience, for example to find bottlenecks within a game, to match players or to detect software errors and fraudulent behaviour by players. By collectively analysing players' data, a video game company can identify if there is a large problem being experienced by the majority of players and learn how it needs to be fixed.²⁴⁹ The EGDF and ISFE argue that the EU video gaming industry has always treated personal data in a responsible manner, for example by "*usually storing and collecting gameplay data in a way that does not allow companies to identify the player directly, or by implementing technical measures to prevent easy linking between the gameplay dataset and the players' account information*".²⁵⁰ One positive example of profiling in the video gaming context is that it can be used to serve other purposes than advertising and marketing, including fixing areas of a game that prove problematic to progression, identifying fraud, providing hints to the players, or personalising gameplay settings.²⁵¹ Such uses may have a positive impact on

²⁴² HODGKIN, R. and NEWELL, P. (n 37); 209; VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 188-190.

²⁴³ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 17.

²⁴⁴ Council of Europe (n 61), 49-50; OECD, *Recommendation of the Council on Children in the Digital Environment*, 2021, 10.

²⁴⁵ See also Chapter 6. UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 31; Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion – Digital media and children's rights*, 2014, 16.

²⁴⁶ CANNATA, J. (n 64), 12.

²⁴⁷ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 13.

²⁴⁸ EGDF & ISFE, *Position paper – consultation on the rights of the child*, 2020, 9.

²⁴⁹ *Id.*

²⁵⁰ *Id.*; however, note the use of the word 'usually'.

²⁵¹ Whether this is true in practice however, is up for debate. See ISFE & EGDF, *Fundamentals for a Child-Oriented Approach to Data Processing*, 2021, 8.

other rights of the child, such as the right to development or the right to be protected against economic exploitation.

Even so, there are significant challenges around these new monetisation practices that may infringe on children's right to privacy or sell their personal information.²⁵² Digital marketing strategies within the video gaming environment can include profiling, targeted advertising²⁵³, or behavioural targeting. As stated in a UNICEF report of 2019, "*digital marketing is not only about observing users' behaviour for the purpose of serving appropriate advertising, but about directly influencing users' behaviour – frequently through methods that are hard to identify as marketing.*"²⁵⁴ Similarly, according to VERDOODT and LIEVENS, "*profiling and behavioural targeting have the capacity to not only compartmentalise children, but also to shape their preferences and interests accordingly, ultimately affecting their autonomy and development*".²⁵⁵ This can limit children's self-development, as behavioural predictions and nudging techniques can predetermine options and choices.²⁵⁶ As a consequence, children could be targeted whilst performing activities in the video game environment, for example by being encouraged to make in-game purchases²⁵⁷, or by seeing advertisements related to in-game features to the same or a similar end.²⁵⁸ This can be dangerous because, as stated by UN Special Rapporteur CANNATAI:

*"Younger children are particularly vulnerable to targeted marketing as they do not differentiate between advertising and content or between fiction and reality, or understand the persuasive nature of advertising. Technology incorporating behavioural techniques (persuasive design/dark practices) maximises engagement, triggers impulsive behaviours, influences decision-making, sparks fears of exclusion and overrides privacy concerns."*²⁵⁹

Furthermore, these practices show a link between the right to privacy and the right to development as discussed *supra*. Due to the potentially far-reaching consequences of these practices for children, a lot of regulatory instruments highlight the dangers of profiling children and contain (provisions recommending) strict regulation for practices which consist of applying a profile to a child in order to take decisions concerning the child or to analyse and predict his or her personal preferences, behaviour and attitudes.²⁶⁰ It would be useful to discuss whether video games that contain in-game purchases should be allowed to be marketed directly to children, or whether monetisation methods related to

²⁵² UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 10.

²⁵³ Gaming advertising is the subject of a future report within the project. See OECD, *Protecting children online – an overview of recent developments in legal frameworks and policies*, 2020, 30-31 for advertising practices in the Google App Store using manipulative or disruptive practices.

²⁵⁴ *Ibid.*, 25.

²⁵⁵ VERDOODT, V. and LIEVENS, E. (n 230).

²⁵⁶ CANNATAI, J. (n 64), 14.

²⁵⁷ This is linked to the aforementioned protection of children against overspending on in-game purchases, due to their limited understanding of real monetary values vs. in-game currency values. See UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 21.

²⁵⁸ For a general overview of the impact of marketing on children's behaviour, see LUPIANEZ-VILLANUEVA, F. et al (European Commission) (n 232).

²⁵⁹ *Id.*

²⁶⁰ One important example, not specifically for children, is Article 22 GDPR, read in conjunction with its nonbinding Recitals 38 and 71, which includes the right not to be subjected decisions solely based on automated processing, including profiling; Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 17 provides a recommendation to prohibit profiling of children by law; Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (NL), *Code voor Kinderrechten*, 2021, 48-50; CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 11-12; UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 7.

gambling(-like) elements should be allowed to be marketed at an underage audience.²⁶¹ This discussion is part of the next report within the project.

Finally, it is useful to look at the mechanisms aimed at tackling these practices to protect children's rights to privacy and data protection in the video game environment. Such protection mechanisms include the aforementioned tools concerning parental control, privacy-by-design, age-appropriate information²⁶², or child privacy impact assessments.²⁶³ Aside from these tools, there is one mechanism receiving increasing attention: age-verification.²⁶⁴ Age-verification methods are meant to prevent children from accessing age-sensitive content, sites, products or interactive services and can be linked to the concept of age-classifications and the widely-used term of 'age-appropriate content'.²⁶⁵ For example in the UNICEF report on child rights and online gaming, the following recommendation is included:

*"Clearly display age restrictions that apply to your service. Design new age-verification methods that do not infringe children's rights to privacy or collect unnecessary personal data, or consider solutions based on parental consent."*²⁶⁶

Age-verification can be performed through several methods (although at this time none of them are rock-solid²⁶⁷), such as information provided by the user himself/herself, technical measures to discourage false information about age, verification through third parties, or verification through email or messaging links.²⁶⁸ In practice, it is often hard for video game developers/publishers to establish exactly which audience plays their game: adults, children, or both. Uncertainty about the age of the users could push service providers to exclude their underaged audiences by installing age-verification mechanisms, in order to avoid having to adopt additional protective measures against content provided in their services.²⁶⁹ While of course beneficial in theory, this may also result in child-users circumventing these age-verification measures in practice, thereby allowing children to access services with content not intended for their age.²⁷⁰ In any event, as stated by UNICEF, it is recommended for the video game industry that their default privacy settings take into account that children might access

²⁶¹ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 26.

²⁶² See e.g. ICO, *Age-appropriate Design Code*, 2020 for practices to ensure age-appropriate design and information.

²⁶³ For the responsibility of the business sector to perform child right impact assessments, see CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 7 and CRC Committee, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, 2016, 21.; For child right impact assessments in general, see e.g. Council of Europe (n 61), 20-22.

²⁶⁴ Note that age-verification is equally important in non-gambling/gaming contexts, such as access to social media, access to information and the accompanying protection against sexual or terroristic content. The age-verification mechanism will be handled in future reports of the project. For more information see e.g. the euCONSENT project < <https://euconsent.eu/>>.

²⁶⁵ See e.g. UNICEF, *Guidelines for Industry on Child Online Protection*, 2014, 27; Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 20;

²⁶⁶ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 31.

²⁶⁷ See e.g. the euCONSENT project, publications available at <<https://euconsent.eu/project-deliverables/>>.

²⁶⁸ ICO, *Age-appropriate Design Code*, 2020, 33-34. Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (NL), *Code voor Kinderrechten*, 2021, 22-23.

²⁶⁹ PASQUALE, L. et al., *Digital Age of Consent and Age-verification: Can they protect children?*, in *IEEE Software (IEEE Computer Society)*, 2020; ISFE & EGDF, *Fundamentals for a Child-Oriented Approach to Data Processing*, 2021, 4; see also UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 31, where it is stated that game developers should consider how features might be restricted if required for underage players, specifically monetisation features such as lootboxes, or turning off in-game purchases and setting spending limits.

²⁷⁰ UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 16.

the provided services/games.²⁷¹ Additionally, the data minimisation principle should be respected, which implies that as few data as possible is collected and processed to verify a person's age.²⁷²

2.4 Right to have a diversity of mass media sources to choose from (Article 17 UNCRC)

IMPORTANCE IN THE DIGITAL AGE. Another important right in the context of gambling(-like) elements in video games is enshrined in Article 17 UNCRC on the right to access to a diversity of media and information. Article 17 requires States to provide children with access to:

"[I]nformation and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."

It is undeniable that this right has become more important with the rise of the digital age. The reality is that many children spend a significant amount of time accessing and receiving information and material from a variety of sources, whether it be watching television, surfing the internet, or using social media.²⁷³ The definition of 'mass media' has become broader than the traditional media (e.g. broadcasters, or traditional sources of information such as museums or libraries) and now also includes video games, the internet, social media, as well as advertising and marketing industries.²⁷⁴ It is important to note that Article 17 UNCRC is linked to the right to receive information as enshrined in Article 13. However, as noted by HANDSLEY and TOBIN, Article 17 is not concerned with receiving information as such, but rather with the *means* by which a child can access information and material (emphasis added).²⁷⁵ Another connection exists between Article 17 and Article 29 UNCRC on the aims of education, as it is included in Article 17 that "*States shall encourage mass media to disseminate information (...) in the spirit of Article 29.*"²⁷⁶

The 'diversity' in mass-media sources implies that States have the duty to ensure that children and adolescents have access to "*a variety of producers and disseminators of movies, television and radio programs, books, magazines, the Internet and other mass media communications*".²⁷⁷ The ECtHR has recognised that the internet, in light of its accessibility, plays an important role in enhancing the public's access to news and in facilitating the dissemination of information in general.²⁷⁸ Moreover, research has shown that children themselves consider access to digital media to be a fundamental right.²⁷⁹ Finally, according to TOBIN and HANDSLEY, restrictions on the rights of Article 17 UNCRC are possible if they would protect other children's rights, protect others' rights, or protect national security objectives.²⁸⁰

²⁷¹ *Id.*

²⁷² See also Chapter 6.

²⁷³ HANDSLEY, E. and TOBIN, J. (n 212), 601; see also Ofcom, *Children and Parents: Media Use and Attitudes Report, 2014*; Common Sense, *Zero to Eight: Children's Media Use in America in 2013*, 2013.

²⁷⁴ HANDSLEY, E. and TOBIN, J. (n 212), 604-605. Note that Article 17 UNCRC mentions the 'important function' of mass media, but does not provide further clarification on this concept.

²⁷⁵ HANDSLEY, E. and TOBIN, J. (n 212), 611. E.g. in the video game environment, information is conveyed to children through online (video gaming) platforms or through communication by the video game company.

²⁷⁶ Which implies that an interpretation in light of the child's development is to be prioritised.

²⁷⁷ SACINO, S., *A Commentary on the United Nations Convention on the Rights of the Child, Article 17: Access to a Diversity of Mass Media Sources* (Brill, 2011), 5.

²⁷⁸ ECtHR, *MTE v. Hungary*, App. No. 22947/13, 2016, para. 56.

²⁷⁹ THIRD, A. et al. (n 91), 31.

²⁸⁰ HANDSLEY, E. and TOBIN, J. (n 212), 613. They remain subject to the conditions of prescribed by law, necessary and proportional.

HARMFUL CONTENT IN A COMMERCIALISED VIDEO GAME ENVIRONMENT. According to Article 17(e), States shall encourage the development of appropriate guidelines to protect children from material and information harmful to their well-being. This also applies in the video gaming context, where children are said to require protection against harmful influences of commercial products such as computer games and internet software, or harmful information and marketing practices aimed at children as consumers.²⁸¹ Although formulated in a general manner, this protection could also be applied to gambling(-like) elements in video games, to which a variety of risks is linked. For instance, children can find themselves agreeing to contracts they do not understand because the contracts (or the design of the website/content) are age-inappropriate, commercially exploitative or unduly persuasive (contract risks).²⁸² Aside from gambling as such, children may not understand disclosures about microtransactions (in-game purchases) or lootboxes, or more generally, may not understand the difference between real currency and virtual currency (consumer risks).²⁸³ In this regard, the precautionary principle is relevant and can be linked to what was written in chapter 1 about the potential dangers linked to gambling(-like) elements in video games and related practices (e.g. microtransactions), which have been the subject of many scientific research reports or policy documents, but where the extent of actual harm is still unclear.²⁸⁴ Based on the precautionary principle, which “*compels society to act cautiously if there are certain – not necessarily absolute – scientific indications of a potential danger and not acting upon these indications could inflict harm*”²⁸⁵, regulation of gambling(-like) elements in video games might be called for.

The guidelines that Article 17 (e) UNCRC refers to can also relate to *inter alia* age-ratings and age-limits, even though their verification mechanisms are not yet fool-proof (*supra*). Labels could function as warnings about commercial features in video games such as the encouragement of making in-game purchases related to gambling(-like) practices, thereby considering the appropriateness of different types of commercial content to specific age groups.²⁸⁶ Based on Article 18 UNCRC, parents also need to provide guidance to their children when it comes to harmful content, including when this content is included in video games.²⁸⁷

2.5 Right to health (Article 24 UNCRC)

RIGHT TO MENTAL HEALTH. The right to health as enshrined in Article 24 UNCRC covers a wide array of important health-related subjects that are not specifically relevant for this report, such as child mortality, malnutrition or environmental sanitation. Here, we focus on the right to mental health due to the potential impact of engaging in gambling(-like) activities on children’s mental and psychosocial

²⁸¹ HANDSLEY, E. and TOBIN, J. (n 212), 639, referring to the UNCRC Committees Concluding Observations for Greece (CRC/C/GRC/CO/2-2), para. 38 and for Romania (CRC/C/ROM/CO/4), para 42.

²⁸² Council of Europe (n 61), 2020, 57. See also UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 32, where is stated (for game distributors) that children should be clearly informed about anything of commercial nature in the game and that these components have to be properly identified.

²⁸³ OECD, *Children in the digital environment – revised typology of risks*, 2021, 12.

²⁸⁴ See for an in-depth analysis of the precautionary principle in light of children’s rights LIEVENS, E., *Growing Up with Digital Technologies: How the Precautionary Principle Might Contribute to Addressing Potential Serious Harm to Children’s Rights*, in 39 *Nordic Journal of Human rights* 128, 2021.

²⁸⁵ *Id.*

²⁸⁶ See also chapter 5; UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 15.

²⁸⁷ HANDSLEY, E. and TOBIN, J. (n 212), 642. This responsibility originates from Article 18 UNCRC. States need to assist parents in this role, as parents are not always optimally capable to take on this responsibility (see *supra*).

wellbeing.²⁸⁸ Surprisingly, contrary to for example Article 12 of the ICESCR, Article 24 UNCRC does not specifically mention mental health, instead formulating the more broad ‘right to the highest attainable standard of health’. However, mental and psychological health can be seen as included under this scope. For example, in its Concluding Observations, the CRC Committee has elaborated on access to mental health services and care²⁸⁹, as well as addressed State obligations in this regard (*infra*). Furthermore, in his commentary to Article 24, TOBIN confirms this inclusion by referring to RUGER, who argues that the right to health is “a multidimensional construct that includes psychosocial as well as physical [and mental] elements”.²⁹⁰ More generally speaking, mental health can be included under the right to health due to the holistic approach that is widely promoted between the right to health and the other rights and principles under the UNCRC. Here, the CRC Committee has stated that it understands the concepts of ‘health and development’ more broadly than strictly limited to the provisions of Articles 6 and 24²⁹¹, as well as that it interprets the child’s right to health in a holistic manner that places it within the broader framework of international human rights obligations.²⁹² As such, it is indispensable for the enjoyment of all the other children’s rights and principles in the Convention, with notable examples being the right to non-discrimination, the right to life, the child’s best interests and evolving capacities of the child, or the right of the child to be heard.²⁹³

CHILDREN’S INCREASED VULNERABILITY. Both young children and adolescents are particularly vulnerable to potential risks to their mental health. In the words of the European Commission, “childhood is a crucial stage in life in determining future physical and mental health.”²⁹⁴ First, the UNCRC has stated that a young child’s health and psychosocial well-being are in many respects interdependent and linked to their development.²⁹⁵ Younger children are less able to comprehend adversities or resist harmful effects on their health, or mental and social development.²⁹⁶ Second, mental health is particularly relevant during the adolescent years. The CRC Committee has stated that:

“The Committee is concerned by the increase in mental ill-health among adolescents, including developmental and behavioural disorders; [...] obsessive behaviour, such as excessive use of and addiction to the Internet and other technologies [...].”²⁹⁷

Indeed, risks and diseases related to mental ill-health are increasingly present, for example depression, self-harm, eating disorders, or even suicidal thoughts.²⁹⁸ These risks are associated with certain (risky or harmful) behaviours, of which engaging in gambling activities can be an example (*infra*).²⁹⁹

²⁸⁸ This impact can be both positive and negative. Regarding the potential positive impact of video games in e.g. the COVID-19 pandemic, see VERDOODT, V., *Esports and platforming of child’s play during COVID-19*, in *Int’l Journal of Children’s Rights*, 2021.

²⁸⁹ UNCRC Committee, *CO Central African Republic*, CRC/C/15/ADD.138, para. 62-63; *CO Norway*, CRC/C/15/Add.126, paras. 40-41; see HODGKIN, R. and NEWELL, P. (n 37), 370-371.

²⁹⁰ TOBIN, J., *Commentary to Article 24: The right to health*, in TOBIN, J. (n 54), 904; RUGER, J., *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, in *18 Yale Journal of Law and Human Rights* 273, 2016, 316.

²⁹¹ CRC Committee, *General Comment No. 4 on adolescent health and development in the context of the CRC*, 2003, 1, 2-4

²⁹² CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 3; CRC Committee, *General Comment No. 5 on general measures of implementation of the CRC*, 2003, 4.

²⁹³ *Ibid.*, 4; TOBIN, J. *Commentary to Article 24* (n 290), 906.

²⁹⁴ European Commission, *EU strategy on the rights of the child* (n 50), 7.

²⁹⁵ CRC Committee, *General Comment No. 7 on implementing child rights in early childhood*, 2006, 4.

²⁹⁶ CRC Committee, *General Comment No. 5 on general measures of implementation of the CRC*, 2003, 4, 16.

²⁹⁷ *Ibid.*, 4; TOBIN, J. *Commentary to Article 24* (n 290), 906.

²⁹⁸ CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 10.

²⁹⁹ CRC Committee, *General Comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 16.

Moreover, it was stated that health services are rarely designed to accommodate the specific health needs of adolescents and they oftentimes experience legal and financial barriers, stigma, or a lack of respect when trying to engage with these services.³⁰⁰ Therefore, to tackle this, the CRC Committee has emphasised that:

“Opportunities for adolescents to build and benefit from social assets [such as participation opportunities, problem-solving skills, safe environments] will enhance their capacities to contribute to the realisation of their rights, including by maintaining good physical and mental health, or avoiding risky behaviour [...].”³⁰¹

RIGHT TO HEALTH IN THE VIDEO GAME CONTEXT. The importance of mental health in the video gaming environment is linked to the potential risks related to gambling as an addictive activity, which may harm the psychological development of children.³⁰² The extent to which gambling(-like) elements in video games entail a risk of addiction is currently still unclear.³⁰³ A linked subject is the controversy around ‘excessive’ screen-time, gameplay time, or use of the internet. It has to be noted that there is no clear-cut answer to the question whether extensive use of the internet is necessarily ‘bad’ for children’s health.³⁰⁴ As noted by the Council of Europe, it depends on the quality of the screen-time (i.e. what activities the child engages in) and the quantity of the screen-time (i.e. how much time spent).³⁰⁵ A similar approach is adopted by the OECD, stating that influential criteria are the duration and type of activities online, as well as other circumstances such as the age and maturity of the child.³⁰⁶ Thus, the child’s well-being can be negatively impacted if the type of activity, the content encountered online, or the commercial practices subjected to, is harmful for the child.³⁰⁷

There is a clear link between the right to (mental) health and other important rights in the digital environment, such as the right to access to information or the right to protection against harmful content and exploitation.³⁰⁸ As discussed, the information and content that children encounter online – including gambling-related content – can be harmful to their health and development.³⁰⁹ As stated by the Council of Europe, factors such as excessive use of the internet, sleep deprivation and physical harm, *gambling*, or commercial exploitation, are all capable of adversely affecting the physical, emotional and psychological wellbeing of a child.³¹⁰ Within the context of this report, this becomes especially relevant since the inclusion by the World Health Organisation (‘WHO’) of ‘gaming disorder’

³⁰⁰ *Ibid.*, 15.

³⁰¹ *Ibid.*, 6.

³⁰² For mental well-being in the digital environment in general, see THIRD, A. et al. (n 91), 46.

³⁰³ Within the Gam(e)able project, this is part of the research objective of the psychology and communication sciences partners and will be more clearly dealt with in future reports.

³⁰⁴ See e.g. STRAKER, L. et al., *Conflicting Guidelines on Young Children’s Screen Time and Use of Digital Technology Create Policy and Practice Dilemma*, in *202 Journal of Paediatrics* 300, 2018; JOHANNES, N. et al (Oxford University), *Video game play is positively correlated with well-being*, 2021.

³⁰⁵ Council of Europe (n 61), 39.

³⁰⁶ OECD, *Children in the digital environment – revised typology of risks*, 2021, 18.

³⁰⁷ SMAHEL, D. et al., *EU Kids Online 2020 – Survey results from 10 countries*, 2020, 77; UK Chief Medical Officers, *Commentary on screen-based activities and children and young people’s mental health and psychosocial wellbeing*, 2019, 5-6.

³⁰⁸ For examples of national legislation to protect children against harmful content or information (e.g. in Lithuania and Russia), see OECD, *Protecting children online – an overview of recent developments in legal frameworks and policies*, 2020, 27-28.

³⁰⁹ As noted by TOBIN, these ‘harmful practices’ are considered to be harmful ‘insofar as they result in negative consequences for [children] including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their potential’. See TOBIN, J (n 290), 957.

³¹⁰ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 20.

in its list of diseases.³¹¹ It can be argued that – aside from the controversy around the extent to which excessive screen-time can contribute to the classification of a gaming disorder – the integration of gambling(-like) practices in increasingly played video games could constitute a legitimate cause for further research, protection, or potential regulation based on said research.³¹² In this regard, UNICEF has developed several instructions for the video gaming industry, such as recommendations to encourage healthy gameplay and refrain from promoting excessive play in game design features (because children are more susceptible to techniques seeking to direct behaviour), to encourage the taking of breaks, to implement no disadvantages for taking time off the game, to use no nudging techniques, or to provide tools to manage gameplay time.³¹³ Finally, linked to the child’s rights to privacy and data protection, it has been argued that children’s personal data should not be used in ways that have been shown to be detrimental to their physical or mental health and wellbeing.³¹⁴

OBLIGATIONS LINKED TO THE RIGHT TO HEALTH. States have a variety of obligations related to the aforementioned vulnerability of children concerning their mental health and wellbeing. First, more generally, States should “*promote physical, mental and emotional health among children, including adolescents, through play, sports, recreation, artistic and cultural expression*”, as well as “*provide special help to children suffering from mental illnesses or psychological disorders.*”³¹⁵ Moreover, States have the obligation to amend, review or implement legal and policy measures, and develop plans of action to fulfil the right to health.³¹⁶ In the EU, the European Parliament adopted further specifications, stating that it is important to introduce measures into the EU framework for action on mental health, to scale up investments in mental health and psychosocial services, and to put mechanisms in place for early detection of mental health issues.³¹⁷ Second, States have obligations addressing the specific risks for adolescents. The CRC Committee has stated that legislation, policies and programmes to promote the health and development of adolescents should be developed and implemented.³¹⁸ More specifically, adolescents should be protected from information that is harmful to their health and development, that they should be provided with accurate and appropriate information on how to protect their health and development and practice healthy behaviours, and that they should be able to participate in decisions affecting their health.³¹⁹ In the video gaming environment, this could for example mean informing adolescents about the presence of gambling(-like) elements in the video games they play, the related risks, and the way they can make (healthy) decisions. Third, States have the obligation to enable and facilitate access to healthcare services.³²⁰ In this regard, Article 24(2)(e) UNCRC is relevant, which includes information and education obligations. According to TOBIN, States have the obligation to raise awareness and ensure access to information concerning children’s

³¹¹ World Health Organisation, *ICD-11 for Mortality and Morbidity Statistics: 6C51 Gaming disorder*. For example if the existence of gambling(-like) elements in the video game contributes to the development of a gaming disorder, or similarly if the gaming disorder causes an increased exposure to gambling(-like) elements due to increased (problematic) playing time.

³¹² For the discussion in general on increasing hours of video game playing, see UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 13.

³¹³ UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2019, 8-9.

³¹⁴ ICO, *Age-appropriate Design Code*, 2020, 43.

³¹⁵ UNGA, *Resolution S-27/2 on A world fit for children*, 2002, 11.

³¹⁶ CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 17.

³¹⁷ European Parliament, *Resolution 2021/2523 on children’s rights in view of the EU strategy on the rights for the child*, 2021, at 19.

³¹⁸ CRC Committee, *General Comment No. 4 on adolescent health and development in the context of the CRC*, 2003, 5.

³¹⁹ *Ibid.*, 7-8 and 11.

³²⁰ CRC Committee Child, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 8; TOBIN, J. (n 290), 924.

health.³²¹ This includes, according to the CRC Committee, information about a broad range of health issues, including the dangers of tobacco, alcohol and psychoactive substances use.³²² In the digital environment, this means ensuring that children have “safe, secure and confidential access to trustworthy health information and services, including psychological counselling services.”³²³ Fourth and finally, States have obligations regarding preventive healthcare. Interestingly, Article 24(2)(f) states that appropriate measures shall be taken to ‘develop preventive healthcare’. As noted by TOBIN, this is an open-ended provision that could include a wide variety of dangers to the right to health, which can be both promising and burdensome for States.³²⁴ According to the CRC Committee:

“Prevention and health promotion should address the main health challenges facing children within the community and the country as a whole. These challenges include diseases and other health challenges, such as accidents, violence, substance abuse and psychosocial and mental health problems. Preventive health care should address communicable and non-communicable diseases and incorporate a combination of biomedical, behavioural and structural interventions.”³²⁵

This prevention includes that States are recommended to adopt regulation for the advertising and sale of substances harmful to children’s health and the promotion of such items in media channels and publications that are accessed by children.³²⁶ Considering all of the above, if gambling(-like) elements or items in video games would be seen as harmful to children’s health, they could be included under this scope of prevention and protection. On a final note, it was recognised that the obligations related to the right to health must take into account the State’s available resources and that States cannot protect against every possible cause of ill health.³²⁷

In addition to States, the CRC Committee has stated that the private sector also has obligations regarding the right to health. In general, they have a due diligence obligation to identify, prevent and mitigate their negative impact on children’s right to health.³²⁸ Importantly however, as noted by TOBIN, there is no legal basis found in the UNCRC to claim these obligations.³²⁹ If the private sector has no obligations, it can still be argued that they have responsibilities vis-à-vis the right to health. As stated by the CRC Committee:

“While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society

³²¹ TOBIN, J. (n 290), 952; see also CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 14.

³²² *Ibid.*, 15.

³²³ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 16.

³²⁴ TOBIN, J. (n 290), 954.

³²⁵ CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 14-15

³²⁶ *Ibid.*, 15.

³²⁷ States can take into account the individual’s biological and socio-economic preconditions for this. See OHCHR, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 2000, para. 9; CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 8; TOBIN, J. (n 290), 908.

³²⁸ CRC Committee, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, 2013, 17.

³²⁹ TOBIN, J. (n 290), 928, referring to TOBIN, J., *The Right to Health in International Law* (Oxford University Press, 2012), 192-194. A similar claim is found in the CESCR General Comment No. 14, para. 36.

*organisations, as well as the private business sector - have responsibilities regarding the realisation of the right to health.*³³⁰

Here, it remains up to States to promote awareness of these responsibilities and to ensure that video game companies respect, recognise and fulfil their responsibilities to the child.³³¹ This discussion is relevant due to the important role of the video gaming sector in general, but also regarding the right to (mental) health of children which can be affected by the integration of gambling(-like) elements in video games. In this regard, the OECD has recommended for digital services providers to regularly take steps necessary to prevent children from accessing services that could be detrimental to their health and well-being and improve their measures where necessary.³³² Finally, parents have a role to play in the promotion of mental health and related prevention strategies, for example through developing a strong parent/child relationship to increase the mental resilience of the child and support the child's empowerment and self-confidence.³³³ In relation to video games, this could mean for example that parents communicate with their children about playing time and in-game spending (and related possibilities to set limits for both), or that parents inform their children about the risks related to gambling.

2.6 Right to education (Articles 28 and 29 UNCRC)

CENTRAL TO THE CONVENTION. The right to education as enshrined in Articles 28 and 29 UNCRC is at the heart of the Convention, as was already stated by the UNCRC Committee in 2001:

*"[Article 29] emphasises the indispensable interconnected nature of the Convention's provisions. It draws upon, reinforces, integrates and complements a variety of other provisions and cannot be properly understood in isolation from them."*³³⁴

The right to education should be read in conjunction with the general principles and rights of the Convention, notably the right to development or the freedom of expression and access to information.³³⁵ As already discussed, education is necessary for the child's development, whereby children should not only be protected from harmful content but also be educated to be able to understand the dangers related to gambling(-like) elements in these video games they play. These rights have a dual dimension: States are required to provide access to educational information to all children, and they have to enable children to develop the life skills to optimally use such educational and informational sources and strengthen their capacity to enjoy the full range of human rights.³³⁶ Education is to be seen as a holistic concept, balancing the promotion of physical, mental, spiritual and emotional aspects of education, the intellectual, social and practical dimensions, and the childhood and lifelong aspects.³³⁷ According to the Council of Europe, the process of developing skills to use new

³³⁰ CRC Committee, *General Comment No. 5 on general measures of implementation of the CRC*, 2003, 13; they refer here to CESCR General Comment No. 14, para. 42, with which 'the Committee concurs'.

³³¹ *Id.*

³³² OECD, *Recommendation of the Council on Children in the Digital Environment*, 2021, 12.

³³³ RUXTON, S. (n 47), 89.

³³⁴ CRC Committee, *General comment No. 1 on Article 29(1): the aims of education*, 2001, 3.

³³⁵ COURTIS, C. and TOBIN, J., *Commentary to Article 28 UNCRRC*, in TOBIN, J. (n 54), 1059-1060.

³³⁶ CRC Committee, *General comment No. 1 on Article 29(1): the aims of education*, 2001, 2.

³³⁷ *Ibid.*, 5; LUNDY, L. and TOBIN, J., *Commentary to Article 29 UNCRRC*, in TOBIN, J. (n 54), 1127-1128.

media and technologies should go hand in hand with learning about the enjoyment of children’s rights and freedoms online.³³⁸

EDUCATION IN THE VIDEO GAME ENVIRONMENT. As with many children’s rights, the arrival of the digital environment has created a whole new aspect to the right to education. UN Special Rapporteur SINGH has noted that *“online education materials and courses, e-textbooks and video and audio files streamed on the Internet, as all of which are modes of e-learning, are revolutionizing the provision of education.”*³³⁹ The digital environment has the potential to be of great benefit to the right to education. As stated by the CRC Committee:

*“The digital environment can greatly enable and enhance children’s high-quality access to inclusive education, including reliable resources for formal, non-formal, informal, peer-to-peer and self-directed learning. Use of digital technologies can also strengthen engagement between the teacher and student and between learners.”*³⁴⁰

Education is an important part of the child’s development and is even the main way through which children develop. In this regard, the Council of Europe has stated that:

*“In support of [the development of the child’s personality, talents and abilities], it is important that the knowledge and resources of the digital environment are available to all children in a way that is inclusive and takes into account children’s evolving capacities and the particular circumstances of children in vulnerable situations.”*³⁴¹

Furthermore, the right to education is closely related to the concept of digital literacy, which recognises the fact that children will need to develop digital skills when navigating the digital environment.³⁴² As such, States should ensure that children have both the competences necessary to engage in the digital environment wisely and the resilience to cope with its associated risks.³⁴³ In Europe, it was already stated in 2012 that digital literacy and skills are crucial to the children’s use of the internet.³⁴⁴ More recently, the EU Strategy on the Rights of the Child mentions digital literacy as *“part of education, to develop children’s ability to critically evaluate online content, and detect disinformation and abusive material.”*³⁴⁵ Even more, the EU has developed a Digital Education Plan for the period 2021-2027 to ensure its citizens have the necessary digital skills.³⁴⁶ At the international level, the CRC Committee has stated that States should ensure that digital literacy is taught in schools as a part of basic education curricula.³⁴⁷ These curricula should (1) include skills to handle digital tools and resources; (2) offer guidance on critical understanding and finding of trusted sources of information and on identifying misinformation; (3) promote awareness among children on the possible adverse

³³⁸ Council of Europe, *Recommendation Rec(2006)12 on Empowering Children in the New Information and Communications Environment*, 2006.

³³⁹ SINGH, K. (Human Rights Council), *Report of the Special Rapporteur on the right to education*, A/HRC/32/37, 2016, 6.

³⁴⁰ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 17.

³⁴¹ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 18.

³⁴² See e.g. UNICEF, *Child Protection Strategy 2021-2030*, 2021, 44, where development of children’s digital literacy is one of the five main objectives of the strategy.

³⁴³ Council of Europe (n 61, 53; Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 18.

³⁴⁴ European Strategy for a Better Internet for Children (n 90), 8. The Commission refers to its earlier Communication on a European approach to media literacy in the digital environment of 2007.

³⁴⁵ EU Strategy on the Rights of the Child (n 50), 17.

³⁴⁶ European Commission, *Communication COM(2020)624 on a Digital Education Plan 2021-2027: resetting education and training for the digital age*, 2020; for examples of education plans in EU Member States, see OECD, *Protecting children online – an overview of recent developments in legal frameworks and policies*, 2020, 38-40.

³⁴⁷ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 17-18.

consequences of exposure to content, contact, conduct and contract risks³⁴⁸; and (4) provide strategies for children to protect their personal data.³⁴⁹ Ultimately, children have to gain an understanding of the digital environment, “including its infrastructure, business practices, persuasive strategies, uses of personal data and surveillance, and of the possible negative effects of digitalization of societies.”³⁵⁰

It has been recognised that video games can be beneficial for education, as they can help to acquire essential competences that are needed in a digitised society, can help transform learning and teaching techniques, or can be used as pedagogical support in the classroom.³⁵¹ The EGDF and ISFE have stated that “Europe’s video games sector is committed to contributing to the further enhancement of the learning process via the interactive nature of video games.”³⁵² Video games are quickly becoming a part of learning processes and “are appreciated in the classroom for their ability to raise pupils’ motivation and their inclusive character”.³⁵³ Video games can contribute to both formal and informal learning, where the former refers to intentional learning in the sense that learning is the goal of the activities the users engage in, and where the latter refers to learning (outside schools) which arises from the learner’s involvement in activities that are not undertaken with a learning purpose in mind.³⁵⁴ Both types of learning can be influenced by video games: examples of formal learning are educational games within schools and examples of informal learning are things children learn whilst playing video games for entertainment purposes. One notable example in this context are the so-called ‘serious games’, which are games that engage users in activities other than pure entertainment, involving goal oriented tasks that aim to improve the player’s motor and cognitive skills.³⁵⁵ In this regard, it is relevant to mention the concept of ludoliteracy, which analyses education (and more broadly learning) through video games.³⁵⁶ Furthermore, the concept of digital literacy is also relevant in the video gaming context specifically. The ability of children to recognise commercial strategies in video games, to understand the persuasive intent of such messages, to recognise and assess the dangers of both gambling(-like) elements and in-game overspending, or the use of their personal data to receive personalised in-game offers, are all part of the development of skills under the umbrella of the right to education and its aims. However, it has to be kept in mind that literacy in this context largely depends on the age, maturity and capacities of the child; it could be argued that younger children need additional protection online or other forms of literacy education, as they are “less equipped when it comes to assessing the reliability of online information.”³⁵⁷ On the other hand, it has been found that for example restrictive measures adopted by parents to protect their children also appear to limit children’s online

³⁴⁸ General examples are cyberaggression, sexual exploitation and abuse, or other forms of violence; examples specifically relevant for this report has been numerous cited *supra*, with gambling as potentially harmful content, in-game purchases as contract risks, or predatory commercial practices such as behavioural targeting.

³⁴⁹ *Id.*

³⁵⁰ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 18; a recent report shows the effects of digital literacy skills on the exposure of children to certain risks, see STOILOVA, M., LIVINGSTONE, S. and KHAZBAK, R. (UNICEF), *Investigating Risks and Opportunities for Children in a Digital World*, 2021.

³⁵¹ EGDF & ISFE, *Position paper on digitalisation of education*, 2020. See e.g. the Games in Schools project, which started in 2006 and is ongoing <https://www.isfe.eu/wp-content/uploads/2019/10/gis-full_report_en.pdf>; for some initiatives throughout Europe, see EGDF and ISFE, *Position paper – consultation on the rights of the child*, 2020, 5-6.

³⁵² EGDF & ISFE, *Position paper – consultation on the rights of the child*, 2020, 5.

³⁵³ EGDF and ISFE, *Position paper – consultation on the rights of the child*, 2020, 6; see for example the Game.Learn.Grow toolbox developed by Mediawijs <[New toolbox shows teachers how to best use games in their classroom – FLEGA](#)> or the UK’s Digital Schoolhouse Project, <[Home \(digitalschoolhouse.org.uk\)](http://digitalschoolhouse.org.uk)>.

³⁵⁴ See Council of Europe, *Formal, non-formal and informal learning*, retrieved at <<https://www.coe.int/en/web/lang-migrants/formal-non-formal-and-informal-learning>>; informal learning is also referred to as experiential learning; see more in general CEDEFOP, *European guidelines for validating non-formal and informal learning*, 2015.

³⁵⁵ HETZNER, D., PAPPA, D. and PANNESE, L., *Serious Games for Formal and Informal Learning*, 2011, 2.

³⁵⁶ See e.g. ZAGAL, J., *Ludoliteracy: Defining, Understanding and Supporting Games Education*, 2010; ARANDA, D. et al., *Ludoliteracy: The unfinished business in media literacy*, 2016.

³⁵⁷ SMAHEL, D. et al. (n 307) , 42.

opportunities to learn, develop skills, or gain resilience to risks.³⁵⁸ As always, the gradual shift of children’s development into adults requires finding a balance between empowering the child and protecting the child regarding its interactions with video games.³⁵⁹

2.7 Right to engage in play and recreational activities (Article 31 UNCRC)

THE RIGHT TO PLAY VIDEO GAMES? Article 31 UNCRC recognises the importance of play and recreation in children’s lives, due to its positive impact on the social, cognitive and personal development of the child. More specifically, Article 31 requires States to:

“[R]ecognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts”.

The CRC Committee has stated that play and recreation are essential to the health and well-being of children, as they develop creativity, imagination, self-confidence, or social, cognitive and emotional strength and skills.³⁶⁰ In the context of this report, it would seem that the right to play is the most important right of the children’s rights framework. Surprisingly however, the focus of Article 31 in regulatory and other policy documents is predominantly on the non-digital aspect of the right to play (e.g. resting, outside playing activities).³⁶¹ Nevertheless, it is relevant to discuss the potential for video games to be included under the right to play. First, video games can be included under the definitions of ‘play’ or ‘recreational activities’, although they are most likely included under the latter. VANDENHOLE ET AL. define play as *“any behaviour, activity or process initiated, controlled and structured by children themselves that takes place whenever and wherever opportunities arise”* and define recreational activities as *“a very broad range of activities (or experiences) chosen voluntarily by the child, either because of the immediate satisfaction provided or because the child perceives that some personal or social value will be gained by accomplishing them.”*³⁶² Another definition is given by the Digital Futures Commission, stating that play is *“any behaviour, activity or process initiated, controlled and structured by children themselves.”*³⁶³ Children play video games both because they simply want to and because games give them satisfaction or social value (e.g. by playing together with friends or in a competitive environment). Second, in recent years, video gaming has been increasingly mentioned in relation to Article 31 UNCRC (*infra*).

RIGHT TO PLAY IN THE DIGITAL ENVIRONMENT. It was already brought forward by the CRC Committee in 2013 that children in all regions of the world are spending increasing periods of time engaged in play via digital platforms and media, including social networking and video gaming.³⁶⁴ In this regard, it has recently been noted that these platforms are becoming more and more interconnected, creating a ‘metaverse’ where the boundaries between video games and social networks are blurred.³⁶⁵ The

³⁵⁸ LIVINGSTONE, S. et al (EU Kids Online), *How parents of young children manage digital devices at home*, 2015, 9.

³⁵⁹ For a similar analysis regarding advertising literacy, see VERDOODT, V. *Children’s Rights and Advertising Literacy in the Digital Era*, 2018, 108-109.

³⁶⁰ CRC Committee, *General comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts*, 2013, 4.

³⁶¹ HODGKIN, R. and NEWELL, P. (n 37), 470-473.

³⁶² VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 313.

³⁶³ Digital Futures Commission, *Playful by Design – Free play in a digital world*, 2021, 3.

³⁶⁴ CRC Committee, *General comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts*, 2013, 14. Note that access to the internet as discussed *supra* is a necessary prerequisite to the realisation of Article 31’s rights.

³⁶⁵ Digital Futures Commission, *The kaleidoscope of play in the digital world*, 2021, 11-12.

important, beneficial role of the digital environment was highlighted in 2021 by the CRC Committee, stating that digital forms of play can “*facilitate children’s social skills, learning, expression, creative activities, such as music and art, and sense of belonging and a shared culture.*”³⁶⁶

Research has shown that playing video games can support young people’s literacy, creativity and empathy (see *supra* on the right to education).³⁶⁷ However, increasing play in the digital environment also exposes children to a wide variety of potential risks of harm, with ‘highly persuasive or gambling(-like) design features’ being one example.³⁶⁸ This is particularly important in the period of early childhood, where play is one of the most distinctive activities, as young children are especially vulnerable to these risks.³⁶⁹ Another example is noted by the Digital Futures Commission, namely that children find the commercial pressures and compulsive features that accompany their play intrusive or problematic, and also find play in digital contexts to be often hostile and unsafe.³⁷⁰ Therefore, it is crucial to recognise the different obligations and responsibilities for States, video game companies and parents respectively. First, according to the CRC Committee, the State has a number of general obligations, such as awareness raising, protecting children from harm, or ensuring online safety by *inter alia* limiting access to adult-rated material and gaming networks.³⁷¹ States should provide a range of incentives, including interactive and play-based tools that stimulate skills such as creativity, teamwork and problem solving appropriate to the child’s evolving capacities.³⁷² Second, according to LANSDOWN, the phrase ‘appropriate to the age of the child’ also requires a positive obligation for States to adopt measures to protect against activities which are age-inappropriate and which present a risk to the child’s physical, mental, emotional, moral, social, and intellectual development.³⁷³ Gambling(-like) elements in video games could be considered as such an activity³⁷⁴, as well as features in video games deliberately designed to ‘hook’ players (see *supra* on behavioural targeting). Third, in line with what we have seen regarding commercial practices, States should ensure that businesses do not target children using other techniques designed to prioritise commercial interests over the interests of the child (for example regarding microtransactions).³⁷⁵ In that regard, States also need to provide guidance for parents concerning their responsibilities under Article 18 UNCRC. Here, the four guiding principles of the children’s rights framework play a central role. As argued by TOBIN and LANSDOWN, children’s engagement in each of the rights under Article 31 must be age-appropriate if it is to facilitate the effective enjoyment of their rights.³⁷⁶ The child’s best interests and development should be parents’ primary concern, although oftentimes these interests will need to be balanced against other competing interests.³⁷⁷ An illustration in this context is the provision of parental tools to limit play time or in-game spending. These tools can be necessary to protect the child’s health, development or to protect the child against harmful content, however they can also unduly restrict the child’s

³⁶⁶ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 18.

³⁶⁷ EGDF & ISFE, *Position Paper – consultation on the rights of the child*, 2020, 4.

³⁶⁸ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 18.

³⁶⁹ CRC Committee, *General comment No. 7 on Implementing child rights in early childhood*, 2005, 15.

³⁷⁰ Digital Futures Commission, *Playful by Design – Free play in a digital world*, 2021, 9.

³⁷¹ CRC Committee, *General comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts*, 2013, 18-19.

³⁷² Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 15.

³⁷³ LANSDOWN, G. and TOBIN, J., *Commentary to Article 31 UNCRC*, in TOBIN, J. (n 54), 1209-1210.

³⁷⁴ E.g. in General Comment 25, the CRC Committee states that legislation should be adopted to protection children from harmful services such as gambling (para. 114).

³⁷⁵ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 18.

³⁷⁶ LANSDOWN, G. and TOBIN, J. (n 373), 1209.

³⁷⁷ *Ibid.*, 1214.

participation rights in the digital environment³⁷⁸, deprive children of their rights under Article 31 or even have the opposite effect and harm children’s well-being and development.³⁷⁹ In this regard, the CRC Committee has stated that when age-ratings or certifications are used regarding digital play and recreation, they should not interfere with their opportunities for leisure or their other rights.³⁸⁰ Central to this balancing exercise is the child’s age and maturity (evolving capacities) to understand the progressive risk-taking by children as they grow older.³⁸¹ Another illustration is linked to the aforementioned predatory commercial practices where children are nudged towards certain behaviour (e.g. in-game spending) or where their data is extensively collected and used throughout their gameplay experiences (e.g. to personalise microtransactions). Here, it is argued that these practices – especially nudging and other dark patterns – can interfere with the ‘voluntary’ aspect of play or recreational activities, which is a fundamental part of its definition.³⁸²

2.8 Right to protection against economic exploitation (Article 32 UNCRC)

BROADENING THE CONCEPT OF ECONOMIC EXPLOITATION. The right to protection against economic exploitation is enshrined in Article 32 UNCRC. Generally, the concept of economic exploitation refers to child labour or exploitation related to work environments.³⁸³ However, VERDOODT³⁸⁴ and others³⁸⁵ have proposed to broaden the scope of this Article to include other types of economic exploitation, such as exploitative advertising and marketing and other manipulative commercial practices. The notion has two aspects: ‘economic’ and ‘exploitation’. According to the 1993 UN discussion day on economic exploitation, the former refers to a material interest (e.g. profit or gain) through the production, distribution and consumption of goods and services; the latter means taking unjust advantage of another for one’s own advantage or benefit, including manipulation, abuse, or victimisation.³⁸⁶ In the context of gambling(-like) elements in video games, the economic interest could be the profits made by the video gaming industry through in-game purchases. Second, the exploitation criterium includes manipulation and entails disrespect for the “*harmonious development of the child’s personality*”.³⁸⁷

EXPLOITATIVE PRACTICES IN VIDEO GAMES. The commercial practices and marketing strategies described throughout this report can in certain instances amount to exploitative practices. To reiterate, due to behavioural targeting – where children’s data is acquired and combined to develop individual profiles – children’s behaviour can be directly influenced.³⁸⁸ Moreover, children are more susceptible to commercial practices seeking to direct their behaviour and manipulate emotions (e.g. nudging techniques)³⁸⁹; may not understand the difference between real money and virtual money values in

³⁷⁸ See e.g. UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 12-13.

³⁷⁹ LANSDOWN, G. and TOBIN, J. (n 373), 1214.

³⁸⁰ CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 19.

³⁸¹ *Ibid.*, 1211; Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 15.

³⁸² Digital Futures Commission, *The kaleidoscope of play in the digital world*, 2021, 29-30; note that this is especially the case in free-to-play games where children’s data is used as a ‘means of payment’. VERDOODT, V. et al. (n 288), 496-520.

³⁸³ SWEPSTON, L., *A Commentary to the United Nations Convention on the Rights of the Child, Article 32: Protection from Economic Exploitation* (Brill, 2012); HODGKIN, R. and NEWELL, P. (n 37), 479-502.

³⁸⁴ VERDOODT, V., *The Role of Children’s Rights in Regulating Digital Advertising*, in *27 International Journal of Children’s Rights* 3, 2020, 455-481.

³⁸⁵ VAN DER HOF, S. et al, *The Child’s Right to Protection against Economic Exploitation in the Digital World*, in *28 Int’l J. of Children’s Rights* 833, 2020, 835.

³⁸⁶ CRC Committee, *UNCRC Discussion Day 1993 on Economic Exploitation of Children*, CRC/C/20, 1993, 3.

³⁸⁷ VAN DER HOF, S. et al. (n 385).

³⁸⁸ UNICEF, *Child rights and online gaming: opportunities & challenges for children and the industry*, 2019, 22 and 25.

³⁸⁹ UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 29. These commercial aspects are oftentimes hidden (‘dark patterns’) and use intentionally deceptive user interfaces.

gambling(-like) features in games³⁹⁰; may find themselves agreeing to contracts they do not understand and which are commercially exploitative or unduly persuasive³⁹¹; may not know that knowledge about their behaviour and interests is used to offer personalised products and services or sold to other parties³⁹²; or may not be aware that they are being manipulated into revealing more data than what would be justified in accordance with their expectations and preferences.³⁹³ Thus, these complex (data processing) mechanisms or revenue models could in certain cases be interpreted as exploiting children's incredulity and inexperience while creating value for companies by feeding children's data into algorithms to profile them and influence their behaviours or perceptions.³⁹⁴ If this is indeed the case, certain gambling(-like) elements in video games could potentially be classified as economic exploitation of children.³⁹⁵ Such exploitation could have long-lasting effects on their development and thereby affect their best interests as well as their rights to development and freedom of thought.³⁹⁶ Not only is this particularly relevant for young children, who are even more vulnerable, it is also important for adolescents because they reach a phase wherein they take more risks and are more exposed to these practices.³⁹⁷ In relation to this, the CRC Committee requires States to adopt and review relevant laws and policies to ensure that children are protected against these forms of exploitation³⁹⁸, and any protective measure adopted by States has to take into consideration the best interests and evolving capacities of the child and should not unduly restrict the exercise of other rights.³⁹⁹ This includes ensuring that businesses do not engage in these predatory commercial practices towards children and requiring all stakeholders to limit the processing of children's personal data for commercial purposes.⁴⁰⁰

2.9 Procedural rights

ACCESS TO JUSTICE. After having discussed the different substantive rights of children relevant in the context of gambling(-like) in video games, the last part of this chapter addresses the importance of procedural rights as a means to enforce children's rights in practice. Central concepts are access to justice and its components related to the right to an effective remedy and child-friendly justice. Surprisingly, the UNCRC includes no specific provision on the right to an effective remedy, contrary to for example Article 8 UDHR or Article 2(3) ICCPR. However, according to the CRC Committee, the right to an effective remedy is "*implicit in the UNCRC and consistently referred to in the other [...] major international human rights treaties*" and in order for children's rights to have meaning, "*effective remedies must be available to redress violations.*"⁴⁰¹ The right to an effective remedy is an important aspect of the broader concept of access to justice, which has been classified by the High Commissioner for Human Rights as a "*fundamental right in itself and an essential prerequisite for the protection and*

³⁹⁰ *Ibid.*, 20;

³⁹¹ Council of Europe (n 61), 57.

³⁹² VAN DER HOF, S. et al. (n 385), 839-840.

³⁹³ *Ibid.*, 840.

³⁹⁴ *Ibid.*, 833; UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 20.

³⁹⁵ Note that not the gambling in itself is an exploitation, however the combination of the behavioural targeting through profiling and the resulting nudging techniques to make children (over)spend on in-game purchases or gambling(-like) activities in video games, is exploitation.

³⁹⁶ VERDOODT, V., *Children's Rights and Commercial Communication in the Digital Era* (Intersentia, 2020).

³⁹⁷ CRC Committee, *General comment No. 20 on the implementation of the rights of the child during adolescence*, 2016, 5.

³⁹⁸ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 19.

³⁹⁹ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 19.

⁴⁰⁰ *Ibid.*, 20.

⁴⁰¹ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 7.

*promotion of all other human rights.*⁴⁰² The relation between access to justice and the right to an effective remedy has been clarified by LIEFAARD:

*“Access to justice is grounded in the right of the child to seek remedies in case of (alleged) rights violations. It implies legal empowerment of children and access to justice mechanisms and remedies that are child-sensitive. The child should have access to justice in order to exercise his right to an effective remedy.”*⁴⁰³

There are several aspects to the concept of access to justice that deserve special attention, relating to its scope, its obstacles and its implementation vis-à-vis children (through legal empowerment and child sensitive justice, see *infra*). First, the scope of access to justice goes beyond judicial tribunals and includes administrative, criminal and legislative authorities, or other competent authorities within the legal system of the State, such as National Human Rights Institutions (NHRIs), Ombudspersons, regional courts (e.g. ECtHR, Inter-American Court of Human Rights), or NGOs.⁴⁰⁴ Access to justice does not mean a *judicial* remedy is always required; as stated by the ECtHR, “*other remedies may present the required effectiveness*”.⁴⁰⁵ Similarly, UNICEF has noted that access to justice is primarily about the right to legal action against rights violations, but “*more broadly encompasses equitable and just remedies*”.⁴⁰⁶ For example, without overlooking the importance of judicial remedies, SHELTON has argued that administrative remedies can be adequate if they are “*accessible, affordable, timely or prompt, effective, legitimate, predictable, compatible with rights, and transparent*”.⁴⁰⁷ In general, there should be a balancing approach to decide which remedy is best, depending on the nature and the gravity of the allegation.⁴⁰⁸ Second, it is important to recognise that children face many obstacles in trying to exercise their right to access to justice and effective remedies. As stated by the CRC Committee, “*children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights*”.⁴⁰⁹ These obstacles cover a wide variety of possibilities,⁴¹⁰ including legal capacity, legal standing, or conflicts of interest with parents or legal guardians,⁴¹¹ complexity of justice system and subsequent lack of knowledge, awareness or information of children about their rights and possible remedies;⁴¹² or judicial systems not being adjusted to children, unsafe,

⁴⁰² United Nations Human Rights Council, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 3.

⁴⁰³ LIEFAARD, T., *Access to Justice for Children: Towards a Specific Research and Implementation Agenda*, in *27 Int’l Journal of Children’s Rights* 195, 2019, 195 and 200.

⁴⁰⁴ LIEFAARD, T. (n 403), 200 and 213; Child Rights International Framework (‘CRIN’), *Rights, remedies & Representation: Global report on access to justice for children*, 2016, 21-27; OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children* (n 402), 11.

⁴⁰⁵ ECtHR, *Conka v. Belgium*, App. No. 51564/99, 2002, para. 75; see also EUFRA, *Handbook on European law relating to access to justice*, 2016, 92-100.

⁴⁰⁶ UNICEF, *Children’s Equitable Access to Justice: Central and Eastern Europe and Central Asia*, 2015, 18.

⁴⁰⁷ SHELTON, D., *Remedies in International Human Rights Law* (Oxford University Press, 2015), 100.

⁴⁰⁸ LIEFAARD, T. (n 403), 201; SHELTON, D. (n 407), 94.

⁴⁰⁹ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 2003, 7.

⁴¹⁰ See in general Child Rights International Framework (‘CRIN’), *Rights, remedies & Representation: Global report on access to justice for children*, 2016, 28-35. The main categories of obstacles are financial, procedural, and those related to system complexities. For a specific application to sexual exploitation, see ECPAT International, *Through the Eyes of the Child: Barriers to access to justice and remedies for child victims of sexual exploitation*, 2017; UNICEF, *UN Common Approach to Justice for Children*, 2008, 12.

⁴¹¹ UNICEF, *Children’s Equitable Access to Justice: Central and Eastern Europe and Central Asia*, 2015, 75; OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 7.

⁴¹² OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 6; UNICEF (n 411), 9, 66-74, 118-119.

intimidating or not taking their complaints seriously.⁴¹³ For the digital environment specifically, the CRC Committee has noted particular challenges in access to justice, such as the lack of knowledge of children about their rights and violations in the digital environment, or the difficulty to obtain evidence or identify perpetrators.⁴¹⁴ Third, and related to the way in which these obstacles can be addressed, are the concepts of legal empowerment of children and child sensitive justice, which are discussed below.

LEGAL EMPOWERMENT OF CHILDREN. The concept of legal empowerment of children has two aspects: the legal capacity to engage in justice proceedings, and the legal assistance they may receive in doing so.⁴¹⁵ As a preliminary note, the UNCRC only mentions 'legal assistance' in criminal matters, not in civil matters, whereas mostly the latter is relevant for this report.⁴¹⁶ First, the starting point in many jurisdictions is that a child does not have legal capacity to commence legal or administrative procedures on his own behalf, or to formally approach a court of law to vindicate his rights independently from his parents or legal guardian.⁴¹⁷ Hence, according to LIEFAARD, it is questionable that the UNCRC does not include a provision about the child's legal capacity, taking into account other provisions of the UNCRC such as the right to be heard or the principles of best interests and evolving capacities.⁴¹⁸ Here, a referral can be made to what was written about the holistic approach of the children's rights principles and the balancing approach which aims to ensure that the child's age and maturity are taken into account, and that they should be able to express their views.⁴¹⁹ This interpretation implies that children should usually be able to exercise their right to access to justice *independently* at some point in time⁴²⁰, thus requiring legal capacity whilst still below the age of majority. In this regard, many jurisdictions have exceptions to the concept of children not having legal capacity.⁴²¹ Second, legal assistance relates to legal aid, which aims to ensure "*effective access to justice for those who have insufficient financial resources to cover the costs of court cases, such as court fees or costs of legal representation.*"⁴²² Under the Council of Europe framework, the ECtHR has expressed itself on legal assistance, stating that it is one of the crucial prerequisites for children's access to justice and child-friendly treatment.⁴²³ One particular cause for debate is whether or not legal assistance should be free. Whereas the High Commissioner for Human Rights and the Council of Europe have stated that free or subsidised legal and other assistance is needed to effectively engage with the

⁴¹³ UNICEF (n 411), 12, 83-84; OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 7.

⁴¹⁴ In that regard, it was noted that digital technologies bring additional complexity to the investigation and prosecution of crimes against children, which may cross national borders. See CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 8.

⁴¹⁵ LIEFAARD, T. (n 403), 197.

⁴¹⁶ Article 40(2)(b)(ii) and (iii) UNCRC. Article 37(d) UNCRC includes similar legal and other appropriate assistance for children deprived of their liberty. Note that this could be relevant in the context of this report, in national frameworks where infringements concerning gambling practices are brought under the scope of penal law.

⁴¹⁷ OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 12; CRIN, *Rights, remedies & Representation: Global report on access to justice for children*, 2016, 17.

⁴¹⁸ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 18 and 28; LIEFAARD, T. (n 403), 205; UNICEF, *UN Common Approach to Justice for Children*, 2008, 5.

⁴¹⁹ Article 12(2) UNCRC explicitly mentions the right to express views in judicial and administrative proceedings. These views should be given due weight in the proceedings based on the age and maturity of the child.

⁴²⁰ LIEFAARD, T. (n 403), 205.

⁴²¹ OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 7; KENNAN, N. and KILKELLY, U., *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU*, 2015.

⁴²² EUFRA, *Handbook on European law relating to access to justice*, 2016, 58-66; LIEFAARD, T. (n 403), 208.

⁴²³ ECtHR, *Güvec v. Turkey*, App. No. 70337/01, 20 January 2009, para. 31; *S.C. v. United Kingdom*, App. No. 60958/00, 15 June 2004.

legal system⁴²⁴, case law of the ECtHR is more nuanced. Under Article 6 ECHR, the requirement of providing legal assistance under the form of representation in non-criminal procedures depends on the specific circumstances of each case.⁴²⁵

CHILD SENSITIVE AND CHILD-FRIENDLY JUSTICE. Child sensitive justice is an approach that balances a child's right to protection and that takes into account a child's individual needs and views.⁴²⁶ It starts by acknowledging that children have a right to access justice and have legal standing if they have an interest in seeking remedies.⁴²⁷ Examples of child sensitive proceedings are the aforementioned NHRIs, Ombudspersons specifically competent for children's rights, or alternative mechanisms such as mediation, treatment programmes, or specific models for family dispute resolution.⁴²⁸ A closely related concept is child-friendly justice, which is defined in the Council of Europe's Guidelines on Child-Friendly Justice as:

*"[J]ustice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age-appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child (...)."*⁴²⁹

According to LIEFAARD, child-friendly justice has three key elements: child-friendly information, effective participation, and child-friendly remedies.⁴³⁰ First, information is linked to Articles 13 and 17 UNCRC on access to information and implies that information should be provided in a manner adapted to the child's age, maturity and specific circumstances.⁴³¹ Adequate information is essential to overcome some of the obstacles for children that were mentioned and includes for example information on the rights, systems and procedures in place, possible outcomes and consequences of procedures and possibilities to obtain reparation or other remedies to protect and safeguard the enforcement of their rights.⁴³² In the digital environment, the CRC Committee has stated that:

*"States parties should provide children with child-sensitive and age-appropriate information in child-friendly language on their rights and on the reporting and complaint mechanisms, services and remedies available to them in cases where their rights in relation to the digital environment are violated or abused."*⁴³³

This information should also be provided to parents, teachers, and other people working with children.⁴³⁴ Second, effective participation can be linked back to what was stated *supra* about the

⁴²⁴ OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 13; Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 27.

⁴²⁵ EUFRA (n 405), 57 and 76-77; see e.g. ECtHR, *Steel and Morris v. UK*, App. No. 68416/01, 15 February 2005, para. 61.

⁴²⁶ The name of the concept stems from ECOSOC, *Resolution 2005/20 on Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, para. 9(d).

⁴²⁷ LIEFAARD, T. (n 403), 213.

⁴²⁸ OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 9.

⁴²⁹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 17.

⁴³⁰ LIEFAARD, T. (n 403), 215.

⁴³¹ See also OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 8.

⁴³² Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 20-21; LIEFAARD, T. (n 403), 217; UNICEF, *Guidelines on child-friendly legal aid*, 2018, Guidelines 5 and 6.

⁴³³ CRC Committee, *General comment No. 25 on children's rights in relation to the digital environment*, 2021, 9.

⁴³⁴ *Ibid.*, 9; Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 21; OHCHR, *Report of the UN High Commissioner for Human Rights on Access to justice for children*, A/HRC/25/35, 2013, 8.

holistic approach within children’s rights.⁴³⁵ Namely, to ensure effective child’s participation, the child’s age, maturity and capacities need to be taken into account, and their freely expressed views – which have a crucial role in participation – need to be taken seriously and given due weight.⁴³⁶ Closely related to participation is the right to a fair trial, which is included for criminal matters in Article 40(2)(b)(iii) UNCRC. Here, the CRC Committee has stated that a fair trial requires that the child is able to effectively participate in the trial and that the child needs to comprehend the charges and possible consequences.⁴³⁷ This could be similar for civil proceedings, where the ECtHR has added that the right to a fair trial does not require that the child “understand or be capable of understanding every point of law or evidential detail”, but that “‘effective participation’ in this context presupposes (...) a broad understanding of the nature of the trial process and of what is at stake (...), including the significance of any penalty which may be imposed.”⁴³⁸ Third and finally is the aspect of child-friendly remedies, about which the CRC Committee has stated that:

*“[C]hildren whose rights have indeed been violated should receive ‘appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [CRC]’.”*⁴³⁹

It can be argued that in general, these remedies should be pedagogically significant, preferably non-financial, and meet the wishes of the child.⁴⁴⁰ Furthermore, national authorities should facilitate the execution of the remedies in their decisions and rulings.⁴⁴¹ Specifically relevant in the context of this report, the CRC Committee has also stated that it may be difficult to obtain remedies when children’s rights have been abused in the digital environment by business enterprises.⁴⁴² Here, States should ensure that businesses (which includes video game companies or social network services providers) have effective complaint mechanisms that do not prevent children from gaining access to State-based remedies, and that national institutions related to children’s rights or data and consumer protection investigate complaints and provide effective remedies.⁴⁴³

OPTIONAL PROTOCOL ON A COMMUNICATIONS PROCEDURE. Surprisingly, the mechanism through which children can effectively file complaints for specific children’s rights violations under the UNCRC has only been available since 2014. The Optional Protocol to the UNCRC on a Communication Procedure was adopted in 2011, entered into force in April 2014 and has at the time of writing been signed by 52 States, ratified by 48.⁴⁴⁴ This is, according to CLARKE, an illustration of the legal transformation that has occurred, which “gives children as individuals, a genuine appeal that enhances the realisation of their

⁴³⁵ See e.g. UNICEF, *Guidelines on child-friendly legal aid*, 2018, Guideline 3.

⁴³⁶ LIEFAARD, T. (n 403), 218-219; for example ECtHR, *T. v. UK*, App. No. 24723/94, 16 December 1999, para. 84 and *V. v. UK*, App. No. 24888/94, 16 December 1999, where it is stated that ‘it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings’.

⁴³⁷ CRC Committee, *General comment No. 10 on children’s rights in juvenile justice*, 2007, 14.

⁴³⁸ ECtHR, *S.C. v. UK*, App. No. 60958/00, 15 June 2004, para. 29.

⁴³⁹ CRC Committee, *General comment No. 5 on General measures of implementation of the Convention of the Rights of the Child (arts. 4, 42 and 44, para. 6)*, 7.

⁴⁴⁰ LIEFAARD, T. (n 403), 220.

⁴⁴¹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, 32.

⁴⁴² CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 8.

⁴⁴³ *Ibid.*, 9.

⁴⁴⁴ United Nations, *Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure*, A/RES/66/138, 2011.

*substantive rights contained in the UNCRC.*⁴⁴⁵ Through the Optional Protocol, increased monitoring of the implementation of the UNCRC in the different States can be achieved, and critical remarks or recommendations can be issued.⁴⁴⁶ Ultimately however, the vision of the CRC Committee remains non-binding and is advisory and non-adversarial in nature, and it remains up to the States to take their statements into account.⁴⁴⁷

Section III – Key takeaways

On the children’s rights framework in general:

- ❖ Children are seen as **active holders of rights** in the digital environment.
- ❖ At the **international level**, the UNCRC (together with the CRC Committee) forms the backbone against which children’s rights policies should be evaluated. Other international institutions with important contributions for children’s rights are UNICEF, the OECD, the UN Human Rights Council and the work of the UN Special Rapporteurs.
- ❖ At the **European level**, the Council of Europe (ECHR) and the European Union (CFEU) have created their own children’s rights framework, inspired by the UNCRC and further building on its provisions. The Council of Europe has issued a plethora of non-binding instruments that are important in the interpretation of children’s rights and the EU has its own Strategy on the Rights of the Child, in which the digital and information society is one of the pillars.
- ❖ The **digital environment** is a double-edged sword for children’s rights, as it presents both benefits and risks. The 2021 General Comment No. 25 of the CRC Committee on the Rights of the Child in the Digital Environment is a crucial document, that sets out to re-interpret the UNCRC in light of the developments regarding digital technologies.

On the children’s rights principles:

- ❖ The four children’s rights principles in the UNCRC are embedded in separate articles, however they should be read together as part of a **holistic approach** which prioritises both children’s protection and empowerment.
- ❖ The **right to development** has two dimensions: the present (childhood) and the future (the development from childhood into adulthood). A child’s development encompasses its physical, psychological, spiritual, emotional, cognitive, cultural and economic capacities, which are constantly evolving and gradually transition from dependence to autonomy.
- ❖ Children’s development may be at risk when they are exposed to gambling practices through video games in early stage of their lives. States, parents and businesses all have responsibilities to protect children in these situations, which is oftentimes challenging due to the rapidly evolving digital environment.
- ❖ The **right to non-discrimination** is relevant in situations where children are profiled in video games based on their personal characteristics such as age or gender, or when video games use stereotypes.

⁴⁴⁵ CLARKE, S., *Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability*, in 84 *Nordic J. Int’l. Law* 183, 2015, 216-217.

⁴⁴⁶ For a more in-depth discussion about the Optional Protocol, see VANDENHOLE, W., TURKELLI, G. and LEMBRECHTS, S. (n 38), 456-481.

⁴⁴⁷ Article 11 of the Optional Protocol only mentions that ‘due consideration’ needs to be given to the views of the Committee; KILKELLY, U. (n 52), 309-310.

- ❖ The **best interests of the child** requires a flexible interpretation taking into account the context and circumstances of each situation, where children’s interests are given a primary consideration. This principle has to be interpreted in a complementary manner to the other principles (development, right to express views) and both States and businesses need to uphold the best interests of the child throughout their policies, for example by using child-rights impact assessments.
- ❖ The **right of the child to express his or her views** requires that children can actively participate in the promotion, protection and monitoring of their rights, and that they have the opportunity to provide their perspectives and experiences based on their age and maturity (the child’s views are not necessarily conclusive or determinative; they should be given due weight). In the video game environment, it is particularly relevant to engage with children and give them a voice when it comes to their experiences and expectations.

On the children’s rights applicable to gambling(-like) elements in video games:

- ❖ In the digital environment, a **central role** is played by the right to seek and receive information. We are living in the age of information abundance, in which an overwhelming amount of beneficial and harmful information is readily available for children. The protection of children against harmful content is an important policy goal.
- ❖ Additionally, there is a **wide variety of commercial practices used by the business sector** (including video game companies), which again may be both beneficial and harmful. In certain instances, such practices threaten a variety of children’s rights.
- ❖ Within the **right to seek and receive information** and to freedom of expression, an important aspect is children’s access to content and information based on their age (age-appropriate information). Here, the balancing exercise between protection and empowerment of the child is important, as it aims to reconcile the protection of children required when navigating the digital environment, with the autonomy children should develop when they grow older, are increasingly able to make their own choices and are aware of the risks presented to them.
- ❖ The **right to freedom of thought** may be violated when commercial practices include manipulation techniques (nudges) or other ‘dark patterns’ that change the decisions they might have made, for instance when players are encouraged to spend more money in-game than planned.
- ❖ The **right to privacy** and data protection is significantly challenged in the digital environment. Practices such as automated decision-making, profiling, (behavioural) targeting, or surveillance are all said to potentially interfere with the child’s rights to privacy and data protection due to their potentially harmful or dangerous character; age-verification, age-appropriate design, information filtering and privacy-by-design are all included under the umbrella of possible solutions, each accompanied by various challenges. States are obliged to make information about privacy tools and settings available, accessible, meaningful and age-appropriate for children.
- ❖ The **right to have access to a diversity of mass-media sources** to choose from is closely related to the right to seek and receive information. Video gaming platforms and companies can be seen as included under the scope of ‘mass media’, especially taking into account the recent evolution of integration of online platforms (e.g. video game platforms and social media platforms). States must encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.

- ❖ The **right to health** in the context of this report refers to the mental health aspects of video gaming and gambling. As such, it is closely linked with the right to development, both for young children whose development could potentially be harmed if they experience early exposure to gambling(-like) elements in video games, and for adolescents who are susceptible to developing mental health problems such as video gaming or gambling disorders. It is important to distinguish these types of disorders, as scientific evidence is not conclusive on the video game disorder (whereas it is on gambling disorders), and the topic of this report provides a unique combination of both, where gambling(-like) elements are present in video games and are therefore certainly relevant to analyse in the context of mental health. It is the responsibility of States to assure that the private sector contributes to the realisation of the right to health.
- ❖ The **right to education** is important for all other rights and aims to ensure that children have the required competences to navigate the digital environment and the resilience to cope with its risks (digital literacy), which includes the risks related to commercial practices used by video game companies. Furthermore, video games can be beneficial for education and can help children to learn both formally and informally.
- ❖ The **right to play** is oftentimes the first right that comes to mind when discussing the topic of video games. It can be argued that video games can be brought under its definition, which is also shown by the increasing amount of research on video games as a way for children to play. In addition, digital forms of play can improve children's skills and competences, however they can also expose children to risks, such as persuasive or manipulative video game design features as described above.
- ❖ The **right to protection against economic exploitation** can be interpreted as requiring protection of children from certain commercial practices described in this chapter (e.g. manipulative or persuasive practices, behavioural targeting, profiling and personalisation of in-game purchases).
- ❖ Procedural rights include important concepts such as **access to justice and effective remedies**. There are several obstacles for children to exercise this right, such as their legal standing, legal capacity, conflicts of interests, the complexity of the judicial system, or children's lack of knowledge. Child-sensitive and child-friendly justice can tackle these issues, where children's rights are respected and implemented and where the justice system takes into account the child's needs and views (due consideration based on the child's age and maturity) and recognises the child's legal standing if remedies are sought. Furthermore, it implies for video game companies that they must provide complaint mechanisms, and it implies for States that national institutions should exist to investigate complaints and provide effective remedies to children.

Chapter 3 – Gambling regulation

INTRODUCTION. A first essential field of law to be looked at is gambling regulation. As noted in chapter 1, a different structure and methodology is deployed for this chapter compared to the subsequent chapters. The reason for this different approach is to be situated with the lack of EU competence to (directly) regulate gambling activities. The purpose of this chapter is twofold: (1) the first section focuses on the delineation of competences between the EU and its Member States in the context of gambling, as well on the issues emerging from this delineation; (2) considering that gambling activities are largely regulated at the national level, section 2 contains a functional comparative analysis of a selection of national gambling laws, which is not the case for the other chapters.

Section I – The role of the European Union

1 *EU competence for gambling*

SUBSIDIARITY AND PROPORTIONALITY. The EU competence for regulating gambling is inextricably linked to the principles of subsidiarity and proportionality, which aim to protect the sovereignty of the Member States.⁴⁴⁸ Gambling services are not an exclusive competence of the Union. According to the principle of subsidiarity, the EU can only act in areas which do not fall within its exclusive competence if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (decentralisation criterion)⁴⁴⁹, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (efficiency criterion)⁴⁵⁰.⁴⁵¹ Additionally, the proportionality principle stipulates that EU actions cannot exceed what is necessary to achieve the objectives of the Treaties. Based on the aforementioned principles of EU law, Member States decided that gambling services are not to be subject to specific Union regulation.⁴⁵²

LACK OF HARMONISATION. 1992 was a pivotal year in the area of EU gambling regulation. Not only was the first preliminary reference relating to national gambling legislation brought before the CJEU⁴⁵³, but in December of that year, the issue of gambling services and the internal market was also discussed by the heads of the Member States at the Edinburgh European Council meeting.⁴⁵⁴ These discussions followed a report prepared for the Commission in 1991, which showed the fragmentation of national gambling regulations within the Union and recommended that gambling services should be subject to the internal market regime.⁴⁵⁵ However, some Member States were reluctant. In Edinburgh, the Commission put forward the principle of subsidiarity as an argument to abandon the harmonisation plan in the field of gambling: the competence to regulate such services should remain with the

⁴⁴⁸ Articles 5 (3) and (4) TEU.

⁴⁴⁹ HOEKX, N., *Kansspelen op het internet* (Larcier, 2011), 48.

⁴⁵⁰ *Id.*

⁴⁵¹ AQUILINA, A., *Setting up a Common Legal Framework to Regulate the Gaming Sector in the European Union*, in *Gh.S.L. Online Law Journal*, 2012, available at <<http://lawjournal.ghsl.org/viewer/30/download.pdf>>.

⁴⁵² HOEKX, N. (n 449), 46.

⁴⁵³ CJEU, *Her Majesty's Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119.

⁴⁵⁴ European Council, *Conclusions of the Presidency*, DOC/92/8, December 1992; VLAEMMINCK, P., VERBEKE, R. and DUTKIEWICZ, L., *Gambling and European Law*, 2021, available at <<https://www.lexology.com/library/detail.aspx?g=98ef83b7-3b1e-4562-89d0-a641342edf4a>>.

⁴⁵⁵ European Commission, *Gambling in the single market: a study of the current legal and market situation* (Luxembourg, 1991); CJEU, *Placanica, Palazzese and Sorricchio*, joint cases C-338/04, C-359/04 and C-360/04, 16 May 2006, Conclusions of Advocate-General Colomer, ECLI:EU:C:2006:324, 929.

Member States.⁴⁵⁶ The Council followed the advice of the European Commission and explicitly decided not to harmonise national legislation in relation to gambling services.⁴⁵⁷ It considered that EU wide regulation of gambling services was not needed, but the possibility was not excluded for the future.⁴⁵⁸ In 2011, the Commission reaffirmed that it did not consider it appropriate (yet) to introduce sector-specific legislation.⁴⁵⁹ Under the guise of catering for the differing national scales of values relating to gambling, the principle of subsidiarity is still referred to. Furthermore, there is also an economic incentive to keep regulating gambling on a national level, especially where it is an important source of tax revenue. Then, in 2017, the European Commission decided to close the infringement and complaints proceedings in the gambling sector, considering they were better dealt with by national courts.⁴⁶⁰ In light thereof, complainants encountering problems with EU law in the gambling sector are encouraged to resort to national remedies. Thus, contrary to a lot of other sectors where common rules in all Member States exist, there is no sector-specific EU legal instrument for gambling. This, however, does not mean that the EU is irrelevant in relation to regulating gambling across the Member States: the principle of subsidiarity does not provide national governments with a *carte blanche* to regulate gambling in a way that restricts cross-border movements in a manner contrary to primary EU law.⁴⁶¹

2 Primary European Union law

A PECULIAR ECONOMIC ACTIVITY. In its case law, the CJEU states that gambling activities are considered to be 'an economic activity of a peculiar nature'.⁴⁶² The fact that they qualify as 'economic activities' implies that the fundamental freedoms underpinning the EU internal market – established under the Treaty on the Functioning of the European Union – do apply.⁴⁶³ More specifically, the provision of gambling services touches upon the freedom to provide services (Articles 56-62 TFEU) and the freedom to establish a business in other EU countries (Articles 49-55 TFEU).⁴⁶⁴ In principle, this means that a gambling activity legally offered in one Member State can freely be offered in other Member States, unless the latter impose restrictions justified by overriding reasons in the public interest (e.g. consumer protection or preserving public order).⁴⁶⁵ However, gambling services are peculiar economic activities, which indicates that it concerns a matter in which many cultural, religious and moral differences exist in the Member States.⁴⁶⁶ Therefore, it is argued that such activities cannot simply be treated as just another economic activity requiring full market liberalisation and competition.⁴⁶⁷

⁴⁵⁶ European Council, *Conclusions of the Presidency*, DOC/92/8, December 1992, Annex 2 to Part A, Subsidiarity. Examples of the Review of Pending Proposals and Existing Legislation.

⁴⁵⁷ *Id.*, 28.

⁴⁵⁸ EU Institutions press releases, IP (92)1120, December 1992.

⁴⁵⁹ European Commission, COM(2012) 596, *Communication Towards a comprehensive European framework for online gambling*, 2012.

⁴⁶⁰ See <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5109>.

⁴⁶¹ HOEKX, N. (n 449), 45.

⁴⁶² CJEU, *Her Majesty's Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, para. 59.

⁴⁶³ Free movement of persons, goods, services and capital; CJEU, *Her Majesty's Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, para. 37.

⁴⁶⁴ CJEU, *Regina v. Thompson, Johnson and Woodiwiss*, C-7/78, 23 November 1978, ECLI:EU:C:1978:209; see also the website of the European Commission on online gambling in the EU, available at <https://ec.europa.eu/growth/sectors/online-gambling_en>.

⁴⁶⁵ European Commission, COM(2011) 128, *Green Paper on on-line gambling in the Internal Market*, 2011, 7.

⁴⁶⁶ CJEU, *Her Majesty's Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, para. 60.

⁴⁶⁷ HOEKX, N. (n 449), 45-46.

DISCRETION FOR MEMBER STATES. Due to gambling activities being special economic activities, Member States are free to set the objectives of their gambling and betting policy in accordance with their own values, and do what is required in order to ensure that the interests in question are protected (notably in terms of fighting crime and fraud, and enhancing consumer protection), in line with the subsidiarity principle.⁴⁶⁸ While being free to choose their approach towards gambling activities (e.g. a monopoly system, a licence system, a complete ban...), there are limits to how far Member States can go. The freedoms in primary EU law – and how they are interpreted – determine the contours within which Member States are free to shape their gambling policies.⁴⁶⁹ In order to know to what extent Member States may enact restrictive measures to these freedoms, not only the justification grounds set out in the TFEU – i.e. public policy, security and health⁴⁷⁰ – but also the jurisprudence of the CJEU should be taken into account. The relevant CJEU case law will be discussed in the next subsection.

3 Jurisprudence of the EU Court of Justice

CJEU AS A COMPASS. Since secondary EU law only plays a marginal role as far as games of chance are concerned, it is necessary to focus on the Treaty itself. Crucial here is the interpretation that the CJEU grants to the provisions of the Treaty – i.e. in relation to the freedom of services and establishments⁴⁷¹.⁴⁷² Since the 1990s, the CJEU has been serving as a compass when navigating the application of the freedoms in light of the cross-border provision of gambling activities:⁴⁷³ by answering numerous preliminary references by national courts seeking guidance on the compliance of national systems with the EU rules on the freedom to provide services and the freedom to establish businesses throughout the EU, the CJEU has set out some indicators on how to interpret EU law in the context of gambling services. Important to stress here is that the Court does not itself make moral judgements on gambling activities and leaves this to national legislators.⁴⁷⁴ Some of the most relevant CJEU interpretations are set out below:

There is no EU definition of gambling ('gaming') activities. Some EU secondary legislation defines 'gambling activities' for the purpose of excluding such services from their scope. Article 5(d) of the Electronic Commerce Directive, for example, stipulates: "gambling activities ... involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions". Other directives make use of similar definitions.⁴⁷⁵ The CJEU has not (yet) interpreted these definitions, nor has it come up with its own definition.

⁴⁶⁸ European Commission, COM(2011) 128, *Green Paper on on-line gambling in the Internal Market*, 2011, 5.

⁴⁶⁹ VERBEKE, A. and HOEKX, N., *De regulering van kansspelen: wanneer bekent Europa kleur?*, in SPAPENS, A., GROENHUIJSEN, M. and KOOIJMANS, T., *Universalis: liber amicorum Cyrille Fijnaut* (Intersentia, 2011), 1010.

⁴⁷⁰ Article 62 jo. Article 52 TFEU.

⁴⁷¹ In this report we will focus on the freedom of establishment as this is considered to be most relevant in light of gambling elements within video games.

⁴⁷² HOEKX, N. (n 449), 51.

⁴⁷³ The freedoms entailed in Article 49 and 56 TFEU do not apply to a situation which is confined in all respects within a single Member State.⁴⁷³ There has to be a cross-border element. See e.g. CJEU, *Bonver Win v. Ministerstvo finance CR*, C-311/19, 3 December 2020, ECLI:EU:C:2020:981.

⁴⁷⁴ CJEU, *Her Majesty's Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, para. 32.

⁴⁷⁵ E.g. Rec. 22 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, *OJ L* 15 April 2010, 95, 1-24 or Article 3(14) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council,

3.1 Large margin of discretion for Member States

SUFFICIENT LATITUDE. As mentioned *supra*, gambling activities are economic activities of a peculiar nature due to national differences regarding moral, religious or cultural aspects. It concerns a sensitive subject matter as the activities concerned involve a high risk of crime or fraud and they can have damaging individual and social financial consequences. Besides that, revenue obtained through gambling-related activities are sometimes used to make a significant contribution to the financing of benevolent or public interest activities (such as through national lottery systems).⁴⁷⁶ For these reasons, Member States enjoy a large margin of discretion “to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield.”⁴⁷⁷ Following this finding the debate has concentrated upon the latitude of this margin and the extent to which Member States can restrict the cross-border movement of gambling services and gambling service providers.⁴⁷⁸

3.2 Limitations for the national legislators

FREEDOM TO PROVIDE SERVICES. In 1994, the CJEU ruled the very first European case on gambling, deciding that gambling is a service within the meaning of Article 56 TFEU.⁴⁷⁹ As a consequence, the freedom to provide services implies that Member States cannot, in principle, restrict the free movement of gambling activities. In subsequent judgments, it was confirmed that Article 56 TFEU applies to various forms of games of chance, including lotteries⁴⁸⁰, slot/gambling machines⁴⁸¹ and betting⁴⁸², also online⁴⁸³.⁴⁸⁴ Nevertheless, this freedom is not unlimited and several restrictions have been considered justified (see *infra*).

NO CARTE BLANCHE. A recurring and established element in the CJEU’s case law is the freedom of choice of the Member States. In the absence of EU harmonisation on gambling activities, the national legislator is deemed best placed to determine, based on its objectives and morals, which system (e.g. a liberal system, a monopoly system, a licence system or a total ban) is appropriate and necessary for the protection of the interests at stake.⁴⁸⁵ Again, this does not mean that Member States are not subject to any limitations in how they organise their gambling markets. The Court affirmed several

and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 15 June 2015, 141, 73–117.

⁴⁷⁶ CJEU, *Her Majesty’s Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, para. 60.

⁴⁷⁷ *Id.*, para. 61; Consequently, some countries strictly regulate gambling activities (e.g. Cyprus, Poland but also Belgium is fairly strict), while others adopt more lenient laws (e.g. Finland or Italy).

⁴⁷⁸ LITTLER, A., *Member States versus the European Union. The regulation of Gambling* (Martinus Nijhoff Publishers, 2011), 2.

⁴⁷⁹ CJEU, *Her Majesty’s Custom and Excise v. Schindler*, C-275/92, 24 March 1994, ECLI:EU:C:1994:119, paras. 25 and 34.

⁴⁸⁰ CJEU, *Lindman*, C-42/02, 13 November 2003, ECLI:EU:C:2003:613 para. 19; CJEU, *Commission of the European Communities v. Spain*, C-153/08, 6 October 2009, ECLI:EU:C:2009:618, para. 29.

⁴⁸¹ CJEU, *Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä and Finnish State*, C-124/97, 21 September 1999, ECLI:EU:C:1999:435, para. 27; CJEU, *ANOMAR et al. v. Portugal*, C-6/01, 11 September 2003, ECLI:EU:C:2003:446, para. 69.

⁴⁸² CJEU, *Questore di Verona v. Zenatti*, C-67/98, 21 October 1999, ECLI:EU:C:1999:514, paras. 24-25; CJEU, *Gambelli et al.*, C-243/01, 6 November 2003, ECLI:EU:C:2003:597, para. 52; CJEU, *Portugal Football League and Bwin International Ltd v. Departamento Lisboa de Jogos*, C-42/07, 8 September 2009, ECLI:EU:C:2009:519, para. 52.

⁴⁸³ *Gambelli et al.*, C-243/01, 6 November 2003, ECLI:EU:C:2003:597, para. 54; CJEU, *Placanica*, C-338/04, 6 March 2007, ECLI:EU:C:2007:133, para. 44.

⁴⁸⁴ HOEKK, N. (n 449), 53.

⁴⁸⁵ CJEU, *Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä and Finnish State*, C-124/97, 21 September 1999, ECLI:EU:C:1999:435, para. 35.

times that unlike in a traditional market, free, undistorted competition in the market of games of chance is undesirable due to potential severely detrimental effects.⁴⁸⁶

CONDITIONS. Restrictions or bans regarding gambling activities within national legislation imply, by definition, a restriction of the free movement of services (and possibly freedom of establishment).⁴⁸⁷ Restrictions on the free movement of services are possible only when they are justified by one of the exceptions in Article 51 or 52 TFEU (i.e. public order, public security or public health)⁴⁸⁸, or by an overriding reason of public interest as developed by the CJEU. The case law of the Court refers almost exclusively to overriding reasons of public interest.⁴⁸⁹ The CJEU has introduced four conditions for imposing limitations: (1) non-discriminatory; (2) justified by an imperative requirement in the general interest (e.g. consumer protection, combating fraud, crime or the squandering of money)⁴⁹⁰; (3) suitable to attain the objective pursued; (4) proportional (i.e. the measures do not go beyond what is strictly necessary).⁴⁹¹

COHERENT AND SYSTEMIC (HYPOCRISY TEST). Member States bear a general duty to prove both the reality of the justification invoked and the compliance of their regulations with the conditions.⁴⁹² However, it is necessary to look at the entire policy to assess whether a particular restriction is justified. Restrictions should contribute to a consistent and systemic limitation of gambling activities.⁴⁹³ It is for example not accepted to choose a monopoly system for lotteries – games which are considered to be less dangerous – based on consumer protection considerations, while at the same time encouraging (potential) players to play (more) when it comes to games which are considered to be more dangerous (e.g. casino games).⁴⁹⁴ Relevant to already mention in this context is that stricter limitations are allowed in relation to *online* gambling. (*infra* 3.4.)

3.3 No mutual recognition

MUTUAL RECOGNITION. Technological developments in the internet area have paved the way for operators to provide their gambling activities online and hence across national borders. This is at odds with the generally restrictive national regulations. A challenge linked to this development can be found in the principle of mutual recognition⁴⁹⁵ – another fundamental principle of the internal market.⁴⁹⁶ The CJEU has explicitly denied the application of the principle of mutual recognition in the field of gambling,

⁴⁸⁶ “Operators of games of chance would be led to compete with each other in inventiveness to make what they offer more attractive, thereby increasing consumers’ expenditure on gaming as well as their risk of addiction”. See CJEU, *Sporting Exchange Ltd v. Minister van Justitie*, C-203/08, 3 June 2010, ECLI:EU:C:2010:307, para. 58.

⁴⁸⁷ VLAEMMINCK, P., VERBEKE, R. and THIBAUT, M., *The Gambling Law Review: Gambling and European Law*, 2021, available at <<https://thelawreviews.co.uk/title/the-gambling-law-review/gambling-and-european-law#footnote-104>>.

⁴⁸⁸ Article 62 TFEU jo. Article 52 TFEU.

⁴⁸⁹ HOEKX, N. (n 449), 58.

⁴⁹⁰ Not accepted as imperative reasons of general interest are financing social welfare and economic objectives of operators. See <[europarl.europa.eu/RegData/bibliotheque/briefing/2013/130509/LDM_BRI\(2013\)130509_REV1_EN.pdf](http://europarl.europa.eu/RegData/bibliotheque/briefing/2013/130509/LDM_BRI(2013)130509_REV1_EN.pdf)>.

⁴⁹¹ CJEU, *Gebhard v. Consiglio degli Avvocati e Procuratori Milano*, C-55/94, 30 November 1995, ECLI:EU:C:1995:411, para. 37; CJEU, *Gambelli et al.*, C-243/01, 6 November 2003, ECLI:EU:C:2003:597, para. 65.

⁴⁹² CJEU, *Commission of the European Communities v. Italy*, C-260/04, 13 September 2007, ECLI:EU:C:2007:508, para. 33; VLAEMMINCK, P., VERBEKE, R. and THIBAUT, M. (n 487).

⁴⁹³ CJEU, *Gambelli et al.*, C-243/01, 6 November 2003, ECLI:EU:C:2003:597, paras. 67 and 69.

⁴⁹⁴ CJEU, joint cases C-316/07, C-409/07 and C-410/07 v. C-358/07, C-359/07 and C-360/07, 8 September 2010, ECLI:EU:C:2010:504, para. 107.

⁴⁹⁵ This means that Member State A must allow goods or services from Member State B onto its territory if those goods or services were produced and offered in Member State B, in accordance with the regulations of the latter Member State. See CJEU, *Commission of the European Communities v. United Kingdom*, C-124/81, 8 February 1983, ECLI:EU:C:1983:30.

⁴⁹⁶ ADRIAANSE, P., BARKHUYSEN, T. and VAN DEN BOGAERT, S., *Nederlandse kansspelregulering aan de Europese maat*, in *29 Nederlands Juristenblad 1900*, 2010, 1902.

meaning that a Member State is not obliged to recognise the rules and restrictions set by another Member State.⁴⁹⁷ As a consequence, when a licence to operate any type of gambling activities is validly obtained in one Member State, it does not automatically have to be recognised by other Member States.⁴⁹⁸ For example, the fact that you have obtained a licence from Malta, does not allow you to offer games of chance in Belgium. The underlying reason for this is again that gambling is linked to sensitive matters such as health and consumer protection and that it may be difficult for authorities of the Member States to assess the professional qualities and integrity of economic operators which are not established in their own country (e.g. in the light of fraud and crime), due to the lack of harmonisation.⁴⁹⁹

PERMANENT ESTABLISHMENT. The obligation to have a permanent establishment on national territory in order to be allowed to provide gambling services in that Member State, is considered by the CJEU to be the very negation of the freedom to provide services.⁵⁰⁰ Such a condition can solely be accepted in case it is indispensable for attaining the objective pursued.⁵⁰¹

3.4 Stricter limitations allowed for online gambling

ONLINE MORE DANGEROUS. The Court has regularly recognised the added dangers adherent to online games of chance, compared to physically offered games. The reasoning behind this is that the lack of direct contact between consumer and operator in light of internet-based gambling leads to different and more substantial risks of fraud on behalf of the operator.⁵⁰² Additionally, several other factors are likely to lead to negative social and moral consequences (e.g. the development of gambling addiction and the related squandering of money): (1) the particular ease and the permanence of access to online gambling services; (2) the potentially high volume and frequency of such an international offer; and (3) an environment which is characterised by isolation of the player, anonymity and absence of social control. This is recognised as a justification for Member States to implement a stricter (but proportionate) approach towards the offer of online gambling services. A prohibition to offer online gambling activities could be regarded as suitable for pursuing the legitimate objectives determined (e.g. the protection of minors and those with a propensity for gambling or likely to develop such a propensity), even when the offer of such games remains authorised through the more traditional channels.⁵⁰³

4 Secondary European Union law

As mentioned *supra*, there is no secondary legislation at EU level that has a significant impact on Member States' gambling policies.⁵⁰⁴ Gambling services as such are not subject to sector-specific EU

⁴⁹⁷ CJEU, *Portugal Football League and Bwin International Ltd v. Departamento Lisboa de Jogos*, C-42/07, 8 September 2009, ECLI:EU:C:2009:519, para. 73; CJEU, joint cases C-316/07, C-409/07 and C-410/07 v. C-358/07, C-359/07 and C-360/07 8 September 2010, ECLI:EU:C:2010:504, paras. 112 and 113.

⁴⁹⁸ HOEKX, N. (n 449), 63.

⁴⁹⁹ CJEU, *Ladbroke's Betting & Gaming Ltd v. Stichting de Nationale Sporttotalisator*, C-258/08, 3 June 2010, ECLI:EU:C:2010:308, para. 54.

⁵⁰⁰ CJEU, *Parodi v. Banque H. Albert*, C-222/95, 9 July 1997, ECLI:EU:C:1997:345, para. 31; CJEU, *Sporting Odds Ltd v. Nemzeti*, C-3/17, 28 February 2018, ECLI:EU:C:2018:130, para. 44.

⁵⁰¹ CJEU, *Commission of the European Communities v. Germany*, C-205/84, 4 December 1986, ECLI:EU:C:1986:463, para. 52.

⁵⁰² CJEU, *Portugal Football League and Bwin International Ltd v. Departamento Lisboa de Jogos*, C-42/07, 8 September 2009, ECLI:EU:C:2009:519, para. 70.

⁵⁰³ CJEU, *Carmen Media Group Ltd v. Land Schleswig-Holstein*, C-46/08, 8 September 2010, ECLI:EU:C:2010:505, para. 103.

⁵⁰⁴ VERBEKE, A. and HOEKX, N. (n 469), 1010.

regulation and are explicitly excluded from most horizontal legislation such as the Services Directive⁵⁰⁵, the E-commerce Directive⁵⁰⁶, the Consumer Rights Directive⁵⁰⁷ and the Audiovisual Media Services Directive⁵⁰⁸. Nevertheless, a number of (these) secondary EU law instruments might still be (indirectly) relevant to the gambling sector, and gambling(-like) elements in video games in particular.⁵⁰⁹ The most relevant ones are discussed in chapters 5 to 7 of this report.⁵¹⁰

5 Policy documents and soft law initiatives

Even though there is no sector-specific legislation by the EU, the institutions have undertaken some efforts in the area of regulating gambling services. The most recent and relevant initiatives are set out below.

5.1 European Commission

SOFT LAW APPROACH. Due to the lack of EU competence, the Commission has predominantly opted for a soft law approach regarding gambling. Following the attempt at additional harmonisation in the first draft of the Services Directive⁵¹¹, a comprehensive study on legal and economic aspects of gambling in the EU, conducted by the Swiss Institute of Comparative Law and commissioned by the European Commission.⁵¹² The findings of the study confirmed that all Member States have rules in place aiming to safeguard public interest objectives, however, these rules differ considerably and often lead to barriers to the freedom to provide services and the freedom of establishment that are incompatible with EU law. In 2011, following the Council of the EU's suggestion⁵¹³, the Commission organised a broad consultation on the issues brought about by online gambling in the internal market.⁵¹⁴

COMMUNICATION ON GAMBLING. On 23 October 2012, following the public consultation⁵¹⁵, the Commission adopted the *Communication Towards a comprehensive European Framework for online gambling*.⁵¹⁶ This Communication, together with the accompanying Commission Staff Working

⁵⁰⁵ Article 2(2)(h) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive').

⁵⁰⁶ Article 1(5)(d) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('E-Commerce Directive').

⁵⁰⁷ Article 3(3)(c) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council ('Consumer Rights Directive').

⁵⁰⁸ Recital 22 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, *OJ L 15* April 2010, 95, 1-24 (Amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('Audiovisual Media Services Directive') in view of changing market realities).

⁵⁰⁹ As we will discuss later, the exclusion of gambling services as such does not necessarily imply that gambling-like elements in video games are also excluded from the scope of these secondary EU law instruments.

⁵¹⁰ European Commission, COM(2011) 128, *Green Paper on on-line gambling in the Internal Market*, 2011, 7.

⁵¹¹ European Commission, COM(2004) 2, *Proposal for a Directive of the European Parliament and of the Council on services in the internal market*, 2006.

⁵¹² Swiss Institute for Comparative Law (commissioned by European Commission), *Study of Gambling Services in the Internal Market of the European Union*, 2006.

⁵¹³ European Council (Internal Market, Industry, Research and Space), *Conclusions on the framework for gambling and betting in the EU member states*, 2010, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/118398.pdf.

⁵¹⁴ European Commission, COM(2011) 128, *Green Paper on on-line gambling in the Internal Market*, 2011, 7.

⁵¹⁵ European Commission, COM(2011) 128, *Green Paper on on-line gambling in the Internal Market*, 2011, 7.

⁵¹⁶ European Commission, COM(2012) 596, *Communication Towards a comprehensive European framework for online gambling*, 2012.

Document⁵¹⁷, identified the key challenges posed by the co-existence of national regulatory frameworks within the Internal Market, while at the same time seeking to propose answers to these challenges. At the time of the Communication, the Commission did not consider it appropriate to propose sector-specific EU legislation (yet). However, there was an almost unanimous call for policy action at EU level.⁵¹⁸ The Commission highlighted that it believed that gambling should be – to a certain point – regulated at EU level and announced that it would explore the merits of introducing a European standard regarding online gambling.⁵¹⁹ The idea behind this Communication was to find a balance between a legal framework on gambling that is wholly regulated by the EU and one that is entirely up to the Member States. To this end, the Communication contains actions to be taken both at national and EU level which mainly focus on online gambling and issues linked to the EU freedoms in light of the cross-border supply of gambling services throughout the EU. The aim of these actions is to enhance legal clarity and to establish evidence-based policies throughout the EU to the benefit of national authorities, operators, other related industries (e.g. media service providers) and consumers. The action plan was based on five key priority areas:

- Compliance of national regulatory frameworks with EU law;
- Enhancing administrative cooperation and efficient enforcement;
- Protecting consumers and citizens, minors, and vulnerable groups;
- Preventing fraud and money laundering;
- Safeguarding the integrity of sports and preventing match-fixing.⁵²⁰

RECOMMENDATION ON PROTECTING CONSUMERS AND MINORS. Following the Communication on online gambling, the Commission has undertaken a number of other initiatives. In 2014, the *Recommendation on principles for the protection of consumers and players of online gambling services and the prevention of minors from gambling* was adopted.⁵²¹ This set of non-binding guidelines encourages Member States to achieve a high level of protection for players, consumers and minors by adopting principles for online gambling services (and for responsible commercial communication) in order to safeguard health and to also minimise the eventual economic harm that may result from compulsive or excessive gambling.⁵²² The Recommendation aims to ensure a minimum standard of consumer protection throughout the EU.⁵²³ It does so by, for example, introducing information requirements (e.g. a ‘no underage gambling’ sign, which shows the minimum age below which gambling is not permissible) as well as principles specifically protecting minors (e.g. Member States should ensure that the operator has procedures in place designed to prevent minors from gambling, including age

⁵¹⁷ European Commission, *Staff working document on online gambling in the Internal Market Accompanying the document Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Towards a comprehensive framework for online gambling*, 2012.

⁵¹⁸ European Commission, COM(2012) 596, *Communication Towards a comprehensive European framework for online gambling*, 2012, 4.

⁵¹⁹ AQUILINA, A. (n 451), 3.

⁵²⁰ European Commission, COM(2012) 596, *Communication Towards a comprehensive European framework for online gambling*, 2012.

⁵²¹ European Commission, *Recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online*, 14 July 2014.

⁵²² *Id.*, Recital 9 and Article 1.

⁵²³ The European Gaming and Betting Association (‘EGBA’) fully endorses the recommendation, yet only Denmark has fully implemented the recommendations nationally: EGBA, *European Court of Justice: European Commission Correct To Issue Guidelines For Protecting Consumers Using Online Gambling Services*, 2018, <<https://www.egba.eu/news-post/european-court-of-justice-european-commission-correct-to-issue-guidelines-for-protecting-consumers-using-online-gambling-services/>>; CARRAN, M. (EGBA), *Review of the implementation of selected provisions of EU Commission Recommendation 2014/478/EU across EU States*, 2018,, 3.

verification checks during registration or, in order to prevent access for minors, displaying links to parental control programmes).⁵²⁴ The measures identified in the Recommendation to protect players against risks of online gambling could be used in the video game environment as well, such as spending limits, cooldown periods, or exclusion periods.⁵²⁵ It should be noted that the Recommendation is especially useful for gambling services as such (e.g. casino's, poker or lotteries), and does not refer to the integration of gambling services in other services such as video games. In the Recommendation, the concept of online gambling services is defined as:

*"[A]ny service which involves wagering a stake with monetary value in games of chance, including those with an element of skill (...) that are provided by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services."*⁵²⁶

At present, it is still up for discussion whether gambling(-like) elements in video games could fall under this definition. In certain instances they might for example not be seen as games of chance, or not involve wagering a stake with monetary value (see also *infra*).⁵²⁷

EXPERT GROUP ON GAMBLING. In 2012, an Expert Group on Gambling Services was established.⁵²⁸ Their mandate ended in 2018 and was not renewed by the Commission.⁵²⁹ The reason provided was that gambling regulation is too culturally dependent for a meaningful contribution at EU level. Nevertheless, the gambling authorities considered the Expert Group to provide a valuable platform for cooperation and information sharing amongst them, considering that still many of the challenges that they face are cross-border in nature.⁵³⁰ A number of national gambling authorities⁵³¹ have requested the European Commissioner for Internal Market to reinstate the Expert Group on Gambling Services. The Directorate General ('DG'), however, rejected the reinstatement of the Expert Group on Gambling Services under its responsibility and referred the national gambling authorities to other DGs as gambling services touch upon many different policy areas, also those falling under the responsibility

⁵²⁴ European Commission, *Recommendation 2014/478/EU* on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, Articles 4(b) and 9-10.

⁵²⁵ See CARRAN, M. (n 523), 34-43. Note that self-exclusion would be difficult to realise in practice regarding video games, not only because it is mostly something voluntarily, but also because it could be argued that children do not need to be excluded from the video game itself, only from the gambling aspects integrated in it.

⁵²⁶ European Commission, *Recommendation 2014/478/EU* on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, Article 3(a).

⁵²⁷ E.g. wagering a stake of monetary value could be the case when it comes to lootboxes, where real money is wagered in a game of chance (outcome of lootbox is uncertain). The qualification would be more difficult for social casino games, because the virtual currencies used to perform the gambling activities can be bought with real money, but there is no 'wager' in this purchase itself. Furthermore, difficulties arise in games where lootboxes or virtual currency can be earned through gameplay (instead of through purchase); this would not classify as a wager or a game of chance. It is the purpose of future reports to conduct this analysis more in-depth.

⁵²⁸ See the Commission's decision to set up the group of experts on gambling services, 5 December 2012, at <<https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=2868>>.

⁵²⁹ See iGamingBusiness's article, *European Commission rejects calls to bring back Expert Group on Gambling*, 2021 at <<https://igamingbusiness.com/european-commission-rejects-calls-to-bring-back-expert-group-on-gambling/>>.

⁵³⁰ Letter to Thierry Breton, European Commissioner for Internal Market, Re: Expert Group on Gambling Services, 30 June 2021, <https://www.egba.eu/uploads/2021/06/210630-Online-gambling-sector-letter-to-EU-Commissioner-Breton.pdf>.

⁵³¹ Austria, Belgium, Cyprus, the Czech Republic, Denmark, France, Ireland, Latvia, Malta, the Netherlands, Poland, Portugal and Spain.

of other Commission services (e.g. anti-money laundering (DG FISMA), consumer and youth protection (DG JUST), the prevention of addiction (DG SANTE) or issues of taxation (DG TAXUD)).⁵³²

COOPERATION AGREEMENT. In 2015, a non-binding cooperation arrangement was concluded between the gambling regulatory authorities of the EEA Member States, which was updated in November 2021.⁵³³ This arrangement follows up on the 2012 Communication, which suggested enhanced administrative cooperation and efficient enforcement as part of the action plan to tackle EU-wide issues regarding online gambling. Participation in the arrangement is voluntary and the actual extent and scope of such cooperation can be determined by each individual Member State.⁵³⁴ The arrangement aims to improve administrative cooperation between the authorities regarding the organisation of gambling, its supervision, enforcement and compliance with applicable national laws and regulations, including the protection of consumers and players, the prevention of money laundering and fraud, and the integrity of bets. For the purposes of the Agreement, ‘cooperation’ is defined as the sharing of information between the authorities, upon request. Furthermore, the Agreement envisages:

- Information sharing on a voluntary and proactive basis on matters of mutual interest such as market data, new games, results of studies and surveys, and international issues;
- The commitment to avoid sending a request for information where the information sought is available in the public domain or in the CIRCABC web-based library.⁵³⁵

For the sake of completeness, it is important to mention that there are also cooperation platforms exceeding the EU level (see *infra*).

STANDARDISATION. Between 2013 and 2016, following the publication of the Communication, the Commission consulted the Member States through the Expert Group on Gambling Services, and interested stakeholders through dedicated workshops. Even though there was still no support for an EU harmonisation effort on behalf of the Member States, the European Commission wanted to take some kind of action. It adopted a decision in April 2018, requesting the European Committee for Standardisation (‘CEN’)⁵³⁶ to develop a European standard defining the core elements of reporting in support of supervision of online gambling services by the gambling regulatory authorities in EU countries.⁵³⁷ This type of standardisation takes place by means of a CEN Workshop Agreement (‘CWA’), which is a voluntary and self-regulatory tool. The standards were made available on the 29th of September 2021 and aim to efficiently accommodate information sharing between the regulatory authorities and the operators and suppliers to minimise the administrative burden for the parties involved, resulting from the existence of different regulatory reporting requirements. The date of publication – i.e. the latest date by which the standard has to be implemented at national level by

⁵³² European Commission (Internal Market, Industry, Entrepreneurship and SMEs), *Letter of 15 February 2021 requesting the reinstatement of the Expert Group on Gambling Services*, Ref. Ares(2021)4191270, 28 June 2021.

⁵³³ European Commission, *Cooperation Arrangement between the gambling regulatory authorities of the EEA Member States concerning online gambling services*, 27 November 2015 (last updated November 2021), available at <https://ec.europa.eu/docsroom/documents/46794>.

⁵³⁴ Gambling regulatory authorities of 27 Member States signed the Cooperation Arrangement.

⁵³⁵ HOJNIK, J., *Online Gambling under EU Law: Strolling Between Controlled Expansion and Genuine Diminution of Gambling Opportunities*, in 2 *LeXonomica* 67, 2018, 97.

⁵³⁶ Directive (EU) 2015/1535 grants CEN the authority to adopt voluntary technical standardisation. For more information, see <https://www.cencenelec.eu/>.

⁵³⁷ European Commission, M/558 C(2018) 1815, *Implementing Decision on a standardisation request to the European Committee for Standardisation as regards a European standard on reporting in support of supervision of online gambling services by the gambling regulatory authorities of the Member States*, 2018.

publication of an identical national standard or by endorsement – is foreseen on the 31st of March 2022.⁵³⁸ Hence, the practical implications remain to be seen.

STUDIES. Finally, also a number of studies on the matter have been initiated by the Commission. A lot of these studies focused on online gambling, however, none of the studies focus explicitly on gambling(-like) elements within video games.⁵³⁹

5.2 European Parliament

NO ADVOCATE FOR HARMONISATION. Compared to the Commission, the European Parliament has been less active and has shown more reluctance towards regulating gambling services at the EU level. Interesting to mention here is that within the proposal for the Services Directive, the Commission aimed to apply the country of origin principle to all services, including gambling services.⁵⁴⁰ This was to be the start of a harmonisation initiative for gambling services. Gambling activities were made subject to a transitional derogation (i.e. within one year after the Directive entered into force, the Commission was to come up with a proposal for an additional harmonisation instrument, following the drafting of a report and a broad consultation among stakeholders).⁵⁴¹ However, the Parliament rejected this and removed gambling services from the scope of the Services Directive based on reasons of consumer protection and the protection of public order.⁵⁴²

RESOLUTIONS. In 2009, the European Parliament adopted a resolution concerning the integrity of online gambling.⁵⁴³ The Resolution rejects full harmonisation of online gambling regulation and instead calls on cooperation to solve a number of issues such as fraud prevention, the minimum age for online gambling, and minimum requirements for consumer protection. A Code of Conduct is mentioned as a useful supplementary tool. The European Parliament adopted another resolution on online gambling in September 2013: the Resolution on online gambling in the internal market.⁵⁴⁴ This resolution is rooted in the unique risks online gambling poses to consumers' health and wellbeing. With that in mind, it recommends that uniform, EU-wide online security standards are adopted. The European Parliament states both the need for the protection of minors in particular (the uniform standards for online gambling should ensure a high level of protection for consumers, in particular minors)⁵⁴⁵ and the right for Member States to regulate and enforce this matter (since the EU does not have specific competences for gambling). Furthermore, it is interesting to note that it is recommended that:

*“[A] clear distinction be made between gambling activities and **other forms of online entertainment**; services which combine distinguishing features of the gambling sector must fall*

⁵³⁸ European Committee for Standardisation (Online gambling), CEN/TC 456, *Reporting in support of supervision of online gambling services by the gambling regulatory authorities of the Member States*, 2021; see also <https://standards.iteh.ai/catalog/standards/cen/660ffa15-79b3-4d49-b748-f8041f782823/pren-17531>.

⁵³⁹ A list of studies can be consulted here: https://ec.europa.eu/growth/sectors/gambling/initiatives_en.

⁵⁴⁰ European Commission, COM(2004)2, *Proposal for a Directive of the European Parliament and of the Council on services in the internal market*, 2006.

⁵⁴¹ *Id.*, Article 18 and Article 40, §1; LITTLER, A., *Een Europese kijk op de voorgestelde wijziging van de Kansspelwet*, in HOEKX, N. and VERBEKE, A. (eds.), *Kansspelen in België/ Les jeux de hasard en Belgique* (Larcier, 2009), 14-15.

⁵⁴² European Parliament (Committee on Internal Market and Consumer Protection), *Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market*, 2005.

⁵⁴³ European Parliament, *Resolution on the integrity of online gambling* (2008/2215(INI)), 2009.

⁵⁴⁴ European Parliament, *Resolution on online gambling in the internal market* (2012/2322(INI)), 2013.

⁵⁴⁵ *Ibid.*, at 17.

under appropriate gambling legislation and fully respect age and identity verification mechanisms.”⁵⁴⁶

This Resolution illustrates the difficult delineation between gambling activities as such, and gambling activities integrated in other entertainment forms such as video games. It recognises the potential for services (e.g. video games) which include *distinguishing* features of the gambling sector to fall under gambling legislation. Finally, the European Parliament recognises that self-regulatory initiatives could serve as good contributions for identifying the content of common standards, however, it reiterates its position that, in an area as sensitive as gambling, self-regulation should be solely complementary and cannot replace national legislation.

STUDY ON LOOTBOXES. Like the Commission, the European Parliament has commissioned studies in relation to gambling in the EU. The most relevant study for the purposes of this report on gambling-like elements in video games is the 2020 study on *lootboxes in online games and their effect on consumers, in particular young consumers*.⁵⁴⁷ The study looks at the relevant regulatory framework at EU and national level for lootboxes and provides an overview of public and industry practices. Importantly, the report mentions that the perspective on gambling needs to be broadened beyond gambling aspects as such and that the issue of lootboxes *and other problematic game designs* needs to be approached from a wider consumer protection angle. It is thus suggested to explore solutions for the challenges posed by lootboxes within consumer protection law, instead of in gambling law.⁵⁴⁸ As the EU has broad competences in consumer protection and a well-established consumer acquis, it would have a much larger toolbox at its disposal to address problematic practices (on this topic, see chapter 5). Finally, the report acknowledges that lootboxes are only one example of problematic game-design features and that the problem is broader and can be linked back to in-game monetisation methods in general.⁵⁴⁹

5.3 Council of the EU

RELUCTANT APPROACH. The Council has largely remained silent on the matter of gambling regulation since the 1992 decision not to harmonise.⁵⁵⁰ Nevertheless, the topic remained on the agenda. Since July 2008, consecutive presidencies of the Council took initiatives within the Council Working Party on Establishment and Services and requested action on behalf of the Commission.⁵⁵¹

Section II – National gambling legislation

In this section, an overview of the gambling legislation within three jurisdictions is given: Belgium, the United Kingdom and the Netherlands. As mentioned in chapter 1, these countries have been chosen based on their varying approaches concerning both gambling as such and gambling(-like) elements in video games.

⁵⁴⁶ *Ibid.*, at 12.

⁵⁴⁷ European Parliament (IMCO Committee), *Lootboxes in online games and their effect on consumers, in particular young consumers*, 2020..

⁵⁴⁸ *Ibid.*, 42.

⁵⁴⁹ *Id.*

⁵⁵⁰ LOVEJOY, K., *A Busted Flush: Regulation of Online Gambling in the European Union*, in *Fordham International Law Journal* 1525, 2014, 1545.

⁵⁵¹ See e.g. Council of the EU, *Presidency progress report*, Doc. Ref. 16022/08, 1 December 2008; *Presidency progress report*, Doc. Ref. 16571/09, 3 December 2009; *Conclusions on the framework for gambling and betting in the EU Member States*, Doc. 16884/10, 10 December 2010.

1 Belgium

1.1 The Law

VARIOUS LAWS. In Belgium, there are several laws regulating the various types of gambling activities.⁵⁵² The most comprehensive law is the Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players (hereafter: the Gaming and Betting Act).⁵⁵³ In addition, the National Lottery, which is operated by the Belgian State, is regulated by the law of 19 April 2002⁵⁵⁴, and other types of lotteries are regulated by the law of 31 December 1851⁵⁵⁵. In this report the focus will be on the Gaming and Betting Act as it is the most relevant instrument for the research topic.

THE GAMING AND BETTING ACT. Up until the introduction of the Gaming and Betting Act, gambling was predominantly regulated by the 1902 Gaming Act⁵⁵⁶, which included a total ban on games of chance, but allowed a number of exceptions.⁵⁵⁷ The fragmentation of the regulatory framework and the limited legal basis underlying it led to legal uncertainty and illegal practices (lack of supervision and enforcement).⁵⁵⁸ To remedy this, the Gaming and Betting Act was introduced right before the turn of the century. After a decade, however, the Gaming and Betting Act had already become outdated as technological evolutions paved the way for the proliferation of new (digital) gambling services, including online gambling services.⁵⁵⁹ With the Act of 10 January 2010, the rules were modernised in order to expand their scope to online games of chance, betting and media games.⁵⁶⁰ Additionally, the Gaming and Betting Act is further clarified and implemented by means of various royal decrees. Among other things, there are the decrees that determine the modalities of each licence application or that determine the number of games of chance or gambling establishments permitted.⁵⁶¹ Also relevant is the decree that establishes the conditions for operating games of chance online.⁵⁶²

SCOPE. The act applies to ‘games of chance’ (*‘kansspelen’*), which the legislator defines as “*any game by which a stake of any kind is committed, the consequence of which is either loss of the stake by at least one of the players or a gain of any kind in favour of at least one of the players, or organisers of the game and in which chance is a factor, albeit ancillary, for the conduct of the game, determination of the winner or fixing of the gain*”.⁵⁶³ In order for a(n) (element of a) game to constitute a ‘game of chance’ (Dutch: ‘kansspel’) under the Belgian law, the four constitutive elements of the definition must be present.

⁵⁵² DE BOCK, M. DEFILLET, T., MELIS, S. and WIJGAERTS, F. (VAD), *Dossier gokken*, 2016, 8, available at <https://www.vad.be/assets/dossier-gokken-1>.

⁵⁵³ Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players, *BS* 30 December 1999 (hereafter: Gaming and Betting Act).

⁵⁵⁴ Wet van 19 april 2002 tot rationalisering van de werking en het beheer van de Nationale loterij, *BS* 4 May 2002, 18828.

⁵⁵⁵ Wet van 31 december 1851 op de loterijen, *BS* 7 January 1852.

⁵⁵⁶ Wet van 24 oktober 1902 op het spel, *BS* 23 December 1902 (repealed by Article 72 Gaming and Betting Act).

⁵⁵⁷ Lotteries for charity purposes were regulated by the Wet op de loterijen of 31 December 1851, betting and horse racing were allowed by a tax law of 28 August 1921, and sports betting was subject to yet another procedure.

⁵⁵⁸ MARIQUE, E. and ROSSEEL, P., *De nieuwe wetgeving op de kansspelen [The new legislation on games of chance]*, 2001, 1, <https://bib.kuleuven.be/rbib/collectie/archieven/vigiles/2001-3-91-104.pdf>.

⁵⁵⁹ HOEKCX, N. e.a., *Duiding Kansspelen* (Larcier, 2015), 41.

⁵⁶⁰ Wet van 10 januari 2010 tot wijziging van de wetgeving inzake kansspelen, *BS* 1 February 2010, 4309.

⁵⁶¹ A list of all royal decrees can be found on the website of the Gaming Commission: https://www.gamingcommission.be/opencms/opencms/jhksweb_nl/law/KB/.

⁵⁶² KB betreffende de voorwaarden voor het uitbaten van kansspelen en weddenschappen via informatiemaatschappij-instrumenten, *BS* 31 October 2018.

⁵⁶³ Article 2, 1° Gaming and Betting Act; Excluded are the practicing of sports, games offering the player the right to continue free of charge up to 5 times, certain card or board games and certain lotteries (Article 3 and 3bis Gaming and Betting Act).

Term	Meaning
Game	<p>A regulated activity conducted by humans eventually resulting in winners and losers. More specifically, a competition between multiple players or the achievement of a specific result by a single player playing against the computer, i.e. the game manufacturer.⁵⁶⁴ E.g. bets.</p> <p>Looking at gambling(-like) elements within video games, the ‘game’ requirement is – by definition – present at the video game level, but also has to be present on the gambling(-like) element’s level, e.g. does a lootbox or in-game casino constitute a game? This will most likely not cause a problem because in-game mechanics are very similar to those used in slot machines, roulettes etc. which are considered to be games of chance under Belgian law.</p>
Stake	<p>Participants pay a stake to take part in the game, which they risk losing if the game has an unfavourable outcome for them. The stake must be an actual consideration for the opportunity to win, rather than a mere expense to participate (e.g. buying the video game).⁵⁶⁵ A stake does not have to be money <i>sensu stricto</i>, but must have monetary value.⁵⁶⁶ Playing for free is not covered by the Belgian law.⁵⁶⁷ Games which offer both a paid and a free option to participate, fall under the Gaming and Betting Act with respect to the paid option.⁵⁶⁸ In general there is no <i>de minimis</i> threshold, however, certain games such as those operated in amusement parks or fairs and games organised occasionally (no more than four times a year) by a local association on the occasion of a particular event and by a <i>de facto</i> association for the benefit of a social or charitable work, are excluded from the scope by article 3, 3° of the Gaming and Betting Act under the condition that they are low-stake (and can only provide the player with a material gain of low value).</p>
Win/loss	<p>Of any kind, not necessarily money. What is relevant is that the player attaches value to the win/loss.⁵⁶⁹ This is important to note because as far as gambling(-like) elements in games are concerned, players often do not win money, but rather virtual items (e.g. skins⁵⁷⁰, emotes, voice lines, victory poses) or in-game credits.</p> <p>According to the Gaming Commission, the fact that in certain games a (colour or numeric) code is used for in-game items as well as that certain prizes can only be won for a limited time period or to a limited extent, implies that there is an inherent scale of values to these in-game items causing players to experience not only a sense of winning</p>

⁵⁶⁴ ANDRIES, K., CARETTE, N. and HOEKX, N., *Kansspel. De wettelijke definitie gewikt en gewogen* (Die Keure, 2006), 79; Belgian Gaming Commission, *Research Report on Lootboxes*, 2018, <https://gamingcommission.paddlecms.net/sites/default/files/2021-08/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf>

⁵⁶⁵ ANDRIES, K., CARETTE, N. and HOEKX, N. (n 564), 247.

⁵⁶⁶ VALGAEREN, P., *Sociale media: een nieuwe speeltuin voor kansspelen?* in VALGAEREN, P., VALCKE, P. and LIEVENS, E., *Sociale media – Actuele juridische aspecten* (Intersentia, 2013), 203.

⁵⁶⁷ HOEKX, N. et al. (n 559), 37.

⁵⁶⁸ ANDRIES, K., CARETTE, N. and HOEKX, N. (n 564), 247.

⁵⁶⁹ Article 2, 1° Gaming and Betting Act; Council of State 25 October 2015, nr. 232.752, 20.

⁵⁷⁰ Skins are aesthetic virtual objects in a video game, such as housings for weapons or equipment for an avatar. These items are intended to personalise the game, but (usually) do not provide a competitive advantage to the player.

	<p>but also a sense of loss (when the prize is a very common item or when the player already has this item).⁵⁷¹</p> <p>There is also no <i>de minimis</i> threshold. Nevertheless, games which do not provide any benefit to the player or gambler other than the right to continue playing for free up to a maximum of five times, are excluded.⁵⁷² <i>A contrario</i>, the possibility of unlimited free playing, or free plays which are limited to more than five times, is considered to constitute a win/loss.</p>
Chance	<p>A minimal influence of chance will already suffice to meet this criterion.⁵⁷³ Even if the amount of chance in the game is much smaller than the amount of skill that is required, the requirement of the presence of chance is fulfilled.⁵⁷⁴ An example is poker: the cards that are dealt rely on chance, while the rest of the game is largely skill-based.⁵⁷⁵</p>

Table 1 - Terms within the Belgian Gaming and Betting Act.

BETS. A bet (*'een weddenschap'*) is a type of game of chance “where each player makes a stake and that results in gain or loss which is not dependent on the acts of the player but on the occurrence of uncertain events that occur without intervention of the players”.⁵⁷⁶ A bet is in fact a variation of the game (i.e. the first precondition defining ‘games of chance’ (*supra*)). Betting has been included in the scope of the Gaming and Betting Act since 2010.⁵⁷⁷ One of the most well-known phenomena that can be found at the crossroads of gaming and gambling is Esports betting (i.e. betting on the outcome of, or events within, multiplayer video game competitions).⁵⁷⁸

ONLINE GAMES OF CHANCE. Online games of chance are games of chance which are offered by means of information society instruments. The latter are defined as: “*electronic equipment for the processing, including digital compression, and the storage of data, which are transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means*”.⁵⁷⁹

1.2 The licensing system

A LICENSING POLICY. The Belgian Gaming and Betting Act is based on the principle that the exploitation of games of chance and gaming establishments is prohibited, unless an appropriate licence has been obtained.⁵⁸⁰ Considering that an absolute ban had led to a proliferation of illegal games of chance in the past, the legislator put in place a licence system.⁵⁸¹ The act determines which games of chance and which types of gaming establishments are permitted, which type of licences exist and how these are to be monitored. The objectives of the Gaming and Betting Act consist of the protection of players,

⁵⁷¹ Belgian Gaming Commission, *Research Report on Lootboxes*, 2018, 10-11.

⁵⁷² Article 3, 2° Gaming and Betting Act.

⁵⁷³ Council of State, *Belgische Staat en Kansspelcommissie v. BV Gamepoint*, 25 October 2015, No. 232.752, 8.

⁵⁷⁴ HOEKCX, N. et al. (n 559).

⁵⁷⁵ See <<https://www.vad.be/assets/dossier-gokken-1>>.

⁵⁷⁶ Article 2, 5° Gaming and Betting Act.

⁵⁷⁷ ANDRIES, K., CARETTE, N. and HOEKCX, N. (n 564), 113 and 122-123.

⁵⁷⁸ Belgian Gaming Commission, *Annual Report 2017*, 17, https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/KSC_2017_NL_single.pdf;

DENOO, M., BIBERT, N. and ZAMAN, B., *Disentangling the Motivational Pathways of Recreational Esports Gamblers: A Laddering Study*, in *CHI Conference on Human Factors in Computing Systems (CHI '21)*, 8-13 May 2021, 2.

⁵⁷⁹ Article 2, 10° Gaming and Betting Act.

⁵⁸⁰ Article 4, §1 Gaming and Betting Act.

⁵⁸¹ See https://www.gamingcommission.be/opencms/opencms/jhksweb_nl/law/; HOEKCX, N., *De wet op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de speler. Een commentaar op de wijziging van de Kansspelwet*, in *Rechtskundig Weekblad* 2010, 1330.

ensuring financial transparency and monitoring of money flows, monitoring of the games, and identification and monitoring of the organisers.⁵⁸² In that regard, it also provides for measures to protect players, such as *inter alia* age limits for access to and participation in gambling (i.e. a total ban for minors; for lotteries and bets 18+; and for casino games 21+), exclusion of certain players through the Excluded Persons Information System (EPIS system)⁵⁸³, and a maximum average hourly loss.⁵⁸⁴

A CLOSED LICENSING REGIME. For the provision of all games of chance (including bets), a licence is required. The Gaming Commission is the body in charge of granting or refusing licences, in accordance with the legal framework.⁵⁸⁵ In Belgium, a closed licence system is applied, meaning that the number of licences that can be assigned is limited (see table *infra*). On the one hand, the gambling establishments are divided into four classes⁵⁸⁶:

Class	Establishment	Max. # of establishments
Class I	Casinos	9 ⁵⁸⁷
Class II	Gaming arcades	180 ⁵⁸⁸
Class III	Drinking establishments	The number of establishments is not limited, but there can only be maximum two automated games of chance and two automated games of chance with a limited stake. ⁵⁸⁹
Class IV	Betting offices	31 ⁵⁹⁰

Table 2 - Class division of gambling establishment.

TYPES OF LICENCES. On the other hand, the law provides for nine different types of licences⁵⁹¹ and three additional licences for the operation of gambling activities via the Internet.⁵⁹² An overview of the current licensing regime is provided below. Depending on the nature of their activities, gambling providers must obtain the following licences:

License	Additional licence for online offer	Activity	Validity (renewable)
A	A+	Exploitation casino	15 years
B	B+	Exploitation slot machine arcades	9 years

⁵⁸² Explanatory memorandum, Wetsontwerp tot wijziging van de wet van 7 mei 1999 op de kansspelen, de kansspelinrichtingen en de bescherming van de spelers, van het Wetboek van de met inkomstenbelastingen gelijkgestelde belastingen, van de wet van 26 juni 1963 betreffende de aanmoediging van de lichamelijke opvoeding, de sport en het openluchtlevens en het toezicht op de ondernemingen die wedstrijden van weddenschappen op sportuitslagen inrichten, van de wet van 19 april 2002 tot rationalisering van de werking en het beheer van de Nationale Loterij, 15 May 2009, 4, available in Dutch at <https://www.dekamer.be/FLWB/pdf/52/1992/52K1992001.pdf>.

⁵⁸³ See <<https://www.gamingcommission.be/en/gaming-commission/faq/faqs-on-exclusions/how-can-i-request-an-exclusion>>.

⁵⁸⁴ See Chapter VI Gaming and Betting Act; DE BOCK, M., DEFILLET, T., MELIS, S. and WIJGAERTS, F. (VAD) (n 552), 3.

⁵⁸⁵ Article 21 Gaming and Betting Act.

⁵⁸⁶ Article 6 *Id*.

⁵⁸⁷ Article 29 Gaming and Betting Act.

⁵⁸⁸ Article 34 Gaming and Betting Act.

⁵⁸⁹ Article 39 Gaming and Betting Act.

⁵⁹⁰ Article 43/3, §2 jo. KB van 14 januari 2021 tot wijziging van het koninklijk besluit van 22 december 2010 betreffende het maximum aantal inrichters van weddenschappen en de procedure voor het behandelen van vergunningsaanvragen ingeval een vergunning vrijkomt wegens intrekking of stopzetting, BS 2 February 2021, 7758.

⁵⁹¹ Article 25 Gaming and Betting Act.

⁵⁹² Article 43/8 Gaming and Betting Act.

C		Exploitation bingo machines and automatic machines in drinking establishments	5 years
D		Staff of casinos, arcades or betting offices	/
E		Manufacturers, installers and maintenance companies	10 years
F1	F1+	Organisation of bets (incl. on horse races → F1P)	9 years
F2		Accepting bets	3 years
G1		Phone-in games involving a standalone game programme on radio, TV, newspapers or magazines.	5 years
G2		All other media games that are just part of a programme or a separate feature within the media.	1 year

Table 3 - Types of licences for gambling activities in Belgium.

ONLINE LICENCE. In order to obtain a **licence** for providing **games of chance online**, the provider will already need to have a licence for exploiting a physical establishment (i.e. so an A, B or F1 licence).⁵⁹³ In other words, the '+' licenses are not stand-alone licences. Furthermore, both the server of the online game of chance and the operation of the game of chance must be located on Belgian territory.⁵⁹⁴ This requirement seems to be at odds with the CJEU case law set out *supra* under I.3.3. Finally, regardless of whether the provider exploits multiple fixed establishments, only one additional licence can be obtained.

1.3 Specific rules on gambling(-like) elements in video games

GAM(BL)ING. Given the fact that the various in-game features intertwining game-play and gambling were not yet under discussion in 1999, these phenomena were not specifically taken into account in the Gaming and Betting Act, nor in its updates. The subsections below sets out how the Belgian Gaming Commission has been dealing with some of these recent features.

1.3.1 In-game casinos

GAME OF WAR. The discussion on gambling(-like) elements in video games already started in 2014, when the Belgian Gaming Commission was contacted to act against a video game manufacturer who had embedded a casino into an online video game (Game of War). At the time, a teenager was spending his grandfather's money on in-game purchases of virtual gold which could be used in the in-game casino. This did not result in a decision by the Gaming Commission, but the Commission did speak out publicly on the matter and the developers of 'Game of War' adapted the game according to the Belgian law.⁵⁹⁵ Another video game that was subject to global controversy is Grand Theft Auto's Diamond

⁵⁹³ Article 43/8 Gaming and Betting Act.

⁵⁹⁴ Article 43/8, §2, 3° *Id.*

⁵⁹⁵ X, *15-jarige verspeelt 37.000 euro met "gratis" computerspel*, 3 October 2014, available at <https://www.vrt.be/vrtnws/nl/2014/10/03/15-jarige-verspeelt37000eurometgratiscomputerspel-1-2108344/>; MENDOZA, M., *Belgian teen spends \$46,000 in free-to-play 'Game of War: Fire Age*, 7 October 2014, available at <https://www.techtimes.com/articles/17267/20141007/belgian-teen-spends-46-000-in-free-to-play-game-of-war-fire->

Casino and Resort. This game feature allows players to access a casino to participate in games of chance such as virtual slots, roulette and poker. This functionality was blocked in many countries (e.g. Luxembourg, Cyprus, Malta), but not in Belgium. So far, the Gaming Commission’s approach vis-à-vis in-game casino’s is not clear.

1.3.2 Lootboxes

CHARACTERISTICS. A research report by the Gaming Commission states that “[l]ootboxes is the umbrella term for one or more game elements that are integrated into a video game whereby the player acquires game items either for payment or for free in an apparently random manner”.⁵⁹⁶ Prizes obtained through lootboxes can take many forms, including objects like weapons, characters (e.g. a FIFA player), voice lines, victory poses or other characteristics. At the end of 2017, the question arose worldwide whether lootboxes should be considered a form of gambling.

APPROACH GAMING COMMISSION. In its research report of 2018, the Gaming Commission addressed this question through the analysis of 4 games (Overwatch, Star-Wars Battlefront II, FIFA 18 and Counter-Strike: Global Offensive), providing an answer to whether the lootboxes in the games concerned fell under the Belgian definition of a 'game of chance'.⁵⁹⁷ The Gaming Commission considered paid lootboxes to be games of chance.⁵⁹⁸ 'Paid' entails that the stake can – directly or indirectly⁵⁹⁹ – be linked to real money. This means that lootboxes which are paid with in-game credit **earned through game-play** (not bought) are, according to the Commission, not qualified as gambling in the sense of the Belgian law. Interestingly, in this investigation, the use of personal data was not considered to be a stake in the sense of the Belgian law.⁶⁰⁰

CONSEQUENCES. The consequence of a qualification as a game of chance is that paid lootboxes cannot be offered in Belgium.⁶⁰¹ They must be removed from the video games, under penalty of criminal prosecution of the operator, risking a prison sentence of up to five years and a fine up to 800.000 euros for a first violation. If such violations are perpetrated against a person below the age of 18, the sanctions could be doubled.⁶⁰²

RECOMMENDATIONS. The Gaming Commission concludes the research report with a number of recommendations:

- Update the Gaming Commission (*inter alia* to allow for more research on gambling elements in video games);
- Specific permits for games of chance within video games should be introduced;
- There should be a principal ban on minors purchasing games containing paid lootboxes;

[age.htm](https://www.standaard.be/cnt/dmf20150211_01524788); VANHECKE, N., *Apple betaalt gedupeerde gamer 25.000 euro terug*, 12 February 2015, available at https://www.standaard.be/cnt/dmf20150211_01524788.

⁵⁹⁶ Belgian Gaming Commission, *Research Report on Lootboxes*, 2018, 5.

⁵⁹⁷ *Id.*

⁵⁹⁸ See <https://www.gamingcommission.be/opencms/opencms/jhksweb_en/gamingcommission/news/news_0061.html>.

⁵⁹⁹ E.g. when the lootbox is bought with in-game currency, but the in-game currency was bought with real money.

⁶⁰⁰ Many companies providing digital goods and services for free, monetise users’ personal data (e.g. by selling the data to advertisers). Consequently, personal data are sometimes considered as a means of payment for “free” digital goods or services.

⁶⁰¹ See e.g. EA’s statement regarding its decision to stop the sale of FIFA points in Belgium to comply with the requests from the local authorities, available at <<https://www.ea.com/nl-nl/news/fifa-points-belgium>>.

⁶⁰² Article 65, §2 Gaming and Betting Act.

- Age verification should be put in place in supermarkets when purchasing codes or gift cards for video games and minors should not be allowed to make payments associated with video games that are not suitable for them;
- Companies (e.g. Disney or the FIFA) who grant licences to video game developers should share the responsibility by applying quality standards (e.g. no illegal gambling or no match fixing);
- Age requirements of platforms and the video game concerned must be the same: a video game which is not suitable for minors, should not allow for minors to make any payments;
- Distributers and game developers are *inter alia* suggested to provide clear indications of the chances of winning certain items; they should allow the Gaming Commission's Technical Assessment team to fully monitor the Random Number Generators ('RNG') used for the lootboxes, and the presence of paid lootboxes may not hamper a normal game without paid lootboxes.⁶⁰³

At the moment of writing, it seems like these recommendations have not yet been given effect. Important to note is that the Gaming Commission is an advisory, decision-making and supervisory body (*infra* 1.4), without legislative power.⁶⁰⁴ Consequently, the report on lootboxes solely has interpretative value.

1.3.3 Esports betting

CHARACTERISTICS. Esports betting is another popular phenomenon at the crossroads of gambling and video gaming.⁶⁰⁵ It is described by the Gaming Commission as **betting on the outcome or course of a multiplayer video game competition**.⁶⁰⁶ It is not a form of in-game betting linked to the game producers, but rather takes place on third-party websites.⁶⁰⁷ In Belgium, betting constitutes a specific type of game of chance, which is defined as a "*game of chance where each player makes a stake and that results in gain or loss which is not dependent on the acts of the player but on the occurrence of uncertain events that occur without intervention of the players.*"⁶⁰⁸ The constitutive elements should be interpreted in the same manner as set out above, when discussing the definition of 'game of chance'. In the event of betting on Esports, both the stake and win or loss can be made up of money (cash or credit), cryptocurrencies or virtual in-game items – often skins.⁶⁰⁹ As mentioned *supra* under 1.1, a stake always needs to have monetary value under the Gaming and Betting Act. Not all skins have real world monetary value, but those that can be extracted out of the game and offered on third-party website, where they can be traded for money or used in Esports competitions or other games of chance (e.g. roulette or card games), do. This is possible for a number of video games such as Counter-Strike: Global Offensive, DOTA 2 and PUBG. It often concerns illegal websites where no age-verification takes place. In Belgium, skin betting always operates in unregulated waters since no licences are available for it (yet). Next, the fact that the win or loss has to take place independent of acts of the player rules

⁶⁰³ Belgian Gaming Commission, *Research Report on Lootboxes*, 2018, 5.

⁶⁰⁴ See e.g. Council of State, 12 March 2019, No. 243.924.

⁶⁰⁵ HOLDEN, T., RODENBERG, R. and KABURAKIS, A., *Esports corruption: gambling, doping and global governance*, in *Maryland Journal of International Law* 2017, 236; GROVE, C., *Esports and gambling: Where's the action?*, Greo, 2016; YUN, S., *A comparative overview of Esports against traditional sports focused in the legal realm of monetary exploitation, cheating and gambling*, in *Cardozo Arts & Entertainment Law Journal* 513, 2019, 513-514.

⁶⁰⁶ Belgian Gaming Commission, *Annual Report 2017*, 17.

⁶⁰⁷ DENOO, M., BIBERT, N. and ZAMAN, B. (n 578), 2.

⁶⁰⁸ Article 2, 5° Gaming and Betting Act.

⁶⁰⁹ MACEY, J. and HAMARI, J. *Esports, skins and lootboxes: Participants, practices and problematic behaviour associated with emergent forms of gambling*, in *20 New Media & Society*, 2019, 23 and 25.

out players betting on their own performance, aiming to eliminate match fixing.⁶¹⁰ When betting on Esports, either pre-match or live, there are different outcomes and occurrences to bet on: the winner of the match/tournament/map/round, 'first blood', first team to..., or handicap. These are uncertain events as required by the definition of betting under the Gaming and Betting Act.

APPROACH OF THE GAMING COMMISSION. Betting on the course or outcome of matches between professional players of video games is considered to be very similar to traditional betting. The Gaming Commission therefore regards this practice as a bet and, more specifically, as betting on events.⁶¹¹ The Gaming and Betting Act makes a distinction between three types of bets: (1) betting on sports, (2) betting on events and (3) betting on horse races.⁶¹² The Commission opted to treat Esports betting as **betting on events** because the International Olympic Committee does not recognise Esports as a sport,⁶¹³ nor does the Flemish Sport Council.⁶¹⁴ Another reason for this approach is that the Gaming Commission considers Esports betting to be more dangerous than sports betting, due to the popularity among minors and a higher risk for addiction. In 2016, the Gaming Commission granted its first licence to provide Esports betting and formally chose to treat Esports betting as betting on events, accompanied by the reservation that this approach could change in light of potential future developments.⁶¹⁵ Nevertheless, the approach was confirmed in 2017⁶¹⁶ and in 2020.⁶¹⁷

CONSEQUENCES OF THE QUALIFICATION AS BETTING ON EVENTS. Treating esports betting as betting under the Belgian law means that operators will need to obtain an F1 licence, and – considering that Esports betting predominantly takes place online – also an F1+ licence. Several Belgian betting websites provide for an Esports section nowadays, where it is possible to bet on professional leagues such as League of Legends, CS:GO, DOTA 2 and FIFA.⁶¹⁸ Furthermore, video-sharing platforms such as Twitch, Steam and YouTube are playing an increasingly important role in the Esports ecosystem: competitions are streamed via Esports channels and a significant amount of social media influencers dedicate their channels to playing and commenting on Esports.⁶¹⁹ The choice of the Gaming Commission to treat the phenomenon concerned as betting on events implies that bets can only be offered in betting offices

⁶¹⁰ GREER, N., ROCKLOFF, M., BROWNE, M. and HING, N., *Esports Betting and Skin Gambling: A Brief History*, in *128 Journal of Gambling Issues*, 2019, 133.; GROVE, C., *Understanding Skin Gambling*, Greo, 2016.

⁶¹¹ VAN DAMME, J., *Kansspelen en social gaming informatieve nota*, 2017, 20-21, available at https://ds1.static.rtb.be/uploader/pdf/d/d/b/rtbinfo_5c742f9b8996afe274e39ad9b4acb453.pdf.

⁶¹² Wetsvoorstel houdende diverse wijzigingen inzake kansspelen van 5 februari 2009, *Parl.St.* Senaat 2008-09, nr. 4-1162/1; HOEKX, N. e.a. (n 559), 5.2.

⁶¹³ See <<https://olympics.com/ioc/recognised-international-federations>>.

⁶¹⁴ Flemish Sports Council (Vlaamse Sportraad), *Advies inzake Esports en het Vlaams sportbeleid*, 20 December 2018, <https://publicaties.vlaanderen.be/view-file/30459>; Article 9, 1° Decreet van 10 juni 2016 houdende de erkenning en subsidiëring van de georganiseerde sportsector, which could, in order to be eligible for subsidies, require a sport to "involve a physical activity regulated by a sports federation with a cardiovascular training effect that a person performs in a healthy, environmentally sound, ethical and medically justifiable manner" [translation].

⁶¹⁵ Belgian Gaming Commission, *Annual Report 2016*, 20, https://gamingcommission.be/sites/default/files/2021-02/KSC-Jaarverslag-2016_NL.pdf.

⁶¹⁶ Belgian Gaming Commission, *Annual report 2017*, 17.

⁶¹⁷ Early 2021, two providers of games of chance and one player have resorted to the Council of State in order to request the annulment of the documents containing the approach of the Gambling Commission, based on Article 10, 11 (non-discrimination) and 23 (dignified living) of the Belgian Constitution. The decision is still pending.

⁶¹⁸ See e.g. UNIBET (<https://nl-sports.unibet.be/betting/sports/filter/esports/matches>) or Betway (<https://sports.betway.be/en/sports/cat/esports>).

⁶¹⁹ See e.g. Flemish Twitch streamer 'MojoOnPC', <https://www.twitch.tv/mojoonpc>. It is also possible to watch Esports competitions on location or via VOD television.

or online, not at newsagents (which is possible for sports betting) as they are considered to be more risky in light of gambling addiction.⁶²⁰

1.4 Enforcement

GAMING COMMISSION. Compliance with the Gaming and Betting Act is monitored by the Gaming Commission. The Commission was established by the Gaming and Betting Act of 1999, as part of the Federal Public Service Justice. The Commission performs its tasks independently and is chaired by a judicial officer.⁶²¹ In addition, the Commission consists of twelve permanent members and twelve alternate members, this includes two representatives – one Dutch-speaking and one French-speaking – from each of the six competent ministries (Ministry of Justice, Ministry of Finance, Ministry of Economic Affairs, Ministry of the Interior, Ministry of Public Health and Ministry responsible for the National Lottery).⁶²² For its daily tasks, the Commission is assisted by a secretariat which is divided into several cells according to their activities.⁶²³

TASKS. The tasks of the Gaming Commission are threefold:

- It provides **advice** to the government and parliament on matters relating to games of chance (e.g. supporting the drafting of royal decrees or amendments to the law);
- It **decides** on the granting or refusal of licences;
- It acts as a **supervisory body**: in the event of an infringement of the Gaming and Betting Act (and its implementing royal decrees), the Gaming Commission is able to impose administrative sanctions on the licensee, ranging from a warning, a suspension, or even revocation of the licence, to administrative fines.⁶²⁴ In 2020, a total of 59.958 euros in administrative fines were imposed. Fines that are not paid are transferred to the Federal Public Service Finance, which has the necessary resources at its disposal to collect the administrative fines. Certain offences could even be subject to criminal prosecution.⁶²⁵ When carrying out its duties, the Gaming Commission can cooperate with various services such as police services and the Cell for Financial Information Processing.⁶²⁶

ENFORCEMENT REGARDING WEBSITES. Over the past years, the Commission has been actively combating websites offering illegal games of chance and it keeps a ‘black list’ of these on its own website.⁶²⁷ Note that not only the offering, but also the playing of non-licensed games of chance is illegal.⁶²⁸ At present, however, the Commission still lacks the resources and manpower to efficiently and effectively monitor the online gaming sector.⁶²⁹ According to the minister of justice, there is a need to invest in a modern, digital and efficient Gambling Commission that is better equipped.⁶³⁰

⁶²⁰ Article 43/4, §5, 1° Gaming and Betting Act.

⁶²¹ Article 10, §§3 and 6 *Id.*

⁶²² Article 10 *Id.*

⁶²³ Article 9 *Id.*

⁶²⁴ Article 9 and Article 15/2 *Id.*

⁶²⁵ Article 15/3 *Id.*

⁶²⁶ Article 15 Gaming and Betting Act.

⁶²⁷ See <https://www.gamingcommission.be/nl/kansspelcommissie/illegale-kansspelen/lijt-illegale-goksites>.

⁶²⁸ Article 4, §2 Gaming and Betting Act.

⁶²⁹ VANDEPUTTE, B., *Therapeuten waarschuwen: "Gamende jongeren gokken steeds vaker"*, VRT, 2017, available at https://www.vrt.be/vrtnws/nl/2017/07/07/therapeuten_waarschuwengamendejongerengokkensteedsvaker-1-3018877/.

⁶³⁰ Verslag (Commissie voor Justitie) van advies inzake sectie 12 van het wetsvoorstel houdende de Algemene uitgavenbegroting voor het begrotingsjaar 2021, *Parl.St.* Kamer 2020-21, DOC 55 1578/012, 51-52,

APPEAL. It is not entirely clear where the Gaming Commission’s decisions can be appealed. On the one hand, the Gaming and Betting Act stipulates that appeal against administrative fines imposed by the Gaming Commission can be lodged with the court of first instance of the appellant’s domicile or registered office, within one month from the notification of the commission’s decision. Appeal against the decision of the court of first instance can only be brought with the court of cassation.⁶³¹ On the other hand, decisions of the Gaming Commission – e.g. on the granting, refusal or revocation of licences – or its informative notes are being appealed with the Council of State.⁶³²

2 The United Kingdom

INTRODUCTION. The national regulatory framework on gambling in the UK includes rules that are not immediately relevant to the topic of gambling(-like) elements in video games (e.g. specific rules on bingo or lotteries). Therefore, this subsection will solely focus on the relevant concepts for the regulation of gambling(-like) elements. The debate in the UK on lootboxes, social casino games and Esports is currently ongoing. The relevant publications by governmental and other bodies are all included in the discussion and their importance is explained.

2.1 The Law

HISTORY AND OVERVIEW. Before the adoption of the main legislative instrument on gambling – the Gambling Act of 2005 (hereinafter: the Gambling Act)⁶³³ – the rules on gambling were included in three other Acts, namely the Gaming and Lotteries Act of 1963, the Gaming Act of 1968 and the Lotteries and Amusement Act of 1976.⁶³⁴ The Gambling Act of 2005 was a result of a legislative review process which was partially inspired by the fear that children were increasingly becoming problem gamblers.⁶³⁵ This danger was highlighted in a report of the Home Office in 2000, which tried to understand the “*rather more complex world of gambling*”.⁶³⁶ It included recommendations to liberalise gambling (e.g. allow a wider range of gambling activities, more types playable in casinos) but at the same time it emphasised the importance of ensuring that the permitted forms of gambling were crime-free, that players would know what to expect and would not be exploited, and of protection for children and vulnerable persons.⁶³⁷ Concerning the latter, the report made recommendations “*that it believed would reduce children’s opportunities to gamble*”, and paid specific attention to online gambling and its dangers and the legal ability for children to play.⁶³⁸ The review process ultimately resulted in the adoption of the Gambling Act in 2005 and is interesting for two reasons. One, it is an illustration of legislative changes as a result of a changing gambling landscape, which is similarly happening at present with the digitisation of gambling and the integration of gambling and video gaming. Two, it

<https://www.dekamer.be/doc/flwb/pdf/55/1578/55k1578012.pdf#search=%221578/012%20%2055k%20%3Cin%3E%20key%20words%22>.

⁶³¹ Article 15/7 Gaming and Betting Act.

⁶³² See e.g. Belgian Gaming Commission, Annual Report 2020, https://gamingcommission.be/sites/default/files/2021-07/Jaarverslag-2020_Kansspelcommissie.pdf.

⁶³³ UK Gambling Act 2005, available at <<https://www.legislation.gov.uk/ukpga/2005/19/contents>>.

⁶³⁴ See UK House of Lords Committee on the Social and Economic Impact of the Gambling Industry, *Gambling Harm – Time for Action*, 2 July 2020, 16-17 (hereinafter: the House of Lords Report).

⁶³⁵ *Ibid.*, 19.

⁶³⁶ BUDD, A. et al, *Gambling Review Report (Her Majesty’s Stationery Office, London)*, 2001.

⁶³⁷ For example the report stated that ‘the most difficult general issue that we had to resolve concerns the familiar dilemma between the desire to permit free choice and the fear that such choice may lead to harm either to the individual or to society more widely.’

⁶³⁸ See BUDD, A. et al (n. 636).

shows that one of the main reasons for legislative change (in the UK) has been the insufficient protection for vulnerable persons, including children.⁶³⁹

SCOPE AND DEFINITIONS. For this report, several definitions of the Gambling Act are relevant. The Gambling Act applies to gambling, which it defines as “*gaming, betting, or participating in a lottery*”.⁶⁴⁰ Gambling can also happen remotely, with the definition of remote gambling being “*gambling by the use of remote communication*”, the latter referring to internet, TV, telephone, or any other kind of electronic or other technology for facilitating communication.⁶⁴¹

In the context of gambling in video games, the definitions of **gaming** and **betting** as forms of gambling are relevant. First, **gaming** is defined as “*playing a game of chance for a prize*”.⁶⁴² This definition includes several aspects:

Term	Definition
Game of chance (excludes sports)	(a) A game that involves both an element of chance and an element of skill, (b) a game that involves an element of chance that can be eliminated by superlative skill, and (c) a game that is presented as involving an element of chance. ⁶⁴³
A person plays a game of chance...	(c) whether or not there are other participants in the game, and (d) whether or not a computer generates images or data taken to represent the actions of other participants in the game. ⁶⁴⁴
A person plays a game of chance for a prize...	(a) if he plays a game of chance and thereby acquires a chance of winning a prize, and (b) whether or not he risks losing anything at the game. ⁶⁴⁵
Prize	(a) money or money’s worth, and (b) includes both a prize provided by a person organising gaming and winnings of money staked. ⁶⁴⁶

Table 4 - Terms used in the UK Gambling Act (1).

Thus, playing a game of chance for a prize needs to conform to all these aspects to fall under the definition of gaming and thereby under the definition of gambling.⁶⁴⁷

Second, next to the specific components of gaming as a form of gambling, there is also **betting**, which is defined as “*making or accepting a bet on (a) the outcome of a race, competition or other event or process; (b) the likelihood of anything occurring or not occurring; or (c) whether anything is or is not true.*”⁶⁴⁸ Note that this definition is very broad in scope, even more so because of the fact that if the

⁶³⁹ The Gambling Act is currently under review again. See UK Government’s Review of the Gambling Act 2005 Terms of Reference and Call for Evidence, available at <<https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>>.

⁶⁴⁰ Section 3 Gambling Act 2005.

⁶⁴¹ Section 4 Gambling Act 2005.

⁶⁴² Section 6(1) Gambling Act 2005.

⁶⁴³ Section 6(2) Gambling Act 2005.

⁶⁴⁴ Section 6(3) Gambling Act 2005.

⁶⁴⁵ Section 6(4) Gambling Act 2005.

⁶⁴⁶ Section 6(5) Gambling Act 2005.

⁶⁴⁷ Note that this is an example of how ‘gaming’ can be confusing in the gambling environment, because it does not refer to video gaming, but to gambling activities.

⁶⁴⁸ Section 9(1) Gambling Act 2005.

event, process or thing has already occurred or failed to occur, or that one party knows about this, this does not exclude it from the definition of betting.⁶⁴⁹ In the context of betting, a few other aspects are defined:

Term	Definition
Pool betting	If all or part of the winnings (a) shall be determined by reference to the aggregate of stakes paid or agreed to be paid by the persons betting, (b) shall be divided among the winners, or (c) shall or may be something other than money. ⁶⁵⁰
Betting intermediary	A person who provides a service designed to facilitate the making or acceptance of bets between others. ⁶⁵¹

Table 5 - Terms used in the UK Gambling Act (2).

Aside from these forms of gambling under the Gambling Act, there are some other definitions relevant in the context of this report. These are:

Term	Definition
Providing facilities for gambling	(a) inviting others to gamble in accordance with arrangements made by him, (b) providing, operating or administering arrangements for gambling by others, or (c) participating in the operation or administration of gambling by others. ⁶⁵²
Providing facilities for gambling in the context of remote communication	(a) making facilities for remote communication available for use, (b) adapting or presenting the facilities in such a way as to facilitate, or to draw attention to the possibility of, their use for gambling, and (c) the nature, adaptation or presentation of the facilities is such that (i) they cannot reasonably be expected to be used for purposes other than gambling, or (ii) they are intended to be used wholly or mainly for gambling. ⁶⁵³
Casino and casino games	For the purposes of this Act a casino is an arrangement whereby people are given an opportunity to participate in one or more casino games. In this Act “casino game” means a game of chance which is not equal chance gaming. ⁶⁵⁴ For the purposes of this section it is immaterial whether an arrangement is provided wholly or partly by means of remote communication. ⁶⁵⁵
Equal chance gaming	Gaming is equal chance gaming if (a) it does not involve playing or staking against a bank, and

⁶⁴⁹ Section 9(2) and (3) Gambling Act 2005.

⁶⁵⁰ Section 12(1) Gambling Act 2005.

⁶⁵¹ Section 13 Gambling Act 2005.

⁶⁵² Section 5(1) *juncto* Section 5(2)(c) Gambling Act 2005.

⁶⁵³ Section 5(3) Gambling Act 2005.

⁶⁵⁴ Section 7(1) and (2) Gambling Act 2005.

⁶⁵⁵ Section 7(4)(b) Gambling Act 2005.

	(b) the chances are equally favourable to all participants. ⁶⁵⁶
Child and young person	In this Act “child” means an individual who is less than 16 years old. In this Act “young person” means an individual who is not a child but who is less than 18 years old. ⁶⁵⁷

Table 6 - Terms used in the UK Gambling Act (3).

Note that a ‘child’ under the Gambling Act is not anyone under the age of 18. Persons between ages 16-18 are seen as ‘young persons’.

2.2 The licensing system

PROVIDING FACILITIES FOR GAMBLING. The definition of ‘providing facilities for gambling’ is central to the Gambling Act. In the UK, operating licences are one of the principal forms of authorisation for the lawful provision of gambling facilities.⁶⁵⁸ Thus, anyone not in the possession of a licence commits the offence of unlawful provision of gambling facilities, which is included in Section 33(2)(a).

LICENSING REGIME. Operating licences are issued by the UK Gambling Commission (‘the Commission’).⁶⁵⁹ The Gambling Commission is established by Section 20 of the Gambling Act of 2005 and is an independent, non-departmental public body sponsored and funded by the Department of Digital, Culture, Media and Sport (‘DCMS’) (see also *infra*). Licences are divided based on the operation or provision of facilities for different gambling activities, such as casinos, betting and betting intermediaries, gambling software, or lotteries.⁶⁶⁰ Important in the context of this report is that these licences can only be issued for either non-remote **or** remote facility provisions. As stated in the explanatory notes of the Gambling Act, it is not possible for one operating licence to combine authorisations for providing both remote and non-remote facilities for gambling; *“one person can hold both types of licence, but he will need to be granted each separately.”*⁶⁶¹ This approach is similar to Belgium’s approach, where additional licences were created for the online provision of different games of chance. With regard to the granting of licences, the default position as stated in the Gambling Act is that the Commission should permit gambling, in so far as it thinks it is reasonably consistent with the pursuit of the licensing objectives.⁶⁶² These licensing objectives are fundamental to the Gambling Act because they provide the criteria for granting licences and therefore also the lawfulness of gambling activities in the UK. The objectives are threefold and are mentioned at the very beginning of the Gambling Act:

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) **protecting children and other vulnerable persons** from being harmed or exploited by gambling.⁶⁶³

⁶⁵⁶ Section 8(1) Gambling Act 2005.

⁶⁵⁷ Section 45 Gambling Act 2005.

⁶⁵⁸ Explanatory notes to the Gambling Act 2005, para. 202.

⁶⁵⁹ Section 65(1) Gambling Act 2005.

⁶⁶⁰ There are 10 in total. See Section 65(2) Gambling Act 2005.

⁶⁶¹ Section 67 Gambling Act 2005 and explanatory notes paras. 211-212.

⁶⁶² Section 22(b) Gambling Act 2005.

⁶⁶³ Section 1 Gambling Act 2005.

It should be noted here that the third objective is the result of what was mentioned in the history of gambling legislation in the UK and shows the importance of child protection within the framework. In the 2016 *Greene King v. Gambling Commission* case, it was stated that the Commission enjoys a wide discretion when considering applications for licences and will do so in the light of the licensing objectives.⁶⁶⁴ Other functions of the Commission related to the licensing are that they can specify the conditions attached to such licences⁶⁶⁵, limit their duration⁶⁶⁶, assess compliance of operators with the Act or with the licence, assess offences committed against the Act⁶⁶⁷, and take regulatory action against licence holders⁶⁶⁸.⁶⁶⁹ For example regarding the conditions of licences, the Commission is required to both state the principles it will follow for licensing and regulation⁶⁷⁰ and to issue one or more codes of practice about the manner in which facilities for gambling are provided, the latter including the arrangements operators must make to protect children and vulnerable persons.⁶⁷¹ These requirements are materialised in the Commission's Licence Conditions and Codes of Practice (LCCP) and compliance with these codes is automatically part of the licence conditions.⁶⁷²

PROTECTION OF MINORS. AS one of the three licensing objectives, **the protection of children and young persons is central to the Gambling Act**. As such, different types of offences are included in Sections 46-59, for example inviting, causing or permitting a child or young person to gamble including sending information that advertises gambling or encourages them to gamble.⁶⁷³ Young persons commit an offence if they gamble or provide facilities for gambling, but a wide variety of exceptions is provided, including participating in lotteries, football pools, and private or non-commercial gaming.⁶⁷⁴ Thus, persons aged 16 and up can participate in these types of gambling activities and even organise them. These exceptions are also included in the Section 46 on the 'invitation to gamble' offence, which would mean in theory that for example a person can invite a *child* (in the UK anyone under the age of 16) to participate in lotteries or football pools. However, in the explanatory notes of the Gambling Act it is stated that the exception of lotteries and pool betting is only applicable to *young persons* (in the UK anyone aged 16-18) and the exceptions for *children* are limited to private and non-commercial betting or gaming machines with the lowest stakes and prizes.⁶⁷⁵ In any event, it should be noted that these gambling activities still need to be licensed before being operable and that therefore the Commission has the opportunity to evaluate them beforehand and attach conditions to the granting of their licences.

2.3 Specific rules on gambling(-like) elements in video games

GAM(BL)ING. The debate on gambling(-like) elements in video games in the UK has increased in intensity since 2017 and is ongoing at the time of writing. Several reports were issued by for instance the

⁶⁶⁴ Upper Tribunal Administrative Appeals Chamber, *Gambling Commission v Greene King Brewing and Retailing Ltd*, 29 January 2016, UKUT 50 GG/0281, para. 15.

⁶⁶⁵ Sections 75-79 Gambling Act 2005. The different types of licences can have specific conditions applicable to them. These are included in Sections 89-99.

⁶⁶⁶ Section 110 of the Gambling Act includes a principle infinite duration of licences.

⁶⁶⁷ E.g. Sections 33-36 and 41 Gambling Act 2005.

⁶⁶⁸ Sections 116-122 Gambling Act 2005.

⁶⁶⁹ See Sections 22-30 for an overview of the Gambling Commission's duties.

⁶⁷⁰ Section 23 Gambling Act 2005.

⁶⁷¹ Section 24 Gambling Act 2005.

⁶⁷² House of Lords Report 2020 (n 634), 59.

⁶⁷³ Section 46(1) and (3) Gambling Act 2005.

⁶⁷⁴ Section 48 Gambling Act 2005.

⁶⁷⁵ Explanatory notes to the Gambling Act 2005, para. 176. Of course, the general rule remains that gambling is not permitted for anyone under 18.

Gambling Commission, the DCMS Committee or the House of Lords and House of Commons.⁶⁷⁶ Currently, the UK government is reviewing the Gambling Act in general and has stated that a white paper will be published in the Spring of 2022.⁶⁷⁷ The key criticism that caused this review is that the Gambling Act is unable to regulate technological developments, because the rapid expansion of gambling in the digital environment was not present when it was drafted (e.g. gambling on mobile devices).⁶⁷⁸ The relevant reports and documents are all included in the discussion below and although they predominantly focus on lootboxes, there are multiple references to social casino games and Esports (betting) as well.

2.3.1 Lootboxes

CONCEPT. To fall under the definition of gambling, lootboxes need to be brought within the scope of the ‘gaming’ concept, which means playing a game of chance for a prize. The House of Lords defines a lootbox as “a virtual item which can be redeemed to receive a further randomised virtual item, such as a customisation option for a player’s character or additional weapons and armour.”⁶⁷⁹ Without elaborating on the definition as such, it has been argued that purchasing a lootbox to win a randomised (i.e. a game of chance) in-game item (i.e. a prize) resembles the notion of gaming as a form of gambling under the Gambling Act.⁶⁸⁰ However, the problem is the criterium of a ‘prize’, which is defined as ‘money or money’s worth’. As stated by the Gambling Commission in 2017, items obtained through lootboxes need to be **convertible into cash or be tradeable to attain real-world value** and thus become articles of money or money’s worth.⁶⁸¹ According to the UK Gambling Commission, this means that all lootboxes in video games where the obtained items can only be used in the game and cannot be further traded or cashed out, do not fall within the scope of the Gambling Act.⁶⁸² Since then, the concept of lootboxes has received increased (regulatory) attention.

GAMBLING(-LIKE) CHARACTER OF LOOTBOXES. In 2019 the UK DCMS Committee issued a report on immersive and addictive technologies where they recommended that lootboxes containing the element of chance should not be sold to children playing video games and should be considered games of chance under the Gambling Act.⁶⁸³ Their main argument – based on psychological and behavioural research⁶⁸⁴ – was that the definition of a prize is out-of-step with the digital economic strategies in the games industry and that **even without conversion into real currency** the items obtained through lootboxes can have **value** for players and influence their behaviour. Similar recommendations were given by the UK’s Children’s Commissioner in 2019, stating that a wider definition of gambling should be adopted to

⁶⁷⁶ For an overview throughout the years, see WOODHOUSE J. (UK House of Commons), *Lootboxes in video games*, 2021, 4.

⁶⁷⁷ See the policy paper on the review of the Gambling Act 2005, para. 20, available also at <<https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>>.

⁶⁷⁸ House of Lords Report 2020 (n 634), 22.

⁶⁷⁹ *Ibid.*, 110.

⁶⁸⁰ ARVIDSSON, C., *The Gambling Act 2005 and lootbox mechanics in video games*, in *29 Entertainment Law Review* 112, 2018, 112.

⁶⁸¹ Gambling Commission, *Virtual currencies, Esports and social casino gaming – position paper*, 2017, paras. 3.8 and 3.17-3.18.

⁶⁸² *Ibid.*, 18. ‘Where prizes are successfully restricted for use solely within the game, such in-game features would not be licensable gambling, notwithstanding the elements of expenditure and chance.’

⁶⁸³ House of Commons DCMS Committee, *Immersive and addictive technologies*, 2019, 29 and 35.

⁶⁸⁴ *Ibid.*, 30-31 and 113-114. They refer *inter alia* to the research done by DRUMMOND, SAUER, CAIRNS and ZENDLE, whose research is stated in chapter 1.

regulate lootboxes⁶⁸⁵ and by the Advisory Board for Safer Gambling, which points to evidence showing different correlations between lootboxes and problematic gambling behaviour.⁶⁸⁶ The provided arguments were based in part on the resemblance between lootbox features and features used in gambling activities⁶⁸⁷ (e.g. random rewards to keep users engaged, also used in slot machines) or dark game design patterns (e.g. misleading or manipulative commercial strategies) which create repetitive behaviours where the effects on the meaningful exercise of choice are unclear, or which incentivise in-game spending.⁶⁸⁸ This line of argumentation was accepted by the House of Lords, which argued in their impactful report of 2020 that “*if a product looks and feels like gambling, it should be regulated as gambling*”.⁶⁸⁹ Moreover, aside from recommending that lootboxes should be seen as games of chance,⁶⁹⁰ the House of Lords made an anticipatory recommendation that Ministers should be given the power to specify by regulations that *any activity which in their view has the characteristics of gambling* should be treated as gambling under the Gambling Act.⁶⁹¹ Finally, two other recommendations by the House of Lords are important: they state that the **minimum age** for *any* online gambling activity should be 18⁶⁹² and they recommend that a testing system for all new gambling activities needs to be developed, where the activity is tested against a series of harm indicators which include addictiveness and appeal to children.⁶⁹³

RESPONSES TO THESE DEVELOPMENTS. First, by the time the House of Lords Report of 2020 was issued, the UK Government had already responded to the criticisms on lootboxes within the aforementioned reports of the DCMS Committee and the Children’s Commissioner. The response came under the form of a call for evidence⁶⁹⁴ that would examine “*the size and variation of the market, the design of mechanisms, the context in terms of other types of in-game spending, the impact on consumers and particularly young people including links to problem gambling, and the effectiveness of the current statutory and voluntary regulation*”.⁶⁹⁵ Here, the House of Lords agreed, because regulation needs to be based on evidence⁶⁹⁶ and the correlations and associations provided for in the reports did not yet establish a causal link.⁶⁹⁷ Further, it is relevant to note that the House of Commons referred to a 2021 report by GambleAware that in their view consolidates the evidence for the structural and

⁶⁸⁵ Children’s Commissioner, *Gaming the system*, 2019, where it is stated that this definition does not reflect the way children spend and gamble online and that these items have immense value to children.

⁶⁸⁶ Advisory Board for Safer Gambling, *Lootboxes: Advice to the Gambling Commission from ABSG*, 2021, available at <<https://www.gamblingcommission.gov.uk/guidance/lootboxes-advice-to-the-gambling-commission-from-absbg>>.

⁶⁸⁷ See also e.g. Royal Society for Public Health, *Skins in the Game – A high-stakes relationship between gambling and young people’s health and wellbeing*, 2019, stating that 58% of children themselves see the buying of lootboxes as gambling.

⁶⁸⁸ The commercial practices and strategies are further discussed in Chapters 5 and 6. House of Commons DCMS Committee (n 683), 42-45.

⁶⁸⁹ House of Lords Report 2020 (n 634), 115.

⁶⁹⁰ Notably, the House of Lords does not say anything about changing the definition of a prize and the discussion on money or money’s worth, which is part of the definition of a game of chance.

⁶⁹¹ *Ibid.*, 116. This may not be welcomed by industry due to the ad hoc character, which makes planning development and monetisation strategies more difficult. See GREENWAY, J., *Lootboxes should be regulated as gambling (sometimes), says Lords report*, in *31 Entertainment Law Review* 276, 2020, 277.

⁶⁹² *Ibid.*, 121.

⁶⁹³ *Ibid.*, 50.

⁶⁹⁴ DCMS, *Lootboxes in Video games – Call for Evidence*, 2020, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920393/Loot_Box_C_all_for_Evidence_Document_.pdf>.

⁶⁹⁵ Secretary of State for DCMS, *Government Response to the DCMS Committee Report on Immersive and Addictive Technologies*, June 2020, 7.

⁶⁹⁶ House of Lords Report 2020 (n 634), 114.

⁶⁹⁷ This was also recognised in the 2021 Advise of the Advisory Board for Safer Gambling and by prominent researcher ZENDLE, who nevertheless argued that the lack of clear causal link does not mean that no action is necessary.

psychological similarities between gambling and gaming.⁶⁹⁸ This report restates the calls for gambling law to be extended to lootboxes, however also warns that rapid evolution within the video gaming environment could quickly make any legislation anachronistic.⁶⁹⁹ Second, the Gambling Commission itself remained more hesitant, stating that even though they are concerned about the blurring lines between gambling and video gaming and that some of the elements do look and feel like gambling, they are still not gambling under the law and changing that law is a matter for Parliament.⁷⁰⁰

CURRENT STATE OF LOOTBOXES. At the time of writing, it can thus be said that the UK is attentively awaiting further action on lootboxes (and on the Gambling Act in general). It was argued by ARVIDSSON that the law should not intervene if research shows that lootboxes offered in a closed loop fashion (i.e. when their items can only be used within the video game itself) are not harmful or exploitative.⁷⁰¹ The Department of DCMS – where the Secretary of State is able to make regulations setting out when an activity is to be treated as a game or game of chance⁷⁰² – has stated on 21 July 2021 that their response to the call for evidence will come in the following months⁷⁰³ and that a white paper would be published at the end of 2021 on the results of the Gambling Act Review.⁷⁰⁴ It will be interesting to see how they will respond to the recommendations by the House of Lords to amend Section 22(b) of the Gambling Act to provide that the Gambling Commission should not permit gambling unless it believes that doing so will be consistent with the licensing objectives.⁷⁰⁵ With regard to these objectives, the House of Lords has also recommended that a third aim of the Commission should be the identification and prevention of potential and actual harm.⁷⁰⁶ To end, here, the aforementioned case of *Greene King* is relevant, because the Commission having a wide discretion in considering applications for licences means that they may not always grant them for video games which offer lootboxes (on the condition that lootboxes are seen as gambling under the Gambling Act), due to the licensing objective of protecting children.⁷⁰⁷

2.3.2 Social casino games and Esports betting

SOCIAL CASINO GAMES. According to the Gambling Commission, social casino games are a sub-genre of social gaming which allow players to play casino style social games based on real money versions of the games (e.g. playing with cards or dice, or slot machines).⁷⁰⁸ The Gambling Commission stated in 2017 that there is not a persuasive case to pursue further regulatory intervention for social casino games, after having focused on risks such as excessive play or expenditure, transition to real money

⁶⁹⁸ House of Commons, *Lootboxes in video games*, 2021, 9. GambleAware is an independent, grant-making charity across the UK which commissions prevention and treatment services.

⁶⁹⁹ CLOSE, J. and LLOYD, J. (GambleAware), *Lifting the Lid on Loot-Boxes – Chance-based Purchases in Video games and the Convergence of Gaming and Gambling*, 2021, 4.

⁷⁰⁰ See statement by the Chair, Neil McArthur, available at <<https://committees.parliament.uk/oralevidence/98/html/>>.

⁷⁰¹ ARVIDSSON, C. (n 680), 114.

⁷⁰² Section 6(6) Gambling Act 2005.

⁷⁰³ Notably, the call for evidence received over 30,000 responses. See <<https://questions-statements.parliament.uk/written-statements/detail/2021-07-21/HW5224>>.

⁷⁰⁴ See <<https://questions-statements.parliament.uk/written-questions/detail/2021-07-19/35940>>. This paper has not yet been published. The call for evidence received over 30,000 responses.

⁷⁰⁵ House of Lords Report 2020 (n 634), 56. Note that this is the inverse of the current provision (stated *supra*), which states that the Commission will grant licences unless it believes them to be contrary to the licensing objectives.

⁷⁰⁶ *Id.* The other two aims included in Section 22(b) are to pursue and have regard to the licensing objectives and to permit gambling if they think it reasonably consistent with the licensing objectives (where they thus recommended to invert the latter).

⁷⁰⁷ ARVIDSSON, C. (n 680), 113. The author states that this would probably not be accepted for lootboxes enabling children to cash in. See Section 1(1)(c) Gambling Act 2005.

⁷⁰⁸ Gambling Commission, *Virtual currencies, eSports and social casino gaming – position paper*, 2017, 13.

gambling, or consumer protection risks.⁷⁰⁹ One of their main arguments was that data on social games suggests that 90-95% of players do not make in-game purchases and that the majority of those that do claimed that they had not gambled with real money.⁷¹⁰ They did however acknowledge that certain aspects of these games can be seen as gambling. Examples are winning additional items such as chips, spins or tokens where they can be converted into cash or be traded, or loyalty schemes where points (and therefore rewards) are received based on the more time spent playing the games if those points can be traded for goods/services which have a monetary value.⁷¹¹ The House of Lords report of 2020 adhered to this approach, confirming that some of the social games may include a game of chance for a prize and may use gambling mechanics such as cards or dice, but, if the prize is not money or money's worth, they are not gambling under UK legislation.⁷¹² However, the House of Lords also stated that even though no further regulation is necessary at this point, there is much less clarity on whether in some circumstances playing social games leads to, or causes, more harmful behaviours, and that therefore the Gambling Commission should continue to monitor social gaming.⁷¹³

ESPORTS BETTING. In the UK, the Gambling Commission has recognised that the most common concern expressed in relation to betting on Esports is its potential attraction to those underage, given the interest in Esports or video gaming for entertainment purposes.⁷¹⁴ Esports betting is particularly relevant for this report when gambling(-like) elements are part of the betting process (e.g. virtual currencies, lootboxes or skins).⁷¹⁵ The House of Lords report of 2020 stated that players can now buy and sell skins for real money, as well as use them as a virtual currency to gamble on other activities such as Esports.⁷¹⁶ This practice known as skin betting (i.e. the use of virtual items acquired in a game as a method of payment for a stake in external, oftentimes unlicensed gambling)⁷¹⁷ is considered gambling and is regulated by the Gambling Act.⁷¹⁸ The Commission furthermore stated that participation in Esports *as such* for a prize will only be classified as playing a game of chance for a prize if the video game is decided by chance instead of by skill, which is seldom the case, as the majority of the underlying games used for Esports are inherently skill games.⁷¹⁹ However, the Commission still believes that it is important for game developers and/or Esports event organisers to assess the element of chance within each game prior to permitting its use for a prize to avoid this classification as gambling under the Gambling Act.⁷²⁰

2.4 Enforcement

GAMBLING COMMISSION. Aside from the functions and duties already mentioned (e.g. the granting of licences and their conditions), the Gambling Commission is also competent to investigate whether offences have been committed under the Gambling Act and can consequently institute criminal

⁷⁰⁹ *Id.*

⁷¹⁰ *Ibid.*, 14.

⁷¹¹ *Ibid.*, 15.

⁷¹² House of Lords Report 2020 (n 634), 111.

⁷¹³ *Ibid.*, 44, 112. It could however be argued that, similar to what the DCMS Committee stated on lootboxes, in absence of scientific evidence the precautionary principle can be applied to social casino games.

⁷¹⁴ Gambling Commission, *Virtual currencies, eSports and social casino gaming – position paper*, 2017, 3.

⁷¹⁵ See MACEY, J. and HAMARI, J., *eSports, skins and lootboxes: Participants, practices and problematic behaviour associated with emergent forms of gambling*, in *21 News, Media & Society* 20, 2018.

⁷¹⁶ House of Lords Report 2020 (n 634), 110.

⁷¹⁷ House of Commons DCMS Committee, *Immersive and addictive technologies*, 2019, 34.

⁷¹⁸ House of Lords Report 2020 (n 634), 110.

⁷¹⁹ Gambling Commission, *Virtual currencies, eSports and social casino gaming – position paper*, 2017, 9.

⁷²⁰ *Ibid.*, 10. This is because if the game is inherently chance-based, it will be classified as gambling because it is a game of chance played for a prize.

proceedings.⁷²¹ Another duty of the Commission is to advise the Secretary of State on all things regarding gambling, such as its regulation, its effects, or the incidence of gambling.⁷²² Furthermore, under its discretionary powers regarding licences, the Commission can review how operators use their licences (e.g. when activities are carried on in violation of the licence),⁷²³ can revoke or suspend a licence, and can impose penalties and request information from licensees.⁷²⁴ Note that these penalties depend on the type of violation and gambling activity. For example, the penalty for adults when inviting children to gamble is imprisonment for maximum 51 weeks, a fine, or both⁷²⁵, whereas the financial penalty for breaching a condition of the licence is highly circumstantial and based on the seriousness of the breach, the knowledge of the licensee and the nature of the licence.⁷²⁶ Examples of financial penalties⁷²⁷ are the 2019 Ladbroke settlement for 5.9 million pounds⁷²⁸, the 2020 Caesars Entertainment 13 million pounds settlement⁷²⁹, or the more recent 9.4 million pounds combined fine for Casumo and InTouch in 2021.⁷³⁰

3 The Netherlands

INTRODUCTION. The third national framework included in the discussion is that of the Netherlands. Two main legislative instruments will be analysed, namely the 1964 Gaming and Betting Act⁷³¹ and the 2021 Decree on remote gambling.⁷³² Perhaps surprisingly - although it was a long time in the making - the remote gambling Decree only took full effect from 1 October 2021. The remote gambling Decree had entered into force on 1 April 2021, however the legal possibility to provide online gambling activities was only started in October 2021 with the entry into force of a Decision on provisions regarding the remote gambling Decree.⁷³³ In addition to these legislative instruments, reports and other publications by governmental and other bodies are included in the discussion.

3.1 The Law

OVERVIEW. Before the adoption of the remote gambling Decree, the Gaming and Betting Act was only applicable to physical facilities that provide gambling activities. Since October 2021 however, the remote gambling Decree has expanded its scope to include the remote version of some of these gambling activities that are *“provided through electronic communications and where participation*

⁷²¹ Section 28(1) Gambling Act 2005.

⁷²² Section 26 Gambling Act 2005.

⁷²³ Section 116(1) and (2) Gambling Act 2005.

⁷²⁴ Sections 117(1), 118-122 Gambling Act 2005.

⁷²⁵ Section 62(1) Gambling Act 2005.

⁷²⁶ Section 121(7) Gambling Act 2005; see also the Gambling Commission’s Statement of principles for determining financial penalties, published in 2017 and updated in 2021, available at <<https://www.gamblingcommission.gov.uk/print/statement-of-principles-for-determining-financial-penalties>>.

⁷²⁷ For a full overview, see <<https://www.gamblingcommission.gov.uk/public-register/regulatory-actions/full>>.

⁷²⁸ See <<https://www.gamblingcommission.gov.uk/public-register/regulatory-action/detail/108>>.

⁷²⁹ See <<https://www.gamblingcommission.gov.uk/public-register/public-statement/detail/caesars-entertainment-uk-limited-public-statement>>.

⁷³⁰ See for Casumo <<https://www.gamblingcommission.gov.uk/news/article/regulatory-action-against-casumo>> and for InTouch <<https://www.gamblingcommission.gov.uk/public-register/business/detail/actions/2091>>.

⁷³¹ Act of 10 December 1964 on provisions regarding gambling (‘Wet van 10 december 1964 houdende nadere regelen met betrekking tot kansspelen’).

⁷³² Wet van 20 februari 2019 tot wijziging van de Wet op de kansspelen, de Wet op de kansspelbelasting en enkele andere wetten in verband met het organiseren van kansspelen op afstand.

⁷³³ Besluit van 26 januari 2021 houdende bepalingen ter uitvoering van de Wet op kansspelen op afstand. The Dutch Gaming and Betting Act was amended by the Decree on remote gambling and this Decree was further specified in the Decision of 26 January 2021 which entered into force 1 October 2021. At the time of writing this report, there are only ten legal gambling websites in the Netherlands, available at <<https://legalewedenschappen.nl/legale-goksites-in-nederland/>>.

occurs without physical contact between the user and the provider of the gambling activities facilities".⁷³⁴ First, the relevant provisions of the Gaming and Betting Act are presented and discussed and second, the relevance of the remote gambling Decree within this framework is assessed.

GAMING AND BETTING ACT. The following provisions are relevant in the context of this report:

Article	Provisions
Article 1(1): it is prohibited, without a licence, to...	<p>(a) Provide facilities to compete for a prize in which the winner is decided by any form of chance over the result of which participants generally do not have substantive control</p> <p>(b) Use facilities meant under (a) knowing that they are not licensed.</p> <p>(c) Create the impression on purpose that facilities meant under (a) are licensed or that no conditions have to be conformed with under the granted licence.</p>
Article 4(a)(1)	Licensees shall take measures and provisions required to prevent as much as possible the addiction to gambling activities they organise.
Article 15	<p>(1) Organising sports bets can only be licenced under the provisions of this title.</p> <p>(2) Sports bets include bets by participants aimed at guessing or predicting the results of sports matches that are announced in advance, excluding horse races.</p>
Article 31	<p>(1) Remote gambling means: facilities under Article 1(1)(a) at a distance through electronic communication methods and where participation happens without physical contact between the user and the provider of the gambling activities</p> <p>(2) For the organisation of remote gambling (...) licences can only be granted as provided for in this title.</p>

Table 7 - Relevant provisions from the Netherlands' Gaming and Betting Act.

Comparing the definitions in the Dutch Act to the approach taken in Belgium and the UK, several remarks can be made. First, unlike the definition of Belgium or the UK, the **definition of a game of chance** under Article 1(1)(a) does not include the criterium of a stake, it only mentions a 'prize' and an 'element of chance' implied in a game.⁷³⁵ Second and related, this definition includes in practice **any form of game in which you cannot determine the outcome by exercising skills**, for example games where players have some influence over the result due to their skill (e.g. poker).⁷³⁶ In this regard, the Dutch High Council has expressed itself on the interpretation of games of chance, stating that an activity is a game of chance when in general the prize-elements depends on chance⁷³⁷ and later also that the results achieved by the vast majority of the players are important for the classification as a game of chance.⁷³⁸ For example, if the majority of the players achieves their results (i.e. winning or

⁷³⁴ Article 31(1) Gaming and Betting Act. Note that remote lotteries are not possible.

⁷³⁵ See also DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 12.

⁷³⁶ SANDERS, T., *Understanding the Dutch 'lootbox' judgment: are all lootboxes now illegal in the Netherlands?*, 2020, available at <<https://www.akd.eu/insights/understanding-the-dutch-lootbox-judgment-are-all-lootboxes-now-illegal-in-the-netherlands->>.

⁷³⁷ High Council, *Saturne judgement*, 21 December 1965, NJ 1966, at 364.

⁷³⁸ This refers to the 'skill' element of a game. High Council, *Golden-Ten judgement*, 25 June 1991, NJ 1991, 808, para. 3.1 and High Council, *Golden-Ten judgement*, 25 June 1991, NJ 1991, 34, para. 5.1.

losing) through skill (i.e. through competences of the players themselves) instead of through chance (i.e. it does not matter how good you are at the video game), the video game will have a lower potential to be classified as a game of chance. These interpretations are relevant when discussing lootboxes under Dutch gambling regulation (*infra*). Third, the **legal age is set at 18** for all gambling activities, which differs from the legal ages in both Belgium (where casinos are 21+) and the UK (where there is a difference in -16 and 16-18).⁷³⁹ These different gambling activities are regulated under separate titles of the Gaming and Betting Act, for example lottery facilities, casinos or gambling machines.⁷⁴⁰ Fourth, with the amendments of the Decree on remote gambling, the Gaming and Betting Act now also includes a number of provisions which could also be relevant in the context of gambling(-like) elements in video games. One example is Article 31(k), where the legal age for registration to remote gambling services is set at 18 and where it is stated that licensees cannot offer remote gambling to persons not registered.⁷⁴¹ The same Article also provides that licensees shall not allow registration by persons about whom it can be reasonably believed that they will harm themselves or their relatives by unlawfully participating in gambling activities or because of gambling addiction.⁷⁴² These requirements hint at the importance of **age-verification of online players** and the related discussion, which was already mentioned in chapter 2 and which is also part of the discussion in the next chapters. Fifth and finally, it is an important and unique aspect of the Gaming and Betting Act that Article 4(a) actively requires licensees to prevent gambling addiction as much as possible. This **objective of addiction prevention** was also highlighted in the preparatory works and the explanatory memorandum of the Gaming and Betting Act, where it is stated that *“the goal of addiction prevention is to prevent that participants of gambling services, in particular vulnerable groups such as children, are negatively affected by these gambling services”*.⁷⁴³

DECREE ON REMOTE GAMBLING. The Decree on Remote Gambling lays down the provisions for the implementation of the Act on Remote Gambling. First, the Decree allows remote gambling licences for casino games and bets on sports and horse races, but not for lotteries.⁷⁴⁴ Second, it allows for an exception to the seat requirements in Article 31(g) for third country-based providers, if (1) the Gambling Authority deems it necessary for the organisation of gambling activities by a licensee and (2) when the applicable laws are similar to those in the Netherlands.⁷⁴⁵ Third, the Decree includes provisions complementary to those under the Gaming and Betting Act. For example, Article 4.1 states that experts will be appointed in the context of the prevention of gambling addiction, to inform players about the company’s addiction prevention policy and to report to the Gambling Commission.⁷⁴⁶ Article 4.3 prohibits the outsourcing of activities regarding the licenced gambling activities to third parties (unless they comply with necessary regulations and can guarantee sufficient supervision). Further,

⁷³⁹ See Articles 14(d) and 27(e)(1) for lotteries; Article 27(j) for casino; Article 20(d) for sports betting; or Article 30(g) for gambling machines (*‘Kansspelautomaten’*).

⁷⁴⁰ Articles 27a-27f, Articles 27g-27z and Articles 30-30aa respectively.

⁷⁴¹ Article 31(k)(1) and (2)(a) Gaming and Betting Act. This registration process includes the verification of users’ ages to prevent minors from gambling.

⁷⁴² Article 31(k)(3) Gaming and Betting Act.

⁷⁴³ Preparatory works (*‘Kamerstukken II 2015/16’*), 33996, no. 3, p. 3. This objective is one of three objectives of the Dutch gambling framework, the others being consumer protection and the detection of fraud and crime.

⁷⁴⁴ Article 2.1 Decree remote gambling.

⁷⁴⁵ *Ibid.*, Article 3.1(1) and (2).

⁷⁴⁶ In this regard, the preparatory works mentioned the question why this analysis of risk of addiction of games of chance is not performed by external independent instances instead of by the providers themselves. The response was limited to stating that the licensee has to assure the analysis is done ‘sufficiently independently’ and separate the duties of management and analysis to ensure this, as well as stating that the analysis has to be based on scientifically relevant risk-factors and methods. See Preparatory works (*‘Kamerstukken II’*) 2019/20, 33996, no. 77, 12.

Articles 4.7-4.8 concern betting and related integrity risks such as match-fixing or insider knowledge abuse and state that these risks need to be identified, analysed and evaluated. Fourth, the Decree includes a whole range of conditions for the registration of users on remote gambling services. It is stated that before a person can be registered, the licensee has to check a register with general information (e.g. name, date of birth) and verify the person's age (which has to happen every time a person logs in)⁷⁴⁷ and his legal capacity.⁷⁴⁸ One notable provision here is that the person needs to define the limits to his gambling behaviour before being able to register.⁷⁴⁹ In the preparatory works it was clarified that these limits are not to be exceeded and that the licensee has to periodically remind the user of these limits (e.g. through pop-ups).⁷⁵⁰ Fifth and last, the Decree includes more specific provisions on the objective of consumer protection in the gambling regulation framework (which is also unique), by for example stating information requirements regarding the terms and conditions, the licence or general information about the company, or the provision of a transparent and easily accessible complaint mechanism for customers.⁷⁵¹

3.2 The licencing system

The Dutch licensing system is integrated within the law, both for traditional gambling and remote gambling. More specifically, the Gaming and Betting Act is divided into several titles which relate to different types of gambling activities and where each title has specific provisions regarding the obtainment of licences and the related requirements. For example, title IV.b concerns casino-type games and Articles 27h, 27i and 27k provide the information concerning licences: they are issued by the board of directors, who can also state requirements before issuing the licences, and revoke the licences if these requirements are violated. Other examples are the category of sport bets, where similar provisions are included in Article 20-22, and the category of slot machines, where a wide range of different slot machines are stated together with the licensing requirements in Articles 30-30l.⁷⁵² In the context of this report, it is worth noting that Article 31a states that it is the board of directors who issues licences for organising remote gambling activities, and subsequent articles state the requirements for such a licence, as well as its revocation in case of violation of these requirements.⁷⁵³ Examples of these requirements concern the trustworthiness of the licensee, transparency and supervision, the adoption of additional measures by the licensee regarding e.g. consumer protection, or administrative provisions stating that the company has to be managed by people with required expertise. As a final remark, the board of directors mentioned throughout the provisions of the Gaming and Betting Act is at the head of the Dutch Gambling Authority.⁷⁵⁴ This licencing competence is hence similar to the systems in Belgium and the UK.

3.3 Specific rules on gambling(-like) elements in video games

3.3.1 Lootboxes

ECONOMIC VALUE OF IN-GAME ITEMS. The Dutch Gambling Authority conducted a study on lootboxes in 2018 and concluded that some of the examined video games offered lootboxes in violation of the

⁷⁴⁷ *Ibid.*, Article 4.18.

⁷⁴⁸ *Ibid.*, Articles 4.11, 4.12, 4.15 and 4.16.

⁷⁴⁹ *Ibid.*, Article 4.14.

⁷⁵⁰ Preparatory works ('Kamerstukken II') 2019/20, 33996, no. 77, 9.

⁷⁵¹ *Ibid.*, Articles 4.34-4.39.

⁷⁵² Note that for slot machines, licences are issued by the mayor of the municipality.

⁷⁵³ Articles 31c-31j Gaming and Betting Act.

⁷⁵⁴ Article 33a Gaming and Betting Act.

Gaming and Betting Act.⁷⁵⁵ First it was recognised that lootboxes are games of chance where the player has no influence over the result.⁷⁵⁶ However, similar to the approach in the UK, only lootboxes where players receive in-game items that are tradeable/transferable outside of the game are prohibited, because in these situations they acquire an **economic value**, which is necessary to bring them under the scope of the ‘prize’ criterium of Article 1(1)(a).⁷⁵⁷ No additional clarification on what constitutes a ‘prize’ is offered in the report, other than the statement that conversations were had with other European supervisors where similar approaches are used.⁷⁵⁸ The Dutch government stated that lootboxes are independent games of chance offered within a video game and cannot be offered in a video game when the prizes have an economic value.⁷⁵⁹ Nevertheless, even though not all lootboxes fall within the scope of the Gaming and Betting Act based on this approach, the Gambling Authority still expressed itself on the risk-potential of lootboxes in light of the objective of Dutch regulation to prevent addiction to gambling.

THE RISK-POTENTIAL OF LOOTBOXES. The study by the Gambling Authority looked at the **risk-potential of addiction** or other problematic gambling risks related to lootboxes. To summarise, the Authority stated that even if lootboxes do not always fall under Article 1(1)(a) of the Gaming and Betting Act, they can still be contrary to the important objective of addiction prevention under Dutch gambling regulation.⁷⁶⁰ More specifically, the lootbox mechanism offers a low threshold for participation.⁷⁶¹ As game publishers often do not adopt protective measures, there are no barriers to engage in lootbox activities.⁷⁶² The Gambling Authority stated that children may be incentivised to participate in other gambling activities through engagement with lootboxes⁷⁶³ and that the risk-potential factors – including unlimited opening potential, near-miss effect, stimulating visual and sound effects, or diversity of offers – caused lootboxes to have a medium or high addiction potential⁷⁶⁴, thereby potentially threatening to violate the objective of addiction prevention under the Gaming and Betting Act.⁷⁶⁵ More generally regarding this risk-potential, it is useful to note the *Carmen Media Group* case of the CJEU (see also *supra* on the role of the EU), where three risk-increasing factors were highlighted: (1) there is no direct contact between the consumer and the game provider; (2) there is easy and permanent access to games of chance through digital means; and (3) the environment is characterised by isolation of players, anonymity and absence of social control.⁷⁶⁶ Even though this case does not

⁷⁵⁵ Gambling Authority (*‘Kansspelautoriteit’*), *Research report on lootboxes*, 2018. The study involved 10 video games, of which 4 were seen as including lootboxes in violation with the Gaming and Betting Act.

⁷⁵⁶ *Ibid.*, 4.

⁷⁵⁷ *Ibid.*, 14. See also DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 9.

⁷⁵⁸ *Ibid.*, 15. It is therefore relevant to refer back to what was written about the ‘prize’ criterium under UK law, as the Netherlands has adopted the same reasoning.

⁷⁵⁹ Preparatory works (*‘Kamerstukken’*) 2017/18, 33996, G, 71-72.

⁷⁶⁰ Gambling Authority (*‘Kansspelautoriteit’*), *Research report on lootboxes*, 2018, 15.

⁷⁶¹ *Ibid.*, 9-10.

⁷⁶² *Ibid.*, 11. E.g. the report noted that only two games were rated as accessible for 18+ only.

⁷⁶³ Gambling Authority (*‘Kansspelautoriteit’*), *Research report on lootboxes*, 2018, 4 and 6. A similar argument used was that the effects of participation in games of chance may not be directly visible for children, but that through early exposure there is a higher chance that this will negatively affect them later on.

⁷⁶⁴ *Ibid.*, 8; DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 32; see also Parliamentary papers (*‘Kamerstukken II’*) 2015/16, 34471, no. 3, 2. This is referred to as short-odd opening, where addiction is more likely if the time between buying and opening the lootbox is shorter, which in combination with the other factors is seen as dangerous.

⁷⁶⁵ Gambling Authority (*‘Kansspelautoriteit’*), *Research report on lootboxes*, 2018, 14-15. It has to be noted however that although this argument can be made in theory, in practice it would be confusing to accept that lootboxes that are not qualified as gambling can still violate one of the gambling regulation objectives.

⁷⁶⁶ CJEU, *Carmen Media Group v. Land Schleswig-Holstein*, C-46/08, 8 September 2010, paras. 102-103.

directly concern gambling in video games, a similar environment is present in video games which include gambling(-like) elements should these elements be classified as gambling. The CJEU stated that risk-potential factors are particularly relevant for vulnerable groups such as children, due to their “propensity for gambling or likely development of such propensity”.⁷⁶⁷

‘FIFA’ CASE AND CURRENT STATE REGARDING LOOTBOXES. Based on the foregoing, even though the dangers related to lootboxes are recognised, most of the lootboxes in video games will only be seen as gambling under Dutch gambling law if their contents have economic value outside the game. This was illustrated by the recent case of *EA vs. the Gambling Authority* concerning the popular soccer game ‘FIFA’ where player packs can be bought which operate similarly to lootboxes and where obtained players can be traded on internal or external markets for virtual coins.⁷⁶⁸ It was stated by the District Court of The Hague that the element of chance requires that the result is decided by chance, not skill, and that the element ‘prize’ requires that the virtual items have real money value based on their tradeability outside the game.⁷⁶⁹ This is the case for FIFA player packs, which causes them to be seen as games of chance under the Gaming and Betting Act.⁷⁷⁰ However, another reasoning of the District Court is also relevant. The Gambling Authority had imposed a 250,000 euros penalty payment to EA for each week the player packs were not removed for Dutch consumers, due to the violation of the objective of the law to prevent gambling addiction.⁷⁷¹ Because EA disputed this, the court looked into the concept of gambling addiction and held that a lack of a clear causal link between (purchasing) lootboxes and gambling problems does not take away the fact that the risk of gambling addiction is still plausible, particularly for children.⁷⁷² As such, the court adhered to the risk-potential assessment done by the Gambling Authority in its 2018 report as well as to scientific reports on the risks of lootboxes regarding problem gambling.⁷⁷³ Moreover, the court stated that the burden of proof lies on the provider of the gambling activity, who has to prove that there is no such risk; EA had not proven this, causing the penalty payment to be justified.⁷⁷⁴ Very recently however, on the 9th of March 2022 the Appeals Court – the Council of State – has issued its final judgment.⁷⁷⁵ In the judgment, the main focus was on the player packs as an independent game within the FIFA Ultimate Team (FUT) game-mode, which the court ultimately decided was not the case (which is contrary to what the preparatory works mentioned, see *supra*). More specifically, the court said that the packs are part of a broader skill game (the FUT-mode) and only add an element of chance.⁷⁷⁶ Therefore, there was no evaluation of the packs under the Dutch gambling regulation and the judgment of the District Court of the Hague was annulled. In the meantime, the Gambling Authority has stated on its website that it will analyse the impact of this judgment on its lootbox policy,⁷⁷⁷ but has included in its 2021 Market vision report that “*the basic principle should be that games should never expose minors, young adults or other vulnerable groups to*

⁷⁶⁷ *Ibid.*, 103.

⁷⁶⁸ The Hague District Court, *EA v. Gambling Authority*, Case No. AWB-20_3038, 10 October 2020, ECLI:NL:RBDHA:2020:10428, para. 2.

⁷⁶⁹ *Ibid.*, paras. 7.6-7.7.

⁷⁷⁰ *Ibid.*, para. 10.

⁷⁷¹ *Ibid.*, para. 2.

⁷⁷² *Ibid.*, para. 9.5.

⁷⁷³ The court refers to the research by GAINSBURY specifically, however other research is available, as already stated in the discussion of the UK framework and in chapter 1.

⁷⁷⁴ *Ibid.*, para. 9.7.

⁷⁷⁵ Council of State [*Raad van State*], *EA vs. Gambling Authority*, Case No. 202005769/1/A3, 9 March 2022, ECLI:NL:RVS:2022:690.

⁷⁷⁶ Council of State [*Raad van State*], *EA vs. Gambling Authority*, Case No. 202005769/1/A3, 9 March 2022, ECLI:NL:RVS:2022:690, para. 8.1.

⁷⁷⁷ See <<https://kansspelautoriteit.nl/aanpak-misstanden/aanpak-loot-boxes/>>.

loot boxes or other potentially addictive elements of gambling.”⁷⁷⁸ It will be interesting to see whether criticisms will be formulated to the judgment of the Council of State and how the lootbox debate in the Netherlands will evolve.

3.3.2 Social casino games and Esports betting

SOCIAL CASINO GAMES. Social casino games are a specific type of social games where free versions of games of chance are offered through social media, mobile apps or other specific websites.⁷⁷⁹ Because no ‘prizes’ can be won, they do not fall under the definition of gambling under Dutch gambling law.⁷⁸⁰ A 2018 report by DE BRUIN (commissioned by the Gambling Authority) states that although research shows that around half of youngsters aged 13-24 playing social casino games have made the transition to real gambling, only 1% of social casino game players are youngsters.⁷⁸¹ Similarly, references are made to research by *inter alia* the International Social Games Association, showing that 99.4% of players of social casino games are 18+ and that only 0.01% of players under the age of 18 spends money on these games.⁷⁸² Although not directly stated, these statistics could mean that the report sees no further need to regulate social casino games without further research. However, the report also states that mixing up casual games with casino games still blurs the lines between video gaming and gambling, that social casino games are types of simulated gambling, and that in any case the wagering of virtual items in bets or games of chance is illegal and undesirable.⁷⁸³ Furthermore, there are the general risks of addiction and normalisation of gambling behaviour when playing social casino games, as it is not always clear when a game transitions into a game of chance to win prizes and also as these games oftentimes offer the possibility to purchase virtual currency with real money.⁷⁸⁴ Here, concerns similar to those stated in the lootbox discussion exist regarding early exposure to gambling activities, which could lead to higher risks for problem gambling in later stages of life.⁷⁸⁵ In any event, these examples confirm the statement that there is no clarity on the situation of social casino games in the Netherlands and that therefore, further research is needed on its addiction-risk and other potential (negative) effects.⁷⁸⁶

⁷⁷⁸ Gambling Authority, *Market vision gambling activities – Market organisation and supervision in the public interest*, 2021, 15. At the same time, it is stated on page 126 that lootboxes are only games of chance when the virtual prizes are tradeable

⁷⁷⁹ DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 7 and 16; Gambling Authority, *Market vision gambling activities – Market organisation and supervision in the public interest*, 2020, 10.

⁷⁸⁰ *Id.* Notable, the Gambling Authority bases this decision on the fact that only longer access to playing the game can be won in social casino games (through virtual currency), which is in contrast with what we have seen under UK regulation where this is sometimes also seen as a prize.

⁷⁸¹ DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 5 and 11.

⁷⁸² *Ibid.*, 24; see KOWERT, R. and QUIN, S., *ISGA Player demographics report*, 2017. However, it is recognised that this could be an understatement of reality due to the limitations of this research, e.g. because the ISGA research is based on analysis of their registered accounts, which are not age-verified.

⁷⁸³ DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 6 and 31.

⁷⁸⁴ *Ibid.*, 11, 17 and 32.

⁷⁸⁵ See e.g. KING, D., et al., *Adolescent simulated gambling via digital and social media: An emerging problem*, in *31 Computers in Human Behaviour*, 2013 or GAINSBURY, S. et al., *An exploratory study of interrelationships between social casino gaming, gambling and problem gambling*, in *13 Int'l Journal of Mental Health and Addiction* 136, 2015.

⁷⁸⁶ DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 6.

ESPORTS BETTING. Even after the adoption of the Decree on remote gambling, Esports betting is not allowed in the Netherlands, which is different from the approach in Belgium and the UK.⁷⁸⁷ Esports are not seen as ‘sports’ and therefore do not fall under the limited scope of licensable remote betting activities in Article 2.1 of the Decree.⁷⁸⁸ Nevertheless, the Gambling Authority has recognised the gambling(-like) character of different aspects of Esports. Aside from the prohibited betting on Esports, two examples are given by the Gambling Authority in its Market Vision report of 2020. The first situation is where virtual items obtainable in video games played in Esports are tradable in-game and outside the game and can also be wagered on illegal gambling websites (e.g. skin betting).⁷⁸⁹ Second is the use of lootboxes within Esports games, where virtual items are obtained through lootboxes. Whereas skin betting is deemed illegal by the Gambling Authority, for lootboxes it depends on external tradeability of obtained items, as discussed above.⁷⁹⁰

3.4 Enforcement

GAMBLING AUTHORITY. In the Netherlands, the Gambling Authority is responsible for the granting of licences. More specifically the board of directors, which is at the head of the Authority, has the task to grant, change and revoke licences for the different gambling activities and to combat the offering of illegal gambling services.⁷⁹¹ Other tasks are to promote the prevention of addiction to gambling, to give information and education on gambling and its risks, and to supervise the compliance with the law and licences and enforce the law where this does not happen (see also *infra*).⁷⁹² Similarly, it is the Gambling Authority that grants the licences for remote gambling activities and includes additional requirements to those licences⁷⁹³, or revokes them if the information given by the provider is incomplete, false, or if in general there are serious suspicions that there is a cause to revoke the licence.⁷⁹⁴ Finally, the Authority evaluates the credibility of licensees based on their intentions, actions and antecedents.⁷⁹⁵

SUPERVISION. Article 34 of the Gaming and Betting Act states that the Gambling Authority is responsible to delegate supervisory duties to public servants and other persons. Since October 2021, these persons have a wider variety of tools at their disposal than before. For example, they can now anonymously participate in gambling activities to gain information about illegal activities by licensees⁷⁹⁶ and are also able to seal company spaces, enter residences without permission and confiscate items (including software used in games of chance to calculate processes or results⁷⁹⁷) to the extent that they are

⁷⁸⁷ Gambling Authority, *Market vision gambling activities – Market organisation and supervision in the public interest*, 2020, 14.

⁷⁸⁸ *Id.* They are not seen as betting on sports because there is no federation with ensures the integrity (cfr. the risks mentioned *supra* on match-fixing or insider knowledge); see also DE BRUIN, D.E., *Gamers and gamblers – Literature study on the risks and harms of gambling in the light of gaming*, 2018, 10, 19 and 26.

⁷⁸⁹ Gambling Authority, *Market vision gambling activities – Market organisation and supervision in the public interest*, 2020, 111.

⁷⁹⁰ It becomes clear that in general a variety of practices, oftentimes with overlapping underlying mechanisms, causes the lines between gaming and gambling to blur, which is of course the preamble of our research.

⁷⁹¹ Article 33(a) and (b) Gaming and Betting Act.

⁷⁹² Article 33(b) Gaming and Betting Act.

⁷⁹³ Article 31(a) Gaming and Betting Act and Article 2.1 Decree remote gambling.

⁷⁹⁴ Article 31(d) Gaming and Betting Act.

⁷⁹⁵ Article 3.4 Decree remote gambling.

⁷⁹⁶ Article 34(c) Gaming and Betting Act. The Article also states that these persons cannot cause the licensee to make other violations than the one for which the person is investigating.

⁷⁹⁷ Article 34a Gaming and Betting Act.

reasonably necessary within the scope of their supervisory duties.⁷⁹⁸ Finally, licensees can be obligated to periodically inform the Gambling Authority of information important to supervise compliance with the law via a governmental decree (Dutch: *'een maatregel van algemeen bestuur'*).⁷⁹⁹ For remote gambling activities, this periodic report is a general obligation which includes information about the integrity policy, the registration of users or provisions related to consumer protection.⁸⁰⁰

ENFORCEMENT. As stated, it is the Gambling Authority who is responsible for the granting of licences, both for physical and for remote gambling activities. Due to its role to combat illegal online gambling in the Netherlands, the Authority has a variety of tools at its disposal to achieve this objective – in addition to the abovementioned supervisory tools. First, the Gambling Authority can issue binding guidelines to ensure compliance with the law by providers of gambling activities who are not licenced, with all relevant obligations and requirements.⁸⁰¹ Second, it can impose what is called in Dutch *'last onder bestuursdwang'*, which entails a sanction for the (partial) restitution of the violation, where the supervisory body can restore the violation itself when the licensee does not do it (in time).⁸⁰² Third is the ability to issue fines related to most of the potential violations of Articles of the Gaming and Betting Act, where the amount of the fine depends on the type of violation.⁸⁰³ Fourth, the Authority can issue a public warning before deciding on a violation of the law if this is reasonably necessary to ensure the quick and efficient informing of players about a potential harmful gambling activity.⁸⁰⁴ Finally, certain violations are classified as crimes – most notably when Article 1(1)(a) is violated on purpose – and penalties here are again depending on the type of violation.⁸⁰⁵

⁷⁹⁸ Articles 34c, 34d, 34e and 34i Gaming and Betting Act. Note that this concept of 'reasonably necessary' used in these provisions implies a margin of discretion and would need to be assessed on a case-by-case basis.

⁷⁹⁹ Article 34(k) Gaming and Betting Act.

⁸⁰⁰ Article 5.1 Decree remote gambling. Another specific obligation in Article 5.3 is that licensees have to retain an anonymised control database about their users and their gambling transactions and behaviours.

⁸⁰¹ Article 34(n) Gaming and Betting Act.

⁸⁰² Article 35 Gaming and Betting Act. This can also include a penalty payment (*'dwangsom'*).

⁸⁰³ Articles 35a, 35b and 35c Gaming and Betting Act. For most violations, this is either 870,000 euros or 10% of the yearly revenue.

⁸⁰⁴ Article 35e Gaming and Betting Act.

⁸⁰⁵ Articles 36, 36a and 36b Gaming and Betting Act. For example in the case of Article 1(1)(a), temporary custody is possible and possible prison sentence up to two years or payment of minimum 21,750 euros.

Section III – Key takeaways

The role of the European Union:

- ❖ Gambling regulation throughout the EU is highly **fragmented**: the lack of harmonisation on EU level has resulted in different regulatory frameworks per country, leading to several obstacles for consumers, gambling authorities and gambling companies in light of cross-border provision of gambling services, e.g. different definitions of what constitutes gambling and no mutual recognition. For a comparison of rules in three jurisdictions (i.e. Belgium, the UK and the Netherlands), see *infra* Section II;
- ❖ Even though there is no sector-specific law on gambling services in the EU, EU law is still relevant to a certain extent. Member States must always take the binding supranational framework regarding the internal market into account. **Primary EU law (i.e. TEU and TFEU)** grants Member States a wide margin to set their national gambling policies, from monopolies, over licensing conditions to market foreclosure, as long as they are in line with the rules on the internal market as established by the TFEU and as interpreted by the CJEU;
- ❖ The **CJEU** plays a prominent role in the EU regulation of gambling as interpreter of the TFEU provisions on the freedom of services and the freedom of establishment. Within its case law, it has recognised gambling services as peculiar economic services, indicating that many cultural, religious and moral differences exist in the Member States. This is an important hurdle in light of EU harmonisation of the rules on gambling;
- ❖ The European Commission has been taking some initiatives towards harmonisation, however, willingness on behalf of the Parliament and Council is lacking. Considering that the road to EU harmonisation of gambling regulation seems to be paved with too many obstacles, the EU institutions have turned to **soft law instruments**. Within these instruments, the institutions have particularly recognised the need for cooperation between national gambling authorities to facilitate information exchange, but also leave the door open for harmonisation efforts in the future. However, for now, Member States keep holding on to their discretionary power mainly by referring to the subsidiarity principle.

Gambling regulation in Belgium:

- ❖ Belgium's gambling policy is based on a prohibition to exploit games of chance and gambling establishments, unless a license has been obtained ('channelling policy'). Belgium makes use of a **closed licencing system**, which implies that providers of video games containing elements that qualify as gambling under the Gaming and Betting Act will have to obtain a licence to legally provide their video games on Belgian territory. Elements which are gambling-like but do not meet the definition of 'game of chance' under Belgian law, do not require a licence. Do note that in the latter case other laws might be applicable, such as consumer law.
- ❖ An interesting aspect to the Belgian gambling law is that licences for the provision games of chance online are not stand-alone licences: in order to obtain such a licence, **there always already needs to be a licensed fixed establishment in Belgium**. In light of game developers active on a global level, this is a very burdensome requirement.
- ❖ The Gaming and Betting Act does not specifically regulate gambling(-like) elements in video games, however, the Belgian Gaming Commission – supervising compliance with the Gaming and Betting Act – has **acknowledged the potential dangers** of gambling elements in the video game context:

- First of all, it played a pioneering role by qualifying **lootboxes** as gambling under the condition that they are – directly or indirectly – paid for by real money. Since it seems difficult to subject lootboxes to one of the current licences under Belgian law, they are illegal on Belgian territory.
- The Gaming Commission has also taken account of the growing popularity of **Esports betting**. It treats this type of betting as betting on events (for the moment).
- ❖ The Gaming Commission has publicly expressed its **need for more financial and human resources** to be able to effectively enforce the Gaming and Betting Act in light of the extensive offer of games of chance online, as well as to investigate and act against new gambling phenomena.

Gambling regulation in the United Kingdom:

- ❖ One of the **key objectives** throughout the history of UK gambling regulation is the **protection of children** and vulnerable persons. It was one of the reasons why gambling regulation in the UK evolved into the Gambling Act 2005 and is now one of the reasons why the Gambling Act is under review again. Children in the Gambling Act are those aged 16 and under, whereas young persons are those aged 16-18.
- ❖ The **UK Gambling Commission** issues licences for gambling activities based on the licencing objectives (which include the protection of children). Therefore, the Gambling Commission has the potential to play an important role concerning gambling(-like) elements in video games.
- ❖ In the UK, **playing a game of chance for a prize is gambling**. Applied to lootboxes, the problem is situated at the level of the ‘prize’ criterium, which is defined as ‘money or money’s worth’: only when items obtained through lootboxes are convertible into cash or are tradeable they will attain real-world value and thus be seen as money or money’s worth.
- ❖ However, this approach has been criticised over the last few years, which culminated in a report by the House of Lords in 2020 in which **it is argued that lootboxes should be regulated as gambling due to their resemblance to gambling activities**. A call for evidence was subsequently released by the Government and it remains to be seen whether new regulatory initiatives will develop in the near future.
- ❖ For social casino games, according to the House of Lords, there is at this time **no persuasive case to pursue further regulatory action**, however it was recognised that some elements resemble gambling and that therefore further research is needed.
- ❖ In Esports and outside, the **skin betting activities are seen as gambling** (i.e. the use of virtual items acquired in a game as a method of payment for a stake in external, oftentimes unlicensed gambling).

Gambling regulation in the Netherlands:

- ❖ **Remote gambling** (online gambling) has only been regulated in the Netherlands from 1 October 2021, by including remote gambling activities under the scope of the Gaming and Betting Act via a Decree.
- ❖ According to the Gaming and Betting Act, it is forbidden to provide facilities to **compete for a prize** in which the winner is decided by **any form of chance**, over the result of which the participants generally do not have substantive control. The **minimum age is set at 18** for all gambling activities.

- ❖ The **prevention of addiction** to gambling activities is directly integrated in one of the Articles of the Gaming and Betting Act and was also highlighted in the preparatory works.
- ❖ The licencing system in the Netherlands is specified for each of the gambling activities, with the **Gambling Authority** competent for granting licences, set conditions for licences and revoke licences. In addition, the Gambling Authority has to promote the prevention of addiction, give information about gambling and its risks, and has a variety of tools to combat illegal online gambling.
- ❖ **Lootboxes** are only included under the scope of the ‘prize’ criterium of the gambling definition if their content is transferable outside of the game (i.e. economic value), even though no additional clarification is given on what a ‘prize’ is.
- ❖ However, it has been stated that due to the **risk-potential of lootboxes for addiction** (due to stimulating effects, unlimited opening potential, near-miss effect...), they can still be contrary to the objective in Dutch law of preventing addiction. This risk-potential was recognised in the ongoing FIFA-case. As such, similar to the UK, it remains to be seen what the ultimate classification of lootboxes will be.
- ❖ For **social casino games**, there is no need for further regulation, but it is recognised that these types of games still blur the lines between gaming and gambling and that therefore further research is needed.
- ❖ In the Netherlands, **betting on Esports is prohibited and skin betting is as well.**

Chapter 4 – Video game regulation

INTRODUCTION. In this chapter, regulation relevant to the topic of gambling(-like) elements in video games is discussed. Importantly, ‘video game regulation’ as such, in the sense of command-and-control, government-issued regulation, is scarce. Instruments that are specifically tailored to video games are mostly self- or co-regulatory in nature. In this chapter, the existing self- and co-regulatory framework is discussed, with a focus on the European PEGI-system. In addition to the PEGI-system, other video game classification systems are briefly discussed for comparative purposes in section II, and in section III two key European organisations are briefly discussed: ISFE and EGDF. In the next chapters, provisions that are relevant to video games in the legal domains of consumer protection, data protection and audiovisual media are discussed more in-depth.

Section I – The Pan-European Games Information System (‘PEGI’)

INFORMATION ON VIDEO GAMES. PEGI is a self-regulatory initiative in Europe that provides age-ratings and content labels to assess the appropriateness of video games for players of certain age categories, thereby assisting parents and children in making informed purchasing decisions.⁸⁰⁶ Most countries in Europe apply PEGI, but have no legal basis to enforce its provisions.⁸⁰⁷ A few countries have specific legislation in place to enforce the PEGI system,⁸⁰⁸ and two countries do not use PEGI but have their own national regulation.⁸⁰⁹ The objective of the PEGI system is to provide guidance to consumers (parents in particular) to help them decide whether or not to buy a particular product for a child.⁸¹⁰ To achieve this objective, PEGI provides two types of information: (1) age labels and (2) content descriptors. First, the **age labels** of PEGI are 3-7-12-16-18 and each video game is rated and brought under one of these categories. The ratings are given based on the content included in a video game and the following explanation is given⁸¹¹:

Rating	Description
PEGI 3	The content of games with a PEGI 3 rating is considered suitable for all age groups. The game should not contain any sounds or pictures that are likely to frighten young children. A very mild form of violence (in a comical context or a childlike setting) is acceptable. No bad language should be heard.
PEGI 7	Game content with scenes or sounds that can possibly be frightening to younger children should fall in this category. Very mild forms of violence (implied, non-detailed, or non-realistic violence) are acceptable for a game with a PEGI 7 rating.
PEGI 12	Video games that show violence of a slightly more graphic nature towards fantasy characters or non-realistic violence towards human-like characters would fall in this age category. Sexual innuendo or sexual posturing can be present, while any bad language in this category must be mild.

⁸⁰⁶ The official website is <<https://pegi.info/>>.
⁸⁰⁷ Belgium, Bosnia, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, North Macedonia, Norway, Poland, Romania, Serbia, Slovenia, Spain, Sweden, Turkey, Ukraine.
⁸⁰⁸ The UK, Malta, Iceland, Israel, Netherlands, Austria; in France, Finland and Lithuania games with PEGI ratings are exempt from mandatory classification with national age symbols.
⁸⁰⁹ Germany (UKS) and Russia (RARS) have their own national regulation.
⁸¹⁰ See <<https://pegi.info/page/pegi-age-ratings>>. These ratings take into account the age suitability of a video game, not its difficulty.
⁸¹¹ See <<https://pegi.info/what-do-the-labels-mean>>.

PEGI 16	This rating is applied once the depiction of violence (or sexual activity) reaches a stage that looks the same as would be expected in real life. The use of bad language in games with a PEGI 16 rating can be more extreme, while the use of tobacco, alcohol or illegal drugs can also be present.
PEGI 18	The adult classification is applied when the level of violence reaches a stage where it becomes a depiction of gross violence, apparently motiveless killing, or violence towards defenceless characters. The glamorisation of the use of illegal drugs and of the simulation of gambling , and explicit sexual activity should also fall into this age category.”

Table 8 - PEGI age-ratings.

Note that the rating of ‘PEGI 18’ includes the ‘glamorisation of the simulation of gambling’, which is not further explained, however the ‘gambling’ content descriptor as described just below mentions simulated gambling as games of chance that are normally carried out in casinos or gambling halls, which is difficult to apply to gambling(-like) elements in video games other than social casino games.

Second, PEGI includes **content descriptors** to make consumers aware of which specific types of content are present in a video game that may be inappropriate for certain ages (e.g. sex, drugs, violence, bad language). For this report, two content labels are particularly interesting, namely gambling and in-game purchases:



*“The game contains elements that encourage or teach gambling. These simulations of gambling refer to games of chance **that are normally carried out in casinos or gambling halls**. Some older titles can be found with PEGI 12 or PEGI 16, but PEGI changed the criteria for this classification in 2020, which made that new games with this sort of content are always PEGI 18.”*



“The game offers players the option to purchase digital goods or services with real-world currency. Such purchases include additional content (bonus levels, outfits, surprise items, music), but also upgrades (e.g. to disable ads), subscriptions to updates, virtual coins and other forms of in-game currency.”⁸¹²

Figure 1 - PEGI descriptors for gambling and in-game purchases.

An important point to note with regard to gambling(-like) elements in video games is that not all of them will be covered by the ‘gambling’ descriptor,⁸¹³ because they are *not normally carried out in casino’s or gambling halls*. Examples are lootboxes, card packs or prize wheels.⁸¹⁴ Such features are covered by the ‘in-game purchases’ descriptor, but require an additional notice if they include random items, which is shown underneath or near the age label and content descriptors, as shown in the picture below. It should be noted that there is no separate pictogram for the ‘random items’ descriptor.

⁸¹² *Id.*

⁸¹³ At a later stage, the Gam(e)(a)ble project will assess whether the different gambling(-like) features in video games are (adequately) covered by the PEGI system.

⁸¹⁴ See <<https://pegi.info/news/pegi-introduces-feature-notice>>. The in-game purchases descriptor was introduced in 2018, the ‘includes random items’ addition was adopted in 2020.



Figure 2 - PEGI descriptors for age 16, violence, in-game purchases and the descriptor for in-game purchases with random items.

Finally, PEGI also offers parental control tools, guidelines on responsible gameplay or information on online safety. For the latter, the PEGI Code of Conduct is important, which we will discuss now.

THE PEGI CODE OF CONDUCT. The PEGI system is based on a Code of Conduct, which contains “*a set of rules to which every publisher using the PEGI system is contractually committed*”.⁸¹⁵ The code deals with age-rating, labelling, promotion of interactive software products and maintenance of safe online gameplay.⁸¹⁶ The Code applies to all interactive software products (including video and computer products) that are distributed for retail sale by all publishers or other organisations.⁸¹⁷ It covers all products distributed electronically by whatever means (internet, mobile, online distribution) and reflects the industry’s commitment to provide information to the public on the content of interactive software products and to ensure safe online gameplay for children.⁸¹⁸ In the context of this report it is also important to note that this self-regulatory code *complements* existing national regulations and that it is stated that the content, distribution and promotion of products complies (and will comply) with existing (and future) laws and regulations at the EU and national level at all times.⁸¹⁹

RELEVANT PROVISIONS. First, the Code contains obligations for signatories (video game publishers), for example to *recommend* to the retailers, distributors and wholesalers of their products to adhere to the PEGI Code and its age-ratings (emphasis added).⁸²⁰ Second, it includes in Articles 7 and 8 the specificities of the age-rating systems as discussed *supra*. Third, Article 9 lays out the conditions for online gameplay environments. Article 9.1 states that products offering online gameplay environments operated by signatories will, where practical, be appropriately rated under the PEGI system. Equally important is that

“[s]ignatories shall use their best endeavours to ensure that these environments are kept free of illegal content or content that might permanently impair the development of minors.”⁸²¹
(Emphasis added)

This provision is relevant where gambling(-like) elements in video games could threaten the development of children, as discussed in chapter 2. In this regard, Article 9 highlights the use of reporting mechanisms, safety warnings and community standards, the latter having to include provisions containing prohibitions against users introducing content or indulging in online behaviour which is illegal or might permanently impair the development of minors.⁸²² These provisions could

⁸¹⁵ See <<https://pegi.info/pegi-code-of-conduct>>.

⁸¹⁶ See <<https://pegi.info/pegi-code-of-conduct>>.

⁸¹⁷ Article 1 PEGI Code of Conduct.

⁸¹⁸ Articles 1 and 2 PEGI Code of Conduct.

⁸¹⁹ Articles 2 and 6 PEGI Code of Conduct.

⁸²⁰ Articles 5.3 and 5.4 PEGI Code of Conduct.

⁸²¹ Article 9.2 PEGI Code of Conduct.

⁸²² Articles 9.3, 9.6 and 9.7 PEGI Code of Conduct.

equally be applied to gambling(-like) elements in video games. Furthermore, Article 9 includes a provision on responsibilities vis-à-vis data collection and processing and their inclusion in companies' privacy policies (see chapter 6). On the protection of minors, Article 9.9 states that:

"[...] Signatories shall adhere to stringent standards ensuring the protection of children from any unsuitable content and behaviour associated with any Online Gameplay Environment offered by any Product aimed at children." (Emphasis added)

This provision could be relevant if gambling(-like) elements in video games would be seen as unsuitable; however, Article 9.9 does not provide specific examples of such standards to protect children, other than the general statement of 'promoting responsible purchasing practices where minors are concerned'. Fourth, on labelling, the Code states that PEGI logos and descriptors shall not be used where products are prohibited or subject to compulsory content classification⁸²³, which may occur in the case of gambling(-like) elements, for example if the country would bring them under the scope of national gambling regulation and thus prohibit them. It is also stated that signatories should commit their **best efforts** to encourage online service providers carrying their products to display the ratings of those products. Finally, Article 15 and Annex A of the Code include provisions on what to do when infringements of the Code happen (e.g. corrective action or sanctions). It is important to note that Article 15.1 states that PEGI's Enforcement Committee and Complaints Board *"shall identify and document any possible wrongful application and/or breaches of the Code"*, as it implies active monitoring of PEGI's members in addition to the 'infringements identified by third parties or the Administrator' as mentioned in the same Article. Concerning these infringements, it is relevant to note that in Annex A of the Code of Conduct, most breaches relevant to the topic of gambling(-like) elements in video games fall under the most serious levels (Levels I and II of Annex A), the most prominent example being the infringement of 'failure to disclose significant content', which includes content that would have led to a higher age-rating (e.g. gambling features) or targeted advertising to children for whom the product is not rated as appropriate.⁸²⁴

Section II – Other video game rating initiatives

NORTH-AMERICA AND AUSTRALIA. In the US and Canada, a similar self-regulatory system is used for the categorisation of video games. The Electronic Software Rating Board ('ESRB') uses rating categories, content descriptors and interactive elements to provide information on video games and their suitability for different groups.⁸²⁵ First, the rating categories use letters instead of numbers, even though ages are used to clarify their meaning: E (everyone); E10+ (everyone above age of 10); T (teens ages 13+); M (mature ages 17+); and A (adults only, 18+). Second, the ESRB provides content descriptors such as blood/gore, humour, nudity, sexuality or gambling. Different from the PEGI system is that the gambling descriptor has two components: real gambling and simulated gambling. Real gambling implies that *"players can gamble, including betting or wagering real cash or currency"*, whereas **simulated gambling** implies that *"players can gamble without betting or wagering real cash or currency"*.⁸²⁶ It can be questioned whether this division is sufficient to cover all gambling(-like) elements this report focusses on. For instance, questions arise regarding those gambling(-like)

⁸²³ Article 10.3 PEGI Code of Conduct.

⁸²⁴ See Annex A of the PEGI Code of Conduct. Note that 'significant content' is subjected to a margin of discretion and can vary for different types of apps/games.

⁸²⁵ See <<https://www.esrb.org/ratings-guide/>>.

⁸²⁶ *Id.*

elements that do not involve wagering real money, but do involve a preceding purchase with real money of virtual money which is then used to engage in the gambling(-like) activity (see e.g. examples given in chapter 3). For such elements, the system’s informative descriptors or labels concerning interactive elements could help, as these cover in-game purchases *as such* as well as in-game purchases regarding random items. However, these descriptors and labels do not influence the rating assignment of a video game and merely refer to “*interactive or online features that may be of interest or concern.*”⁸²⁷ The ESRB limits its information to a description of the products, stating that ‘in-game purchases including random items’

“[c]ontain in-game offers to purchase digital goods or premiums with real world currency (or with virtual coins or other forms of in-game currency that can be purchased with real world currency) for which the player doesn’t know prior to purchase the specific digital goods or premiums they will be receiving (e.g., lootboxes, item packs, mystery awards).”⁸²⁸

Even though this description covers most gambling(-like) elements in video games, it is unsure how effective it is without influencing the age-rating or without highlighting the potential dangers related to these features (which is something PEGI also does not do).

In Australia, where gambling in video games has received special attention⁸²⁹, the Australian Classification Board (‘ACB’) – which is a governmental body and not self-regulatory – provides the ratings for video games. The classification contains two parts: (1) the advisory categories, where there are no legal restrictions for playing the games; and (2) the restricted categories where there are legal restrictions.⁸³⁰ Surprisingly, there is no mention of gambling within either of these categories. In 2018, it was debated within the Australian Senate to what extent video games including gambling(-like) elements should be categorised and/or restricted. It was argued that, depending on further research, certain gambling(-like) features in video games could be given the MA 15+ or R 18+ rating, which are the legally restricted categories where the content is high or strong in impact.⁸³¹ The latest development happened in July 2021, when a proposal for a ‘Lootbox Bill’ was introduced, using the R 18+ approach which would make video games with lootboxes prohibited for children under the age of 18.⁸³²

INTERNATIONAL COALITION. Finally, it is worth mentioning the International Age-rating Coalition (‘IARC’). The IARC aims to ensure that consumers have consistent access to established and trusted age-ratings across game devices through a globally streamlined age classification process.⁸³³ In short, when a new app/game is created and the developer wants to submit it to one of the participating members (e.g. the Google Play Store), the developer is asked to fill in a questionnaire concerning the content of their created app/game. Then, an algorithm uses this questionnaire to provide age-ratings for the game for

⁸²⁷ *Id.*

⁸²⁸ *Id.*

⁸²⁹ See, aside from the research of GAINSBURY cited in Chapter 1, the website of the Victorian Responsible Gambling Foundation concerning gambling in video games and the related reports, available at <<https://responsiblegambling.vic.gov.au/reducing-harm/video-gaming-and-gambling/>>.

⁸³⁰ See <<https://www.classification.gov.au/classification-ratings/what-do-ratings-mean>>.

⁸³¹ Further research is needed to prevent a ‘blanket or sweeping’. This was based on recommendations made by the Australian Institute of Family Studies as well as some behavioural scientists such as DRUMMOND and SAUER and Law Professor HANDSLEY. See <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Gamingmicro-transactions/Report/c04>.

⁸³² See <<https://www.kotaku.com.au/2021/07/an-australian-mp-is-introducing-a-bill-to-ban-loot-boxes-for-kids/>>.

⁸³³ See <<https://www.globalratings.com/about.aspx>>.

the separate regions where the app/game will be offered (e.g. in Europe this would be an age-rating based on the PEGI system). Upon completing this process, the developer receives an IARC rating certificate which can be used on other storefronts (e.g. when the developer wants to offer the app/game on the Apple App Store or the Microsoft Store).⁸³⁴ It is a basic, however uniquely universal, non-binding process which is supported by *inter alia* PEGI, the ESRB, or the Australian and German age-rating bodies and includes notable participants such as Google Play, Microsoft, Nintendo or the PlayStation Store.

Section III – European federations within the video gaming industry

Within the self-regulatory framework of Europe, two federations are particularly important: the Interactive Software Federation Europe and the European Games Developers Federation. Their roles are both briefly discussed below.

INTERACTIVE SOFTWARE FEDERATION EUROPE. ISFE is the voice of Europe’s video gaming industry. Their members are major video game publishers (e.g. Electronic Arts, Activision, Nintendo, Microsoft, Epic Games...) and national trade associations representing game developers and publishers at the national level (e.g. Spain, the Netherlands, Switzerland, Austria, Germany, France, UK, Belgium...).⁸³⁵ According to ISFE, their goal is to raise the bar on harmonised self-regulation and responsible gameplay, to build awareness and understanding of video games and to put the video game players central.⁸³⁶ Included in the latter is the protection of minors through the PEGI System, with an important role for Articles 9 and 15 of the PEGI Code of Conduct (see *supra* on monitoring and infringements), as well as the provision of information on parental control tools, understanding in-game purchases, or safe and healthy gameplay.⁸³⁷

EUROPEAN GAMES DEVELOPERS FEDERATION. Second, the EGDF focuses on growth of EU game developers, on the improvement of general understanding about the video games industry with policy makers and on better communication between local industries within the EU.⁸³⁸ It unites national trade associations which are more focused on game developers studios, such as the game developer associations of Belgium (FLEGA), France (SNJV), Ireland (IMIRT), the Netherlands (DGA), Spain (DEV) or the UK (TIGA).⁸³⁹ One of the EGDF’s core objectives is the protection of players, which includes the protection of minors and more generally, consumer protection and data protection.⁸⁴⁰

Section IV – Key takeaways

On video game rating systems:

- ❖ The PEGI system provides **age labels and content descriptors** for video games, by assessing the appropriateness of these video games for players of different age categories based on the content in the video games.

⁸³⁴ See <<https://www.globalratings.com/how-iarc-works.aspx>>.

⁸³⁵ See <<https://www.isfe.eu/our-membership/>>.

⁸³⁶ See <<https://www.isfe.eu/about-ifse/>>.

⁸³⁷ See <<https://www.isfe.eu/responsible-gameplay/>>. For example, ISFE mentions that ‘responsible data management allows for the protection of gamers and minors *through active monitoring of inline chatrooms and fora*’ (emphasis added).

⁸³⁸ See the EGDF’s mission statement for 2030 at <<http://www.egdf.eu/documentation/egdf-mission-statement-for-2030/>>.

⁸³⁹ See <<http://www.egdf.eu/documentation/european-games-industry/>>.

⁸⁴⁰ See <<http://www.egdf.eu/documentation/7-balanced-protection-of-vulnerable-players/protection-of-minors/>>.

- ❖ PEGI has descriptors with a pictogram for in-game purchases and gambling, however for the descriptor **'includes random items'** (e.g. lootboxes) only a text-version exists.
- ❖ The **PEGI Code of Conduct** includes a variety of relevant obligations for its signatories, although it has to be noted that oftentimes non-obligatory language is used ('best efforts', 'recommends'). Gambling(-like) elements in video games could be brought under the scope of the provisions of 'illegal content that might permanently impair the development of minors' or 'unsuitable content'.
- ❖ In the US and Canada, the **age-rating system of the ESRB** includes two components of gambling: real gambling and simulated gambling. These do not offer a sufficient solution for the different types of gambling(-like) elements, and whilst there is additional clarification given by the informative descriptors on e.g. in-game purchases, these descriptors ultimately have no influence on the age-rating, which raises questions on its practical effectivity.
- ❖ In Australia, legislation was introduced to include all video games with lootboxes under the R 18+ rating, which would make them prohibited for children. However, further research is needed before applying the legally restricted content categories to these video games.

On European video game organisations:

- ❖ The **ISFE** focuses on video game publishers and aims to raise the bar on harmonised self-regulation and to build awareness and understanding of video games throughout Europe.
- ❖ The **EGDF** focuses on video game developers and aims to improve the understanding about video games for policy makers and to improve communications between local industries in the EU. One of its core objectives is the protection of players, which is particularly relevant for this report.

Chapter 5 – Consumer protection regulation

INTRODUCTION. The consumer protection framework plays an important role in the context of gambling(-like) elements in video games, as it contains rules regarding *inter alia* the digital market, contract terms and unfair commercial practices. Considering the high level of harmonisation of consumer protection law at the EU level, the discussion in this report will predominantly focus on the legal framework of the EU. According to Article 38 CFEU, consumers are entitled to a high level of consumer protection. HELBERGER et al. describe that there are two rationales that underlie EU consumer law: (1) **empowering** consumers as sovereign market actors and providing them with the necessary rights and information to act in that role and (2) **protecting** consumers in situations where they are the weaker party in commercial dealings and unable to protect their rights, interests and safety themselves.⁸⁴¹ Considering that children are vulnerable consumers engaging in contracts through in-game purchases in various forms, it is necessary to examine exactly which rights and obligations they have in the video game context.⁸⁴² Furthermore, it is relevant to assess what protections they enjoy under EU regulations, for example against different (potentially harmful) commercial practices integrated into video game design features.⁸⁴³ Therefore, this chapter provides an overview of the most important EU consumer protection Directives and also briefly discusses other policy documents containing provisions relevant to gambling(-like) elements in video games (section II). Before discussing the legal framework, however, three important concepts in the video game environment which are closely related to consumer protection regulation need to be introduced. They are discussed in section I and concern (1) the legal capacity of children to enter into contracts; (2) video game contracts; and (3) the legal status of virtual goods and currencies.

Section I – Preliminary considerations

LEGAL CAPACITY TO ENTER INTO CONTRACTS. Most EU rules are without prejudice to national conditions concerning the capacity to enter into contracts. For children, a difference has to be made between the child's age of majority and the child's legal capacity to enter into contracts. The age of majority is the age at which a child becomes an adult and acquires full legal capacity, meaning that they can engage in legal activities and be liable for contractual obligations.⁸⁴⁴ This age is set at 18 for all EU Member States.⁸⁴⁵ In many jurisdictions, contracts are voidable when they are entered into by children who are not yet competent under national law.⁸⁴⁶ This is relevant for the topic of this report because children

⁸⁴¹ HELBERGER, F., BORGESIU, J. and REYNA, A., *The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law*, in *54 Common Market Law Review* 1427, 2017, 7. Note the similarities between balancing the protection and empowerment of children (chapter 2).

⁸⁴² See LUPIANEZ-VILLANUEVA, F. et al (European Commission) (n 232), 53-54, 57, 70-72, 84-88, 92-95, 175-177 for the impact of commercial practices in online games on children's behaviour.

⁸⁴³ The research of KING et al. is particularly important in this context. They examined game design features of the 13 major video game companies (e.g. Microsoft, Tencent, Activision, Nintendo, EA) and found that these design systems involve *inter alia* personalisation of in-game offers, optimisation of scheduling of offers to increase purchase probability, profiling players through individual player metrics that affect the likelihood of purchasing, making predictions on players' behaviours, or using behavioural data to incentivize players to make continuous in-game purchases. See KING et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behaviour* 131, 2019.

⁸⁴⁴ EUFRA, *Age of Majority*, 2017, <Age of majority | European Union Agency for Fundamental Rights (europa.eu)>; PESSERS, L., *Refining the Legal Approach towards the Underage Consumer: A Process Still in its Infancy*, 2012.

⁸⁴⁵ Except Scotland, where it can be obtained at 16.

⁸⁴⁶ See e.g. VERDOODT, V., CLIFFORD, D. and LIEVENS, E., *Toying with Children's Emotions, the New Game in Town? The Legality of Advergaming in the EU*, in *32 Computer Law & Security Review* 599, 2016, 604.

would then not be able to engage in in-game contracts to purchase for example lootboxes or other virtual content. However, there is no uniformity with regards to the national contract law and the legal capacity of children to enter into contracts in different EU Member States.⁸⁴⁷ In many EU Member States, the concept of ‘everyday contracts’ or ‘everyday household purchases’ exists, often accompanied by a wide range of national criteria. For example in Belgium, minors do not have legal capacity to enter into contracts but can enter into a number of everyday contracts, such as purchasing magazines, sweets or games with their pocket money.⁸⁴⁸ In France, children always need legal representation to enter into contracts except for ‘acts of daily life’ which carry no serious risk and, therefore, it is argued that only trivial purchases like candy or small objects fall within the scope of this exception.⁸⁴⁹ In the Netherlands, children are allowed to carry out legal transactions when these are considered by society to be customary for minors of their age to conduct independently.⁸⁵⁰ Linking this to for example the lootboxes debate, the European Parliament has stated that because lootboxes purchased through microtransactions often only cost a few euros, “*as long as a minor does not exceed a reasonable price limit by purchasing a high number of [lootboxes] such contracts would be considered valid.*”⁸⁵¹ In any event, these examples show that national contract laws of EU Member States vary and that therefore children’s capacity to enter into contracts is accompanied by uncertainties and depends on national interpretations of what constitutes an ‘everyday contract’ or what an appropriate age for these contracts would be.⁸⁵²

VIDEO GAME CONTRACTS. Before discussing the relevant legal framework on consumer protection, it is useful to clarify a number of contractual practices specific to the video gaming industry. Oftentimes, when purchasing or downloading a video game, reference will be made to three documents: (1) the End-User Licence Agreement (‘EULA’),⁸⁵³ (2) the terms of service/use⁸⁵⁴ and (3) the privacy policy of the company⁸⁵⁵.⁸⁵⁶ Sometimes, all three are merged into one document (e.g. in the mobile gaming industry),⁸⁵⁷ but the larger video gaming companies (e.g. Activision, Blizzard, Epic Games, Valve) offer separate documents. These documents are important, not only for this chapter (see *infra* on the impact of EULAs on contracts within the video game environment), but also for the next chapter on the regulation of data protection (e.g. regarding the consent of children to privacy policies). Variations exist throughout video games regarding the impact of (not) accepting these documents. For example, in the game ‘Rocket League’ it is not possible to access the multiplayer environment without accepting

⁸⁴⁷ PESSERS, L. (n 844), 5; for example in the UK a definite age for this does not exist, see ICO, *Children and the GDPR*, 2020, 17. For a more in-depth, comparative analysis, see CLAEYS, I. and BAECK, J., *Restitution of money spent on lootboxes in video games?*, in *41 Computer Law & Security Review*, 2021, 6-10, where the authors analyse national private law rules on the incapacity of minors to enter into lootbox-purchase contracts, and argue that in most cases, lootbox-purchases made by minors may be voidable under existing private law rules in Belgium, France, the Netherlands and the UK.

⁸⁴⁸ See Infoshopping’s FAQ on consumers at <<https://infoshopping.be/nl/faq-customer/jongeren-en-e-commerce>>.

⁸⁴⁹ PESSERS, L. (n 844), 5. These ‘actes courants’ are included in Article 1148-1149 of the French Civil Code, which

⁸⁵⁰ Article 1:234 of the Dutch Civil Code.

⁸⁵¹ European Parliament, *Lootboxes and their effects on consumers*, 2020, 33. There is no clarification on what a reasonable price is. For example, not all lootbox-related microtransactions are low in price and can reach higher amounts of money spent per purchase, e.g. 50 or 100 euros.

⁸⁵² CLAEYS, I. and BAECK, J. (n 847), 7, where the authors argue that it is uncertain whether lootbox-purchases can be classified as ‘ordinary contracts’ at this point in time.

⁸⁵³ An EULA is a binding agreement between the owner of a product (for video games oftentimes software) and the end-user which contains the rights and obligations that apply to the product.

⁸⁵⁴ The terms of service are similar consists the rights and responsibilities related to the use of the service by the users.

⁸⁵⁵ The privacy policy is a legal statement that states how users’ data is collected, used, managed and disclosed.

⁸⁵⁶ The analysis and evaluation of these practices and of the three types of documents in general will form a part of a future report.

⁸⁵⁷ Where it also commonly occurs that links are provided to the separate documents on the download page, even though this is not always allowed (see *infra*).

the EULA, terms of use and privacy policy.⁸⁵⁸ A more common, different approach is where a provision is included stating that users have a choice of not sharing their data with the service provider, however if they choose not to, they will not be able to access the company’s services and products.⁸⁵⁹

THE UNCLEAR LEGAL STATUS OF VIRTUAL GOODS AND CURRENCIES. When discussing the protection of consumers in the context of online services that may include gambling(-like) elements (e.g. when consumers purchase in-game currency to perform gambling(-like) activities, or in-game content which resembles a gambling(-like) activity), it is important to address the unclarity regarding the legal status of virtual goods and currencies. More specifically, even though the EU is increasingly making efforts to protect consumers in the digital age,⁸⁶⁰ it is unsure in how far these measures apply to in-game purchases related to virtual goods and currencies. The reason for this is that virtual goods and currencies obtained in a game – either through gameplay or through purchase – are not seen as property of the user. In the EULAs of most major gaming developers/providers the transfer of ownership is excluded in specific clauses, stating that **the purchase of in-game content and currency is a licence and not a transfer of ownership**. Examples provided in the EULAs of notable businesses in the video gaming world are:

Company	Provision	Link to EULA
Epic Games (Fortnite)	EULA para. 4: “When you earn or pay the fee to obtain Game Currency or Content, you are obtaining or purchasing from Epic the right to have your License include such Game Currency or Content. Regardless of any references Epic may make outside this Agreement to purchasing or selling Game Currency or Content, both Game Currency and Content are licensed, not sold , to you under the License.”	Epic Games
Blizzard Entertainment (Overwatch)	EULA para. 2(A)(i)(4): “The following components are owned or licensed by Blizzard : (...) Items: Virtual goods, such as digital cards, currency, potions, weapons, armour, wearable items, skins (...)”	Blizzard Entertainment
Valve (Counter-Strike) (Steam)	EULA para. 2(F): “All title, ownership rights and intellectual property rights in and to the Content and Services and any and all copies thereof, are owned by Valve and/or its or its affiliates’ licensors.” EULA para. 3(D): “You also understand and acknowledge that Subscriptions (for example, license rights to virtual items) traded, sold or purchased in any Subscription Marketplace are license rights, that you have no ownership interest in such Subscriptions, and that Valve does not recognise any transfers of Subscriptions (including transfers by operation of law) that are made outside of Steam.”	Valve

⁸⁵⁸ See Rocket League’s FAQ at <<https://support.rocketleague.com/hc/en-us/articles/360056166973-Why-Do-I-Get-a-Message-About-the-License-Agreement>>.

⁸⁵⁹ See Blizzard’s privacy policy at <<https://www.blizzard.com/en-us/legal/a4380ee5-5c8d-4e3b-83b7-7ea26d01a9918/blizzard-entertainment-online-privacy-policy#1297753635>>, Activision’s privacy policy at <<https://www.activision.com/legal/privacy-policy#toc5>>, or Epic Games’ privacy policy at <<https://www.epicgames.com/site/en-US/privacypolicy>>.

⁸⁶⁰ See e.g. the proposals for a Digital Services and Market Act, or Directive 2019/770 and 2019/771 on certain aspects concerning contracts for the supply of digital content/services and for the sale of goods.

Zynga (Poker)	EULA para. 5: “Regardless of any other statement in these Terms, (...), you do not own any Account that you create on our Services, including in our games, and your Account is not your property. Likewise, you do not own any Virtual Items that you obtained through our Services, regardless of whether you “earned” those Virtual Items or “purchased” them. Your Account and any related Virtual Items are owned by Zynga. Zynga gives you a limited license and right to use your Account and the related Virtual Items while we offer the Services.”	Zynga
Electronic Arts (FIFA, Battlefield)	EULA paras. 2 and 3: “The EA Services are licensed to you, not sold. The EA Services include Content and Entitlements.” “Entitlements are rights that EA licenses to you to access or use (...) Examples of Entitlements include access to digital or unlockable content; (...); virtual assets; (...); virtual points, coins or currencies. ” “We refer to these virtual points, coins or currencies as EA Virtual Currency. When you obtain EA Virtual Currency (...) you receive a personal, limited, non-assignable, non-exclusive, revocable license (...)” “EA Virtual Currency has no monetary value and (...) cannot be sold, traded, transferred or exchanged for cash. (...) EA Virtual Currency is non-refundable. (...) Once you redeem EA Virtual Currency for an Entitlement, that Entitlement is not returnable, exchangeable or refundable. ”	Electronic Arts

Table 9 - EULA provisions of notable video game companies.

This exclusion of ownership is implemented in the EULAs of all dominant video gaming companies, such as Tencent, Microsoft, Nintendo, Electronic Arts, or Sony.⁸⁶¹ Additionally, the EULAs also all state that refunds are not possible for in-game content.⁸⁶² These EULA provisions may be problematic for the application of certain EU consumer protection rules. For example, as we will see, some rules require a transfer of ownership in a transaction for it to be classified as a contract, such as the definition of a ‘sales contract’ under the Consumer Rights Directive.⁸⁶³ Looking at the practical reality of purchasing in-game content or currency, it is hard to ignore the fact that these **transactions between players and video game companies have much in common with (digital) contracts**; that is, the trader supplies digital content to the consumer and the consumer pays a price. This was confirmed by the European Parliament for lootboxes: “[p]urchasing a lootbox is effectively a contract like any other: players agree to pay a fee in return for a digital service provided by the video game publisher.”⁸⁶⁴ Furthermore, offering gambling(-like) elements in video games can be seen either as a services contract, where the transfer of ownership is not an issue, or they can be seen as a type of *sui generis*

⁸⁶¹ KING et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behaviour* 131, 2019, 138.

⁸⁶² *Id.*

⁸⁶³ Article 2(5) Consumer Rights Directive.

⁸⁶⁴ European Parliament, *Lootboxes and their effects on consumers*, 2020, 33. Note that the EU Parliament does not seem to take into account the legal status of lootboxes and the content received through the lootbox (i.e. virtual goods or currencies) and the fact that they are most of the time not seen as property of the user.

contract which is neither a sales or services contract.⁸⁶⁵ Hence, regardless of the legal classification, it could be argued that the contracts for virtual content and currencies deserve special consideration due to their unclear status.

Second, arguments have been made by US scholars that even though EULAs state that property rights of the virtual content remain with the video game company, players still have some rights regarding the in-game purchase contract. More specifically, it was argued by KING⁸⁶⁶, KAYSER⁸⁶⁷ and MEEHAN⁸⁶⁸ that **contract terms excluding all property rights for players may be invalid depending on the reasonable expectations players** can have vis-à-vis video gaming companies' treatment of their purchased virtual content.⁸⁶⁹ In this regard, it is worth mentioning that an important issue in evaluating the rights of consumers who make in-game purchases concerns the extent to which virtual goods should be considered to have equivalent status as real-world tangible products or services, as this could affect the level of protection offered by the consumer protection framework.⁸⁷⁰ Even though a decisive solution for this issue is not present at this time, part of the answer may be found in the consumer rights included in the EU framework (e.g. *infra* on the quality of digital content). Therefore, it is relevant to discuss the general protective measures included in the EU Directives (and other regulatory instruments), to get a clearer view on consumer protection in the context of in-game purchases related to gambling(-like) activities.

Lastly, in the context of the discussion on the definition of gambling, it is useful to point out that the majority of EULAs also include a provision which states that **transfers of in-game content/currency to third parties is prohibited**. This possibility of further sale of in-game content links back to the discussion on the definition of gambling, because whether or not the gambling(-like) element is considered as actual gambling under national law often depends on its real world monetary value (see chapter 3 on the criterium of 'prize' in the UK and the Netherlands).⁸⁷¹

Section II – Legal framework

INTRODUCTION. This section contains an overview of the different EU legislative instruments regarding consumer protection that are relevant to the topic of gambling(-like) elements in video games. In its

⁸⁶⁵ E.g. in Recital 19 of the Consumer Rights Directive, it is stated that 'contracts for digital content (...) should be classified neither as sales contracts nor as service contracts.'

⁸⁶⁶ KING, C., *Forcing Players to Walk the Plank: Why EULAs Improperly Control Players' Rights Regarding Microtransactions in Video Games*, in *58 William & Mary Law Review* 1365, 2017.

⁸⁶⁷ KAYSER, J., *The New New-World: Virtual Property and the End-User Licence Agreement*, in *27 Loyola of L.A. Entertainment Law Review* 59, 2006.

⁸⁶⁸ MEEHAN, M., *Virtual Property: Protecting Bits in Context*, in *13 Richmond Journal of Law & Technology* 1, 2006.

⁸⁶⁹ Reasonable expectations is a concept developed in common law jurisprudence, and means in this context that which a person can reasonably expect based on the contract, influenced by the contract terms (their content, formulation etc.). Regarding virtual content, the key takeaway of these scholars is that even if EULAs state that only a licence is given over in-game content, the game developers still treat their players as consumers because of the importance of in-game purchases. The players therefore come to expect and rely on consumer protection found in the real world. Note that the legal value of this interpretation is highly dependent on interpretative reasoning, as well as highly circumstantial (it depends on the exact forms of microtransactions, the importance of virtual content within the game, and the way the game is played and designed). Nevertheless, the underlying idea is useful to include in the discussion on virtual content and microtransactions, which are similar in the context of lootboxes or virtual currencies.

⁸⁷⁰ KING et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behaviour* 131, 2019, 138.

⁸⁷¹ The analysis of the gambling definition is part of a future report. The reason for this is that further sale on online marketplaces gives the in-game content 'real-world monetary value' and the feature can therefore be classified as a gambling practice, contrary to games where the content is solely used for the purposes of the game and has online in-game value and no real-world monetary value.

New Consumer Agenda 2020-2025, the EU Commission discusses consumer protection under one of the designated key priority areas: the digital transformation.⁸⁷² More specifically, it states that dangerous commercial practices must be tackled, such as dark patterns, personalisation practices based on profiling, false or misleading information, or manipulated consumer reviews.⁸⁷³ As a means of tackling these issues, the Commission refers to several of the Directives that are discussed in this section and highlights that additional guidance is needed on their applicability in practice, the latter also relevant for gambling(-like) elements in video games.⁸⁷⁴

EU COMPETENCE. Before discussing the different EU legislative instruments, it is necessary to briefly state which competences the EU has in consumer protection matters. First, Article 4 TFEU mentions consumer protection as a shared competence between the EU and the Member States.⁸⁷⁵ Second, Article 114 TFEU – which is the legal basis for internal market harmonisation measures –⁸⁷⁶ states that a high level of protection will be taken as a base concerning consumer protection.⁸⁷⁷ Third, Article 169 TFEU specifically addresses consumer protection and states that the EU shall contribute to protecting the health, safety and economic interests of consumers, and promote their right to information, education and organisation in order to safeguard their interests. Oftentimes (but not always), EU consumer protection legislation follows the minimum harmonisation of rules approach, where Member States can adopt additional protective measures, but where the EU framework lays down the minimum level of protection and where those additional measures need to comply with the EU policy.⁸⁷⁸

OVERARCHING COOPERATION REGULATION. For topics such as gambling(-like) elements in video games, for which specific consumer protection legislation in the EU is absent, the 2017 Regulation on cooperation for consumer protection is a useful foundation for further action in the future.⁸⁷⁹ This Regulation foresees, through binding provisions, in the cooperation between national authorities “*responsible for the enforcement of Union laws that protect consumers’ interests*” in Article 1. The resulting EU Consumer Protection Cooperation (‘CPC’) network has enabled the collection of the input of different national consumer organisations and the analysis of related complaints, and has also provided insights in the Member States’ regulation of specific problems related to gambling(-like) elements such as lootboxes.⁸⁸⁰ Aside from this framework, there is an obligation for the European Commission to ensure

⁸⁷² European Commission, *Communication COM(2020)696 on a New Consumer Agenda: strengthening consumer resilience for sustainable recovery*, 2020. For example, it is stated that between 2007-2019, 60% of websites checked were found not to be complying with basic consumer rules (at 7).

⁸⁷³ *Ibid.*, 10; see also BEUC, *Automated decision making and AI – A consumer perspective*, 2018.

⁸⁷⁴ See for example the 2019 Recommendations for a better presentation of information to consumers, adopted within an expert group of business organisations with in the EU Commission, providing guidance on provisions within the Directives discussed below.

⁸⁷⁵ Article 4(2)(f) TFEU.

⁸⁷⁶ European Parliament, *Briefing on Protecting European Consumers*, 2020, 3.

⁸⁷⁷ Article 114(3) TFEU; this is also stated in Article 38 of the CFEU.

⁸⁷⁸ European Parliament, *Briefing on Protecting European Consumers*, 2020, 3; note that some of the Directives discussed in this subsection take the maximum harmonisation approach, where there is no margin for Member States to adopt different measures, be it more protective or less protective.

⁸⁷⁹ Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation No 2006/2004, 2017 (‘the CPC Regulation’).

⁸⁸⁰ See e.g. the 2014 Common position of national authorities within the CPC Network regarding in-app purchases in online games, targeting Apple, Google and the ISFE, available at <https://ec.europa.eu/info/sites/default/files/20140718_in-app_cpc_common-position_en.pdf>.

that EU citizens are able to access up-to-date information about their Union consumer rights in a clear, understandable and easily accessible manner.⁸⁸¹

THE EU LEGAL FRAMEWORK. Over the years, the EU has adopted several key Directives on the topic of consumer protection, which are also relevant for gambling(-like) elements in video games. Furthermore, recently, several Directives were adopted to modernise EU consumer protection regulation, notable examples being the Directive on aspects of contracts for the supply of digital content and services⁸⁸² and the Directive on the better enforcement and modernisation of Union consumer protection rules.⁸⁸³ Their relevance vis-à-vis gambling(-like) elements in video games is discussed in this section. As a final remark, several of these Directives have gambling activities *as such* explicitly excluded from their scope. However, it can be questioned whether these exclusion provisions also apply to gambling(-like) elements in video games.⁸⁸⁴

1 *The Consumer Rights Directive and the Directive on the supply of digital content and services*

SCOPE. The Consumer Rights Directive ('CRD') of 2011⁸⁸⁵ contains general provisions for different forms of contracts (sales, services, distance ...) concluded between consumers⁸⁸⁶ and traders, such as pre-contractual information obligations, rights and obligations regarding the right to withdrawal or the termination of a contract, and remedies in case of violations. Although not the whole CRD is relevant for the topic of this report, there are some general provisions that may be relevant in the context of gambling(-like) elements in video games.

INFORMATION OBLIGATIONS IN THE CONTEXT OF GAMBLING(-LIKE) ELEMENTS IN VIDEO GAMES. Regardless of how contracts related to video game content are classified (*supra*), they occur predominantly via the internet and can thus be seen as **distance contracts** under Article 2(7) CRD.⁸⁸⁷ The Directive contains specific information requirements for distance contracts in Article 6, entailing that information should be offered in a clear and comprehensible manner before the consumer is bound.⁸⁸⁸ Furthermore, the consumer needs to be able to fully read and understand the main elements of the contract,⁸⁸⁹ and the

⁸⁸¹ Article 5 of the Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules, amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and the Council, 2019.

⁸⁸² Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, 2019.

⁸⁸³ Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules

⁸⁸⁴ What is meant here is that the contracts excluded from these Directives relate to gambling involving wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions. Thus, there are two possibilities. One is that gambling(-like) elements in video games are brought within this definition because they are seen as the same type of activity as lotteries or casino games. The other is that they are seen as another type of gambling activities not meant to fall under this definition. The former would mean that the gambling(-like) elements in video games are excluded from the scope of the Directives, the latter would imply that this exclusion does not apply. This duality will be addressed in a future report.

⁸⁸⁵ Directive 2011/83 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council ('Consumer Rights Directive').

⁸⁸⁶ See KUNNECKE, A., *New standards in EU consumer rights protection? The new directive 2011/83/EU*, in *European Scientific Journal* 1857, 2014, 431, where it is noted that the Directive missed the opportunity to provide a more specific terminology of the consumer in certain sectors (e.g. mobile phones or the internet), where the term 'user' is more commonly used than 'consumer'.

⁸⁸⁷ Recital 20 of the CRD mentions 'internet' as an example of a means of distance communication. Although this Directive was not drafted with the digital environment specifically in mind, its scope is broad and covers in-game purchases.

⁸⁸⁸ Recital 34 CRD.

⁸⁸⁹ Recital 39 CRD.

specific needs of consumers who are vulnerable due to their age, credulity or infirmity need to be taken in to account.⁸⁹⁰ The latter is particularly important for **children as vulnerable consumers** based on their age and more limited capacities to understand contracts and their terms, which includes contracts in the video game environment.⁸⁹¹ Articles 6 and 8 contain information obligations and other requirements for the trader, of which the most relevant are:

Article	Provision
Article 6(1)(a)	The main characteristics of the goods or services.
Article 6(1)(b-c)	The trader's identity, and e-mail or other communication method, to enable the consumer to contact the trader quickly and efficiently.
Article 6(1)(e)	The total price of the goods or services, including additional charges and costs.
Article 6(1)(n)	The existence of relevant codes of conduct.
Article 6(1)(o)	The duration of the contract, or if the contract is to be extended automatically, the conditions for terminating the contract.
Article 6(1)(r)	The functionality, including applicable technical protection measures, of digital content.
Article 6(1)(t)	The possibility of recourse to an out-of-court complaint and redress mechanism.
Article 6(1)(ea)	The personalisation of the price on the basis of automated decision-making. ⁸⁹²
Article 8(2)	If a distance contract concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and comprehensible manner and directly before the consumer place his order.

Table 10 - Applicable CRD provisions.

These provisions are relevant to contracts for gambling(-like) elements for several reasons. For example, in the video game context it can be unclear for consumers where they can file a complaint or who to contact if a problem occurs with the delivery of the digital content. It can also be unclear what the main characteristics are of the gambling(-like) element (e.g. for lootboxes, which types of digital content they contain, what their drop-rates are...), or what the total price of the digital content is (e.g. the exchange rate or additional buying fees when buying virtual currency in a social casino game). Another aspect is the automatic renewal of the contract (e.g. a monthly purchase of virtual currency) of which the consumer should be informed, as well as how to stop this renewal or terminate the contract. The recent addition of personalisation of pricing as part of the information obligation shows the recognition of possible predatory practices (as discussed in previous chapters) and the overlap with the data protection framework. Finally, taking into account the danger of overspending on in-game purchases, the obligation to clearly inform consumers that they pay real money is an important aspect of the CRD.⁸⁹³ In this regard, Article 8(9) CRD refers to the E-Commerce Directive, more specifically its Articles 9 and 11, where the trader is required to allow the consumer to verify the e-order before placing it, which is important in the context of in-game purchases.⁸⁹⁴

⁸⁹⁰ Recital 34 CRD.

⁸⁹¹ It should not be forgotten that in principle (see *supra* on everyday contracts) children should not be able to conclude these contracts if they have not attained the age of majority, which is 18 in EU Member States.

⁸⁹² This was added by Article 4(a)(ii) of Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules.

⁸⁹³ See also e.g. OECD, *Recommendation of the Council on Consumer Protection in E-Commerce*, 2016, 5, stating that businesses should not misrepresent or hide terms and conditions that are likely to affect a consumer's decision regarding a transaction, or that they should not use unfair contract terms.

⁸⁹⁴ See e.g. the European Commission's 2014 Guidance document on the CRD, at 32.

RULES FOR DIGITAL CONTENT. In addition to the general information obligations, the CRD contains a number of provisions related to digital content in particular. In Article 2(11), digital content is defined as “data which are produced and supplied in digital form” and Recital 19 mentions applications and games as examples. The definition was introduced in 2019 Directive on modernisation of EU consumer protection rules⁸⁹⁵ to align it with the Directive on the supply of digital content and services (*infra*).⁸⁹⁶ Regarding this information obligation, in its Guidance document on the CRD, the European Commission stated that:

“[w]here the digital product includes **optional additional and built-in purchases**, the consumer should be **duly informed** that such additional purchasing options may be offered, **before acquiring the digital product**.”⁸⁹⁷ (emphasis added)

This obligation includes information about in-game purchases, as well as the payment arrangements for these additional purchases, and is an important aspect of information that needs to be provided before the consumer (child) signs up to the video game service.

A second aspect concerns the **right of withdrawal**. Article 16(m) CRD states that there is no right of withdrawal when the performance of the contract (i.e. the supply of digital content) has begun with the consumers’ prior express consent and thereby their acknowledgement that they thus lose their right of withdrawal. Although not an identical situation, this provision is also relevant in the video gaming context, where the purchase of in-game content is oftentimes accompanied by a notice that the purchase is non-refundable. The ‘express’ consent requirement means that the consumer has to take a positive action, such as ticking a box on the trader’s website (or in the video game).⁸⁹⁸ In other words, a trader (the video game publisher) needs to obtain express consent of the consumer (the users of his video game) for revoking their right to withdrawal regarding the purchase of in-game content. This interpretation is conform Article 8(7) CRD, which states that confirmation of this consent needs to happen before the start of the performance.

Aside from the CRD, the more recent **Directive on the supply of digital content and services** contains general provisions on contractual obligations. This Directive builds on the CRD and introduces new provisions regarding digital content to meet the rapid evolutions in the digital market. First, the Directive states in Article 3 that it applies to *any* contract where a trader supplies digital content or digital services to a consumer, which not only helps with the contract type issue mentioned *supra*, it also enables online platform providers to be considered as traders.⁸⁹⁹ Second, the Directive broadens the scope by removing the payment of a price as a requirement for falling under the notion of a contract. This is mentioned in Recital 24, where the business model is discussed wherein consumers provide personal data and traders provide digital services. This situation has links with the data protection framework discussed in chapter 6 and can be relevant for example in free-to-play games where a child’s personal data is used for other purposes (e.g. marketing) than the use of the provided digital service. Third, the Directive contains general requirements for objective and subjective

⁸⁹⁵ Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules, Article 4(1)(d).

⁸⁹⁶ Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, 2019, Article 2(1).

⁸⁹⁷ *Ibid.*, 65.

⁸⁹⁸ *Ibid.*, 65.

⁸⁹⁹ See Recital 18 of the CRD. Gambling services are again excluded from the scope of application, however it has to be noted that gambling(-like) elements in video games are not necessarily gambling services as such.

conformity of the digital content, such as purpose-fitness of the content/service, standards of quality, accessibility and security, or supplementary instructions and accessories related to the contract. For example, regarding the standards of quality of the digital content, we can refer back to the question to which extent virtual goods (i.e. digital content) can be seen as having an equivalent status as real-world tangible goods or services. As stated by KING et al., it would be difficult to apply a quality-test (which exist for tangible goods, e.g. smartphones or washing machines) to virtual goods, due to the absence of any recognised standards of quality for virtual items (e.g. there is no existing standard of quality to which a lootbox should adhere).⁹⁰⁰ Although the application by KING ET AL. concerns Australian consumer protection law, the EU Directive on contracts for the supply of digital content and services includes a similar provision, stating that in order to be in conformity with the contract, the digital content or service has to be of the quality required by the contract.⁹⁰¹ The problem here persists, as it would be unclear what quality ‘is required by the contract’, which becomes even more difficult if we take into account the fact that video game companies’ EULAs oftentimes state that in-game purchases are valueless and that therefore no quality threshold can be expected.⁹⁰²

REMEDIES AND ENFORCEMENT. Before discussing the provisions relating to remedies and enforcement, it should be restated that oftentimes the purchase of virtual content is non-refundable and that the invested money cannot be returned. This, of course, does not take into account potential breaches of the contract by video game companies, which would lead to remedies and enforcement possibilities. In the CRD, remedies are linked to the right of withdrawal and the subsequent obligations for the trader and consumer as stated in Articles 13 and 14 CRD. For example, if the consent of the consumer is not obtained prior to the purchase, the consumer shall not bear costs for the supply of the digital content according to Article 14(4)(b) CRD. The other provisions relate to more general remedies, most notably the reimbursement of payments (which can thus conflict with the no-refund policies in the video game companies’ EULAs). Similar provisions are included in the Directive on the supply of digital content and services, where Article 14 mentions proportionate reductions in price or termination of the contract, entitlement of the consumer to have the digital content brought into conformity, and Articles 15-18 refer to general obligations in case of termination of the contract and subsequent reimbursement of payments. Finally, regarding enforcement, it is up to the Member States to provide adequate means to ensure compliance with these Directives and to decide when and how for instance consumer organisations can take action to ensure their application.⁹⁰³ In this regard, it could be interesting to analyse in the future how effective sectoral codes of conduct could be (e.g. video gaming industry codes) and how effective national regulation would be to ensure compliance.

2 The Unfair Contract Terms Directive

INTRODUCTION. The Unfair Contract Terms Directive⁹⁰⁴ is an additional relevant Directive when discussing consumer protection in the context of this report. Even though it is an older Directive, adopted in 1993, it contains provisions on unfair contract terms which can be applied to the digital

⁹⁰⁰ KING et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behaviour* 131, 2019, 138.

⁹⁰¹ Article 7(a) of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, 2019.

⁹⁰² KING et al., *Unfair play? Video games as exploitative monetised services: An examination of game patents from a consumer protection perspective*, in *101 Computers in Human Behaviour* 131, 2019, 138.

⁹⁰³ Article 23 CRD and Article 21 Directive on the supply of digital content and services.

⁹⁰⁴ Council Directive 93/13/EEC on unfair terms in consumer contracts (‘Unfair Consumer Terms Directive’), 1993.

environment and to the video gaming environment in particular. Helpful in this regard is the 2019 Guidance document issued by the European Commission ('the Guidance document'), which sheds more light on the interpretation and application of the generally formulated Articles of this Directive, including the interpretations thereof provided by the CJEU.⁹⁰⁵ Two concepts are key to understanding the importance of this Directive: (1) unfairness and (2) transparency.

UNFAIRNESS AND TRANSPARENCY. When talking about unfair contract terms in the video gaming context, there is a central role for the terms of service that are provided to the consumer before downloading the game.⁹⁰⁶ These terms of service are not individually negotiated and therefore, according to Article 3(1), shall be regarded as unfair if they are **contrary to good faith** and cause a **significant imbalance** in the parties' rights and obligations, to the detriment of the consumer. This is what the Guidance document refers to as the **general unfairness test**, which has to be assessed taking into account the nature of the goods or services, the other terms of the contract, and the circumstances attending the conclusion of the contract.⁹⁰⁷ The good faith requirement refers to the contract term being conform with fair and equitable market practices.⁹⁰⁸ As a criterium in the unfairness assessment, in Article 4(2) the 'definition of the main subject matter of the contract' is mentioned, which is, according to the CJEU, "*the terms that lay down the essential obligations of the contract and as such characterise it*".⁹⁰⁹

Aside from the general unfairness test, Annex I to the Unfair Contract Terms Directive contains a **list of specific terms that may be judged as being unfair**. This list includes *inter alia* terms which bind consumers even though they had no real opportunity of becoming acquainted with them before the conclusion of the contract; terms which allow the trader to unilaterally alter a contract without a valid reason; terms excluding or limiting legal rights of the consumer vis-à-vis the trader; or terms restricting the consumer's right to take legal action or exercise legal remedies.⁹¹⁰ It should be noted that this unfairness test is relevant in the context of what has been stated *supra* on the exclusion of ownership of virtual goods in the EULAs of video game companies and the uncertainties on the legal status of virtual content (e.g. when an EULA provisions states that the video game company can unilaterally remove all virtual content from players' inventories without prior notice).⁹¹¹

Furthermore, the Unfair Contract Terms Directive contains **transparency requirements**, based on its Articles 4(2) and 5, which use the notion of 'plain intelligible language' regarding the drafting of the contract terms. Consumers must be given the opportunity to become acquainted with contract terms before the conclusion of the contract, which entails the question of whether the consumer had access

⁹⁰⁵ Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, 2019 ('Guidance document').

⁹⁰⁶ For example, the UK's Behavioural Insights Team (BIT) – a company that generates and applies behavioural insights to inform policy and improve public services – states that "*Paypal's terms & conditions altogether total 36,275 words – that's longer than Shakespeare's Hamlet. This is representative of consumers' online experiences: they are asked to engage with long and complex terms and conditions and notices about how companies will use and share their data. A combination of inattention and information overload means that these disclosures are largely ineffective, leaving consumers exposed and with a poor understanding of the true value exchange they are making with online companies.*" See BIT, *The behavioural science of online harm and manipulation, and what to do about it*, 2019, 3.

⁹⁰⁷ Article 4(1) Unfair Consumer Terms Directive; Guidance document (n 905), 30.

⁹⁰⁸ Guidance document (n 905), 30.

⁹⁰⁹ CJEU, *Andriuciu v. Banca Romaneasca SA*, C-186/16, 20 September 2017, ECLI:EU:C:2017:703, para. 35; *Caja de Ahorros y Monte de Piedad de Madrid v. Ausbanc*, C-484/08, 3 June 2010, ECLI:EU:C:2010:309, para. 34; *van Hove v. CNP Assurances SA*, C-96/14, 23 April 2015, ECLI:EU:C:2015:262, para. 33; Guidance document (n 905), 23.

⁹¹⁰ Annex I, 1 of the Unfair Consumer Terms Directive.

⁹¹¹ See *supra* on the arguments by scholars that virtual items are seen as valuable by many video game communities and that this value is represented by money and time investments.

to read the contract terms, and whether these terms were comprehensible taking into account the position of the consumers and their familiarity with the used terminology.⁹¹² The CJEU has provided further specifications on this, stating that the requirement of transparency cannot be reduced merely to their formal and grammatical intelligibility and that it is based on the weak position of the consumer vis-à-vis the trader.⁹¹³ Moreover, the consumer needs to be in a position to be able to evaluate the economic consequences stemming from the contract.⁹¹⁴ More specifically, all the information likely to have impact on the extent of the consumer's commitment to enter into the contract is of fundamental importance and has to be communicated to the consumer before the conclusion of said contract.⁹¹⁵ Finally, the link between unfairness and transparency is that the lack of the latter can contribute to the former. In other words, a lack of transparency does not automatically lead to unfairness of a contract term, but it can contribute to it. At the same time, a contract term can be transparent and still be deemed unfair in light of the unbalanced content.⁹¹⁶ If a contract term is classified as unfair, Article 6(1) states that the term will not be binding on the consumer and that the contract shall continue to bind the parties if the other terms allow it to be continued.

APPLICABILITY IN THE VIDEO GAME CONTEXT. These interpretations of the articles of the Unfair Contract Terms Directive are relevant in the context of gambling(-like) elements in video games. If the purchase of in-game content is seen as a contract, then the essential characteristics of this contract could be for example the type of content, the price paid, or the method of acquisition of the (virtual) content (e.g. through lootboxes or direct acquisition through payment). When applying the unfairness test in this context, the circumstances and the nature of the goods are relevant criteria to assess whether or not there is an 'imbalance' to the detriment of the consumer. The 'good faith' criterium of Article 3(1) (*supra*) could be violated in video game contracts, for example when consumers had an inducement to agree to the terms or when the video game company misuses its position of strength towards the users.⁹¹⁷ Additionally, it could be argued that the imbalance in rights and obligations between trader and consumer of Article 3 can also be enhanced by a lack of transparency. More specifically, when video games include in-game purchase mechanisms (including those related to gambling(-like) elements) the information about these mechanisms provided by the video game company in its terms and conditions will be of fundamental importance. Consumers (children⁹¹⁸) need to be made aware of the existence of these specific monetisation features before accessing the game, and the mechanisms need to be explained to them in a comprehensible manner taking into account their capacities, age and maturity,⁹¹⁹ as well as making children aware of the potential economic dangers of in-game purchases (e.g. overspending). A 2016 study commissioned by the European Commission has shown

⁹¹² Guidance document (n 905), 21 and 25; Recital 20 of the Unfair Consumer Terms Directive; Point 1(e) of the Annex to the Directive;

⁹¹³ CJEU, *Kasler v. OTP Jelzalogbank Zrt*, C-26/13, 30 April 2014, ECLI:EU:C:2014:282, paras. 71-72; *Bucura v. SC Bancpost SA*, C-384/14, 9 July 2015, ECLI:EU:C:2015:447, para. 52.

⁹¹⁴ CJEU, *Kasler v. OTP Jelzalogbank Zrt*, C-26/13, 30 April 2014, ECLI:EU:C:2014:282, para. 75; *van Hove v. CNP Assurances SA*, C-96/14, 23 April 2015, ECLI:EU:C:2015:262, para. 50.

⁹¹⁵ CJEU, *Andriuc v. Banca Romaneasca SA*, C-186/16, 20 September 2017, ECLI:EU:C:2017:703, para. 48; *RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen eV*, C-92/11, 21 March 2013, ECLI:EU:C:2013:180, para. 44.

⁹¹⁶ Guidance document (n 905), 34.

⁹¹⁷ Recital 16 of the Directive states that in making the good faith assessment, particular regard shall be had to e.g. the strength of the bargaining position of the parties or whether the consumer had an inducement to agree to the term; both examples are relevant in the video gaming context, where the video game company has the strongest position and where consumers can oftentimes not use the company's services without agreeing to the terms and conditions (see *supra*). It could also be argued that using predatory commercial practices is in general contrary to the principle of good faith.

⁹¹⁸ See also *supra* on the legal capacity of children to enter into contracts.

⁹¹⁹ See chapter 2 on the child's evolving capacities.

that the terms of use in the digital environment are oftentimes just accepted without being read, even though they are the main instrument through which child-consumers and parents are informed of the different dangers related to in-game purchases and their gambling(-like) features (see also chapter 6).⁹²⁰ Many video game companies only include a general statement in their terms of use, with a link provided to their website for additional information on the gambling(-like) features (e.g. the disclosure probability for lootboxes or the valorisation of virtual currencies in social casino games). It has been argued that these types of information need to be more clearly communicated to consumers, especially to children. For example, the Dutch Code for Children’s Rights of 2021 states that it has to be clear beforehand for children that they pay real money for in-game purchases, or that children can only make an informed decision about a transaction if they know exactly what the costs and functionalities are (which is only possible if the information is provided to them in a clear and comprehensible manner).⁹²¹ Similar recommendations are found in UNICEF’s Recommendations for the online gaming industry, the UK Office of Fair Trading’s principles for online and app-based games, or the OECD’s Toolkit for digital consumers.⁹²² In any event, it can be argued that the Unfair Contract Terms Directive certainly has the potential to offer protection to child-consumers in the context of contracts entered into in the video game environment (e.g. in-game purchases related to gambling(-like) elements). According to the CJEU, it is then up to the national courts to determine the potential unfairness and transparency of the terms in these contracts.⁹²³

3 The Unfair Commercial Practices Directive

‘UNFAIR’ COMMERCIAL PRACTICES. The 2005 Unfair Commercial Practices Directive (‘UCPD’)⁹²⁴ is one of the key regulatory instruments of the EU to realise its objective of achieving a high level of consumer protection through maximum harmonisation.⁹²⁵ The European Commission has acknowledged the potential exploitation by traders of children’s behaviour for commercial purposes, as well as the exposure of children to misleading or aggressive commercial practices online.⁹²⁶ More specifically, the Commission has stated that the UCPD can be used to address unfair data-driven commercial practices in the business-to-consumer relationship.⁹²⁷ The UCPD is not restricted to specific products, media or types of market behaviour, and includes gambling services.⁹²⁸ It has principle-based provisions, allowing it to catch fast-evolving products, services and sales methods.⁹²⁹ It is however restricted to

⁹²⁰ ELSHOUT, M. et al. (Centre for the Study of EU Contract Law), *Study on consumers’ attitudes towards Terms and Conditions*, 2016; see also OECD, *Toolkit for Protecting Digital Consumers*, 2018, 32.

⁹²¹ Kansspelautoriteit (NL), *Code voor Kinderrechten*, 2021, 31 and 36.

⁹²² UNICEF, *Recommendations for the online gaming industry on assessing impact on children*, 2020, 21-22; UK Office of Fair Trading, *Principles for online and app-based games*, 2014, 3-8; OECD, *Toolkit for Protecting Digital Consumers*, 2018, 6-8.

⁹²³ CJEU, *Pannon GSM v. Erzsebet Sustikne Gyorfj*, C-243/08, 4 June 2009, ECLI:EU:C:2009:350, paras. 42-43.

⁹²⁴ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 of the European Parliament and the Council, 2005 (‘Unfair Commercial Practices Directive’).

⁹²⁵ It does so through the full harmonisation approach, where Member States are not allowed to impose stricter rules than those in the Directive. See Recitals 5, 12 and 13 UCPD and CJEU, *VTB-VAB NV v. Total Belgium*, C-261/07, 23 April 2009, para. 52.

⁹²⁶ European Commission, *Communication COM(2020)696 on a New Consumer Agenda: strengthening consumer resilience for sustainable recovery*, 2020, 11.

⁹²⁷ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 100.

⁹²⁸ The only referral to gambling is made in Recital 9, where it is stated that the UCPD is without prejudice to national or Community rules on gambling services.

⁹²⁹ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 5.

business-to-consumer relations according to its Article 3(1), which is applicable to the video gaming environment where players are considered consumers and video game companies are considered traders.⁹³⁰ The UCPD aims to regulate those commercial practices that harm consumers' economic interests by prohibiting those that are 'unfair', which is defined as either: (1) contrary to professional diligence and materially distorting or likely to distort economic behaviour; (2) misleading; or (3) aggressive.⁹³¹ Furthermore, the UCPD contains several provisions relevant for children as consumers and how they should be protected.

DISTORTING, MISLEADING OR AGGRESSIVE PRACTICES. A first question that should be analysed is whether commercial practices related to gambling(-like) elements in video games could be deemed unfair under the UCPD. For misleading or aggressive commercial practices, the practice has to lead consumers to take a transactional decision that they would not have taken otherwise, which also encompasses for example pre- and post-purchase decisions.⁹³² For the distorting practice this is *de facto* identical, although worded differently, as can be derived from the definition in Article 2(e): "*to materially distort the economic behaviour of consumers means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.*"

First is the **materially distorting** option, stated in Articles 5(2)(b) and 5(3) UCPD. There are two requirements to classify a commercial practice as contrary to professional diligence and materially distorting or likely to distort economic behaviour. The 'professional diligence' requirement refers to concepts such as honest market practices, good faith, or good market practices, emphasising values that apply in the specific field in business activities.⁹³³ Notably, it was confirmed by the CJEU and the European Commission that Article 5(2) is a self-standing criterion and not an additional test for the specific categories of misleading and aggressive commercial practices (*infra*), which is important for commercial practices that use 'dark patterns'.⁹³⁴ As stated by the European Consumer Organisation (BEUC), it could be argued that using manipulative practices that materially distort economic behaviour are *as such* contrary to professional diligence.⁹³⁵ For the second requirement, it is sufficient that the commercial practice is *likely* to materially distort the economic behaviour of the average consumer whom it is addressed to, which means that an actual distortion is not required.⁹³⁶ The '**average consumer**', according to Recital 18, means a reasonably well-informed, observant and circumspect consumer, taking into account social, cultural and linguistic factors.⁹³⁷ This assessment is highly

⁹³⁰ Articles 2(a) and 2(b) UCPD. 'Consumer' means any natural person who, in commercial practices covered by this Directive, is acting for the purposes which are outside his trade, business, craft or profession; 'Trader' means any natural or legal person who, in commercial practices covered by the Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.

⁹³¹ Article 5 UCPD.

⁹³² European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 31.

⁹³³ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 37.

⁹³⁴ CJEU, *CHS Tour Services v. Team4 Travel*, C-435/11, 19 September 2013, ECLI:EU:C:2013:574, where it is also stated that it is not necessary to prove that the trader breached this professional diligence duty; See also European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 37.

⁹³⁵ BEUC, "*Dark Patterns*" and the EU Consumer Law Acquis – Recommendations for a better enforcement and reform, 2022, 6, available at <https://www.beuc.eu/publications/beuc-x-2022-013_dark_patterns_paper.pdf>.

⁹³⁶ *Ibid.*, 36.

⁹³⁷ CJEU, *Gut Springenheide GmbH v. Rudolf Tusky*, C-210/96, 16 July 1998, ECLI:EU:C:1998:369, para. 31; *Estée Lauder v. Lancaster Group*, C-220/98, 16 September 1999, ECLI:EU:C:1999:425, para. 29; the European Commission has found in its

circumstantial, is based on the principle of proportionality, and should take into account the high level of consumer protection as required in Article 114 TFEU.⁹³⁸ Furthermore, children can be seen as a particularly vulnerable group because of their age and credulity as stated by Article 5(3) UCPD, which can be reasonably foreseen by the trader.⁹³⁹ Therefore, the assessment of what an average consumer in that group is should be done from the perspective of the average member of that group.⁹⁴⁰ This basically means a higher level of protection is awarded for children due to their vulnerability, because in many cases the average child will not have the same capacities as the average consumer.⁹⁴¹ This is also why direct exhortations to purchase aimed at children are listed as always unfair in Annex I of the UCPD (*infra*).⁹⁴² Applied to gambling(-like) elements in video games, this economic behaviour distortion is directly linked to what has been stated about the potential risks of behavioural targeting, nudging techniques, or other practices to encourage children to spend money on in-game content, which may affect their right to development, freedom of thought and protection from economic exploitation.⁹⁴³ On this, the European Commission has stated that “*the concept of vulnerability in the UCPD is dynamic and situational*” and that “*certain consumers may be particularly susceptible to personalised persuasion or manipulative practices [dark patterns, e.g. nudging] in the digital environment*”.⁹⁴⁴ Finally, a relevant concept regarding the relationship between businesses and consumers is ‘digital asymmetry’, which is used to describe the situation where traders (video game companies) are in a more powerful position due to their knowledge about the consumer.⁹⁴⁵ According to the BEUC, this asymmetry has a relational aspect (there is no equal interaction between the video game company and the player), architectural aspect (due to the way interfaces are designed and operated) and knowledge-based aspect (the trader has detailed insights about the consumer while the consumer often understands little about how the trader and the service operate).⁹⁴⁶ This concept is relevant because in principle all digital consumers can be rendered vulnerable under conditions of digital asymmetry and as such it should arguably be included in the average consumer benchmark under the UCPD.⁹⁴⁷ It links back to what was written in section I about video game contracts and the often unilateral imposition of contract terms by video game companies on the users of their services.

study on consumer vulnerability that “well-informed” entails feeling quite informed about prices, declaring reading communications on the internet and stating that there is no reliance on advertising information only; “observant and circumspect” entail being quite careful in dealing with people and decision-making, not being very willing to take risks, and disagreeing that advertisements report objective facts. Notable, the study found that the median consumer was not able to select the best deal in the online sector.

⁹³⁸ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 33-34.

⁹³⁹ Article 5(2)(b) UCPD; note that ‘foreseeability’ can be linked to the discussion of online games or applications *likely* to concern children or adolescents, taking into account the game-design features which can attract these groups, such as cartoons, popular characters, youth celebrities and idols, etc.

⁹⁴⁰ Recitals 18 and 19 UCPD.

⁹⁴¹ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 36; note that this is also linked to the discussion in Chapter 1 about the varying capacities of children based on their maturity and age.

⁹⁴² Annex I, 28 UCPD.

⁹⁴³ See chapter 2 and this chapter for references to these commercial practices.

⁹⁴⁴ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 100-101.

⁹⁴⁵ HELBERGER, N., MICKLITZ, H. et al. (BEUC), *EU Consumer Protection 2.0 – Structural asymmetries in digital consumer markets*, 2021, 46 and 106.

⁹⁴⁶ BEUC, “*Dark Patterns*” and the EU Consumer Law Acquis – Recommendations for a better enforcement and reform, 2022, 9.

⁹⁴⁷ *Id.* Note that the BEUC argues that this approach is insufficient due to the scale of the problem and that a more thorough reform of the UCPD should be envisaged, for which they offer the introduction of new concepts such as fairness by design or the alleviation of the burden of proof.

Second is the **misleading commercial practice**, which is unfair if it contains false information, or if it deceives or is likely to deceive the average consumer even if the information is correct, and causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.⁹⁴⁸ Here, the most relevant provision is Article 6(1)(b) UCPD, which mentions the main characteristics of the product as one of the elements to potentially deceive the consumer. These characteristics are for example the benefits and risks, the usage or the results expected from the use of the product. In the context of paid random content (e.g. lootboxes), this means according to the European Commission that an explanation should be offered regarding how the lootbox works, its price, which results are possible based on the probability disclosure and how this is calculated,⁹⁴⁹ and could also include the risks involved in the activity of opening lootboxes (e.g. overspending or addiction). It has to be noted that Article 6 also includes the ‘overall presentation’ of the practice, which can refer to for example promoting a specific option, using ambiguous language, visually obscuring important information, or using trick questions as possibilities for potentially misleading practices.⁹⁵⁰ Furthermore, one might also take a closer look at Article 7 UCPD on misleading omissions, which means **omitting material information** that the average consumer needs in order to make an informed transactional decision, as well as **hiding the commercial intent** of the commercial practice.⁹⁵¹ This establishes a positive obligation on traders to provide all the information which the average consumer needs to make an informed purchasing decision.⁹⁵² Article 7(4) lists examples of information to be regarded as material (e.g. the main characteristics of the product), aiming to ensure that enough information is available for consumers to take an informed decision to purchase, unless that information is already apparent from the context.⁹⁵³ The failure to identify the commercial intent is specifically mentioned in the context of advertising and marketing practices,⁹⁵⁴ however its relevance for in-game purchases and related gambling(-like) activities should not be overlooked. Of course, commercial intent is in a way inherent to video games, since it is an economic interest of video game companies to make money through in-game content offers. Nevertheless, sometimes the commercial intent is not clear from the beginning, for example when the game is free-to-play but gradually tries to encourage players to spend money even though this is not required (i.e. nudging). Furthermore, the BEUC has stated that Article 7 is relevant when dark patterns are used to hide information from consumers to make them take a transactional decision, which can for example occur in video games when there is a possibility to continue using the service without paying, but the experience is severely diminished (e.g. when players cannot stay competitive without spending money or have to spend significant amounts of time (waiting) on the video game if no payment is made).⁹⁵⁵ Finally, if the players

⁹⁴⁸ Article 6(1) UCPD.

⁹⁴⁹ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 105; See e.g. the Dutch Authority for Consumers & Market, *Guidelines on the protection of the online consumer – Boundaries of online persuasion*, 2020, 26-30.

⁹⁵⁰ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 101; BEUC, “Dark Patterns and the EU Consumer Law Acquis – Recommendations for a better enforcement and reform”, 2022, 7.

⁹⁵¹ Article 7(1) and (2) UCPD.

⁹⁵² European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 50.

⁹⁵³ *Ibid.*, 54; the Commission further notes that in order to not place disproportionate information burdens on traders, the requirements of Article 7(4) are not static and require different information based on the situation, which is also apparent from the wording in e.g. Article 7(3) or 7(4)(a).

⁹⁵⁴ See VERDOODT, V. *Children’s Rights and Advertising Literacy in the Digital Era*, 2018; Article 6(a) of the E-Commerce Directive, Article 9(1)(a) of the AVMSD, or Article 13(4) of the E-Privacy Directive.

⁹⁵⁵ BEUC, “Dark Patterns and the EU Consumer Law Acquis – Recommendations for a better enforcement and reform”, 2022, 7.

of video games get invitations to purchase (i.e. commercial communications indicating the characteristics of the product and the price, thereby enabling the consumer to make a purchase)⁹⁵⁶, the main characteristics of the product need to be included in the provided information, which refers back to the information obligations as discussed *supra*.⁹⁵⁷ The European Commission has confirmed this:

“When offering in-game purchases, traders must ensure that they comply with the information obligations in Article 7 UCPD and the CRD. The main characteristics of the product must be clearly described and the prices of virtual items must be clearly and prominently displayed (also) in real currency.”⁹⁵⁸

Third are the **aggressive commercial practices** as included in Articles 8-9 UCPD. A commercial practice is deemed aggressive if it significantly impairs or is likely to impair the average consumer’s freedom of choice or conduct and thereby causes him to make a transactional decision which he would otherwise not make. This could, for instance, be the case if video gaming companies would exert undue influence to impair or try to impair the consumer’s freedom of choice or conduct, for example by exploiting specific circumstances which impair the consumers judgement (e.g. by tracking a child’s emotions or inner state), or by imposing non-contractual barriers when a consumer wishes to terminate an in-game purchase contract.⁹⁵⁹ A clear illustration of an aggressive commercial practice is the abovementioned example of direct exhortations to children to make purchases, and another practice which can be aggressive in certain situations is behavioural advertising.⁹⁶⁰ Furthermore, the BEUC has stated that many forms of dark patterns can be captured by these provisions due to impairment of consumers’ freedom of choice/conduct, because *“traders [...] are in general aware of choices that are most likely to be made by consumers under different circumstances and can therefore use that knowledge to their advantage”* (see also *supra* on digital asymmetry).⁹⁶¹ In that regard, the European Commission has given an example of what may constitute an aggressive practice:

“An online game uses algorithms to determine, on the basis of the playing habits of the user, its ‘risk taking score’ to personalise the timing of in-game offerings of loot boxes, the chances of obtaining a highly valued item in a loot box, the strength of adversaries in the game, all with the purpose of keeping them glued to the game and increase in-game spending. The algorithms are used to target addiction-prone players in particular.”⁹⁶²

⁹⁵⁶ Article 2(i) UCPD; European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021, 53-54. Note that this does not require an actual option to purchase, see CJEU, *Konsumentombudsmannen v. Ving Sverige AB*, C-122/10, 12 May 2011, ECLI:EU:C:2011:299, para. 32.

⁹⁵⁷ These information obligations also entail that the information needs to be provided in a clear, intelligible, unambiguous and timely manner in order to be classified as not-misleading.

⁹⁵⁸ European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 104.

⁹⁵⁹ Disproportionate non-contractual barriers imposed by traders are mentioned in Article 9(d) UCPD.

⁹⁶⁰ See VERDOODT, V., *Children’s Rights and Advertising Literacy in the Digital Era*, 2018, for a case-study regarding this issue.

⁹⁶¹ BEUC, *“Dark Patterns and the EU Consumer Law Acquis – recommendations for a better enforcement and reform*, 2022, 8, where the example is given of ‘click-fatigue’, where traders know that consumers are less likely to cancel contracts if they need to go through multiple steps and therefore design their contract cancel interface to discourage consumers from making such a choice. A similar example is in privacy settings when many steps have to be taken to opt-out from the default settings.

⁹⁶² European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market*, 2021/C 526/01, 2021, 104.

THE BLACKLIST. Annex I of the UCPD contains commercial practices which are in all circumstances seen as unfair and are therefore prohibited. Examples of provisions that are relevant to the topic of this report are the following:

Provision	Relevance
7. Falsely stating that a product will only be available for a limited time or in particular terms, in order to elicit an immediate decision and deprive consumers of sufficient opportunity and time to make an informed choice.	E.g. limited-time offers on in-game purchases which are personalised and not based on objective terms. ⁹⁶³
9. Stating or otherwise creating the impression that a product can be legally sold when it cannot.	E.g. when gambling(-like) elements are prohibited (for instance, on the basis of national law) and are still sold. ⁹⁶⁴
16. Claiming that products are able to facilitate winning in games of chance.	E.g. misleading information about winning probabilities in lootboxes, on the precondition that lootboxes are seen as games of chance in the relevant jurisdiction.
20. Describing a product as 'free' or 'without charge' if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice.	E.g. when online games are classified as free-to-play when in fact you need to pay money from a certain level to continue playing.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents to buy advertised products for them.	E.g. when marketing communications are phrased as commands or put pressure on players/parents to buy lootboxes or other virtual items/currency.
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when there is no prize or taking any action to claiming the prize means the consumer has to pay money.	Misleading information on winning probabilities of e.g. lootboxes creates the impression for video game players that they will always win their desired in-game content item, when this is not the case. ⁹⁶⁵

Table 11 - Applicable blacklist-provisions of the UCPD.

4 The E-Commerce Directive and the Digital Services Act

LIMITED BUT RELEVANT APPLICABILITY. Although not directly envisaging the protection of consumers, the E-Commerce Directive contains some general provisions related to the free circulation of online services throughout the EU that can be applied to video games.⁹⁶⁶ According to Article 1, the goal of the E-

⁹⁶³ Similarly, when these offers are (falsely) stated to expire, but are then immediately after expiration re-offered under equal or slightly changed conditions.

⁹⁶⁴ Or when a slightly different version of the element is sold under the impression that it is legal, when it is not.

⁹⁶⁵ Note that maximum harmonisation means that Member States cannot introduce rules stricter than those in the Directive, however what we mean here by a broad interpretation concerns the interpretation of gambling(-like) elements as prize-winning activities where consumers can be misled.

⁹⁶⁶ The forthcoming Digital Services Act also includes numerous references to consumer protection objectives. For example, the latest version of the Proposal of the European Parliament includes an amendment for Article 1 to include a high level of consumer protection as one of the objectives of the DSA and also adds consumer protection as an element of different Articles and Recitals. See <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.pdf>.

Commerce Directive is to contribute to the proper functioning of the internal market by ensuring the free movement of ISS. The Digital Services Act ('DSA') would expand upon those provisions (without replacing them), although it has to be noted that the DSA is still a proposal for a Regulation and its discussion within this report therefore remains subject to future amendments if it is ultimately adopted. The discussion below takes the E-Commerce Directive as the starting point and includes provisions of the DSA that could be specifically applicable to the topic of gambling(-like) elements in video games.

In Article 1(5)(d) of the E-Commerce Directive, gambling activities are excluded from its scope. However, as stated *supra*, gambling(-like) elements in video games are in certain instances not necessarily qualified as gambling as such, which would bring them under the scope of the E-Commerce Directive. Moreover, VERBIEST AND KEULEERS argue that the Directive will be applied to or will have some influence over the gambling sector, considering that this Directive is and will remain the foundation for future legislation, which means that *"the principles laid down in the Directive should be applicable to all aspects of information society services, including gam[bl]ing services, or at least have an indicative function"*.⁹⁶⁷ This interpretation would apply when gambling(-like) elements are classified as gambling. In any case, leaving open the possibility to include certain gambling(-like) activities within the scope of the E-Commerce Directive, they still first need to qualify as an ISS. There is no clear-cut answer to the question whether video games are to be seen as ISS, but arguments can be made in favour of such an interpretation. More specifically, the CJEU in its case law has stated that information society services cover contracts and other services that are concluded or transmitted online.⁹⁶⁸ A problem with this is that this case law still presupposes a sale of goods or services, which, as we have seen *supra*, cannot be generally accepted in the video gaming context. As stated, it is generally included in video gaming companies' terms of service that purchasing in-game content does not imply a transfer of ownership of this content, which is required for a sale. Thus, there is a possibility, but no certainty, that in-game purchases contracts are seen as contracts covered by information society services. As discussed below, video games *as such* may still be qualified as ISS, irrespective of in-game purchase possibilities.

More generally, the definition of an ISS in Article 2(a) E-Commerce Directive is *"(1) any service normally provided for remuneration, (2) at a distance, (3) by electronic means and (4) at the individual request of a recipient of services."*⁹⁶⁹ It should first of all be noted that the video game as such can be distinguished from the services it includes, the latter for example being in-game purchases which are then related to gambling(-like) elements. The first requirement is that the service is provided for remuneration. For video games where in-game purchases are made to buy in-game content, this requirement is met.⁹⁷⁰ However, it becomes more difficult in video games where in-game content can be both unlocked with virtual currency and with real currency directly. Even more complex are situations where in-game content can be bought with virtual currency, and this virtual currency can be earned through gameplay or through direct purchase with real money. There is no clear-cut answer to the question in which situations these services are provided for remuneration under the E-Commerce Directive, however in the cases where in-game content can be purchased with real money it would be

⁹⁶⁷ VERBIEST, T. and KEULEERS, E., *Cross-Border Gaming: The European Regulatory Perspective*, in *3 Gaming Law Review* 185, 2003, 194.

⁹⁶⁸ CJEU, *Ker-Optika v. ANTSZ* C-108/09, 2 December 2010, ECLI:EU:C:2010:725, paras. 22 and 28.

⁹⁶⁹ The E-Commerce Directive refers to Article 1(1)(b) of Directive (EU) 2015/1535 on rules on information society services.

⁹⁷⁰ Similarly, when a price is paid in a microtransaction, the service is provided for remuneration.

appropriate to classify it as such. This classification issue is especially important in the case of free-to-play games, where the video game itself is free (i.e. not provided for remuneration), but where in-game purchases are an important aspect of the gameplay experience.⁹⁷¹ The second and third requirements are that the service is provided at a distance and by electronic means, which is the case for video games and their in-game features as they are software provided to the player by the developer.⁹⁷² The fourth requirement concerns an individual request. As noted by SAVIN, this requirement was introduced to distinguish ISS from traditional broadcast services (e.g. TV and radio).⁹⁷³ One author has argued that the need to create an account and log in to play the video game implies the individual request, which can nowadays be applied to the majority of video games which include a gambling(-like) element⁹⁷⁴ and in any event it could be argued that downloading or purchasing a video game implies an individual request.

According to the UK's Information Commissioner's Office the definition of ISS should be interpreted broadly, including apps, programs and online games in general.⁹⁷⁵ This interpretation would imply that any type of online video game is to be considered an ISS, however the issue remains regarding what is an 'online' video game (*supra*), or regarding the acknowledgement that (a minority of) video games without an online component can include gambling(-like) elements. Looking at recent regulatory developments, this difficulty in classification was highlighted by the ISFE, stating in its position paper on the DSA that:

*"[F]urther clarifications of the E-Commerce Directive's simple framework are needed to address the increasing complexity of today's digital services. The lack of definitional clarity in the DSA may leave some companies struggling to determine with any degree of certainty into which particular category their services might fall and, in consequence, which obligations will apply to them."*⁹⁷⁶

This statement not only relates to the question whether all online games should be seen as ISS, but also to the different obligations under the E-Commerce Directive and the DSA depending on which services are provided. In conclusion, video games can arguably be classified as ISS based on the existing definition in the E-Commerce Directive, even though a degree of caution is recommended, because differences in types of video games complicate the potential for a clear-cut inclusion under its scope.⁹⁷⁷

OBLIGATIONS RELATED TO ILLEGAL CONTENT. For those video games that can be classified as ISS, the E-Commerce Directive contains provisions on the liability of intermediary service providers (e.g. video games on social media platforms or other online platforms) in its Articles 12-15. In that regard, the 'safe harbour' exemptions of Articles 12-14 are relevant for these intermediaries, as they foresee exemptions in liability related to transmission or storage of information, or awareness of the illegality

⁹⁷¹ Note here also the case law of the CJEU on the aspect of a 'price' paid, where it was stated that this does not need to be money, but can also be (personal) data as a method of 'payment'. Here, free-to-play games would also be classified as provided for remuneration.

⁹⁷² As noted by SAVIN, at a distance means that electronic communication between the parties must have existed at the time the contract was concluded. See SAVIN, A. *EU Internet Law* (Edward Elgar Publishing, 2020), 54.

⁹⁷³ *Id.*

⁹⁷⁴ Games on social media and other online platforms are examples of such video games.

⁹⁷⁵ ICO, *Age-appropriate Design Code*, 2020, 16.

⁹⁷⁶ ISFE, *Position Paper on the Digital Services Act*, 2021, 2.

⁹⁷⁷ See also e.g. DE STREEL, A. (IMCO Committee of the EU Parliament), *The e-commerce Directive as the cornerstone of the Internal Market*, 2020, 39, where a broad and progressive interpretation of ISS is said to be optimal.

(e.g. when gambling is present in video games played for children) and subsequent actions to counter it.⁹⁷⁸

Furthermore, online platforms have an increasingly important role regarding the removal of illegal content online. In the proposed DSA, which applies to intermediary services in the internal market,⁹⁷⁹ provisions are included on notification by users to intermediaries about potentially illegal content or *activities*⁹⁸⁰, as well as measures to tackle this content or activity.⁹⁸¹ Should certain gambling(-like) elements in online video games be seen as illegal activities, the DSA could offer additional protection to consumers, in the form of ‘notice and take-down actions’ related to these features on online video game platforms (e.g. the service provider will be liable if it knows about the gambling(-like) practices on their service and does not undertake action) or video game providers (e.g. when they violate national or EU regulation by including certain gambling(-like) features in their video game).⁹⁸² The DSA includes some additional relevant provisions, such as the traceability of traders which could apply to in-game purchases (information regarding the trader’s identity and other contact details),⁹⁸³ the additional obligations for very large online platforms (this is relevant for the question regarding the extent to which video game platforms can be seen as ‘very large’ platforms),⁹⁸⁴ an internal complaint-handling system for online platforms⁹⁸⁵, or more generally the creation of an EU Board for Digital Services which can help to tackle specific issues such as our topic, together with national authorities to coordinate digital services.⁹⁸⁶

Section III – Key takeaways

General takeaways:

- ❖ The consumer protection framework is relevant to look at as an **additional framework for protection**, for example when gambling(-like) elements would not fall under the scope of gambling regulation.
- ❖ The **full legal capacity of children to enter into contracts is set at the age of 18**, but is accompanied by uncertainty concerning in-game purchases (related to gambling(-like) elements in video games). It cannot be generally accepted that for example the purchase of a lootbox constitutes an ‘everyday contract’, a concept present in the private law rules of different EU Member States.
- ❖ When discussing consumer protection in the context of video game contracts, three types of **policy documents from video game companies** are important: the End-User Licence

⁹⁷⁸ Note that this liability regime was subjected to criticism and is now revisited in the proposed DSA. See MADIEGA, T. (EU Parliamentary Research Service), *Reform of the EU liability regime for online intermediaries*, 2020, 7-18.

⁹⁷⁹ In the DSA Proposal, intermediary services are either (1) ‘mere conduit’ services that consist of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network including technical auxiliary functional services; or (2) ‘caching’ services that consist of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients upon their request.

⁹⁸⁰ Article 2(g) and Recital 12 DSA.

⁹⁸¹ Articles 14 and 20 DSA.

⁹⁸² See e.g. EGBA, *EGBA welcomes European Commission proposal for a Digital Services Act*, 2020 <<https://www.egba.eu/news-post/egba-welcomes-european-commission-proposal-for-a-digital-services-act/>>.

⁹⁸³ Article 22 DSA.

⁹⁸⁴ See Section IV DSA.

⁹⁸⁵ Article 17 DSA.

⁹⁸⁶ Articles 38 and 47 DSA.

Agreement, the Terms of Service/Use and the Privacy Policy. These documents include for example the contract terms decided by the company to its users, as well as the information the company is required to give to the users of its services.

- ❖ The **legal status of virtual goods and currencies** is unclear at this point in time. Many video game companies include a provision in their policy that in-game content is only licensed to the users and that there is no transfer of ownership. On the other hand, it is argued that in-game purchase contracts resemble digital contracts and that users may still have some rights regarding these contracts, based on the concept of reasonable expectations.
- ❖ The **EU Consumer Protection Cooperation network** is a useful mechanisms for future regulation of gambling(-like) elements in video games through cooperation of national consumer protection organisations.

On the European consumer protection Directives:

- ❖ The **Consumer Rights Directive** includes general information obligations related to clearly informing consumers about the main characteristics of the gambling(-like) elements, on the filing of complaints, the duration of the contract, or the use of personalisation of pricing based on automated decision-making. Furthermore, **digital content includes content used within the different gambling(-like) elements** and it is required that consumers are informed about in-game purchase mechanisms.
- ❖ The **Directive on the supply of digital content and services** broadened the definitions of a contract and a trader, as well as removed the requirement of payment of a price for contracts, all of which are relevant for contracts related to gambling(-like) elements in video games. Furthermore, the Directive includes provisions on purpose-fitness of digital content, its standard of quality, the accessibility of the contract, or potential remedies and enforcement.
 - In the video game context, we have seen that **these provisions can be challenging for in-game content**, for example because there are no quality standards for virtual goods based on their unclear legal status (content is not owned by players), or for example because they are classified as non-refundable by video game companies and as such are difficult to enforce or obtain remedies for in case of contractual violations.
- ❖ The **Unfair Contract Terms Directive** includes two central concepts: unfairness and transparency. The general **unfairness** test means that if a contract term is contrary to good faith and causes a significant imbalance in parties' rights and obligations, the term will be deemed unfair. **Transparency** means that consumers need the ability to become acquainted with the contract before its conclusion, in plain and comprehensible language, and be able to evaluate the economic consequences stemming from the contract.
 - **In the video game context**, commercial practices such as nudging, manipulation/persuasion or behavioural targeting could be contrary to the good faith requirement. The significant imbalance in the video game context may be caused by the unilaterally decided video game contracts by video game companies. Regarding transparency, (child) consumers need to be informed about existing gambling(-like) elements before accessing the game, in an understandable way for them that takes into account their capacities.
- ❖ The **Unfair Commercial Practices Directive** states three types of unfair commercial practices: (1) contrary to professional diligence and materially distorting, (2) misleading; or (3) aggressive

commercial practices. They all refer to consumers making transactional decisions they would not have made otherwise due to commercial practices by the company.

- **Materially distorting** has two components: contrary to professional diligence (which refers to good faith and honest market practices) and the practice is likely to distort the decisions of the average consumer (which for children, due to their increased vulnerability and lesser capacities, requires a higher level of protection).
 - **Misleading** commercial practices are practices that are likely to deceive consumers, or cause consumers to make transactional decisions that would otherwise not have been made. Here, the main characteristics of the items are important, in the example of lootboxes this could be how they work mechanically, what their risks are, or the probability disclosures. Further, misleading omissions can be relevant when commercial intent is hidden by the company, for example in free-to-play games.
 - **Aggressive** commercial practices are practices that are likely to impair the consumer's freedom of choice or conduct, where the manipulative commercial practices or other techniques involving dark patterns can influence this freedom of choice of consumers.
 - The UCPD includes a **blacklist** with provisions that are deemed unfair in all circumstances, with some of its provisions applicable to gambling(-like) elements in video games (e.g. direct exhortations to children to make purchases).
 - The UCPD is equally relevant regarding **online platforms**, when commercial practices are performed by third parties (e.g. video game companies) on social media or other online (video game) platforms.
- ❖ The **E-Commerce Directive** can be applied to (features of) video games if they are classified as information society services, which is likely for the majority of video games. Difficulties with this classification exist due to the different types of video games, which sometimes make it challenging to universally include them under the scope of information society services, for example in applying the conditions of remuneration or individual request.
- For those video games that fall under the scope of the E-Commerce Directive, applicable provisions relate to obligations regarding the **removal of illegal content**, i.e. when the service provider has knowledge about the existence of illegal content on the service.

Chapter 6 – Data protection regulation

INTRODUCTION. Within the digital environment, vast amounts of children’s personal data is collected and processed.⁹⁸⁷ As children develop their ‘digital footprint’ from a very early age⁹⁸⁸, this can have significant consequences for them throughout their development and in adulthood.⁹⁸⁹ Children often feel very strong about interpersonal privacy, but do not always understand the concepts of personal data collection and related risks:⁹⁹⁰ they do not always know how much of their data is collected,⁹⁹¹ what happens with this data, or where this data is kept and how it ‘travels’ across the internet (i.e. is shared with others).⁹⁹² As stated in previous chapters, the potentially harmful character of many commercial practices or marketing techniques used in the digital environment is often linked to the collection and processing of children’s (personal) data.⁹⁹³ Therefore, the objective of this chapter is to give an overview of the regulation on (children’s) data protection relevant for the topic of gambling(-like) elements in video games. The second section discusses the applicable legal framework, with a central focus on the framework of the European Union, notably the General Data Protection Regulation (‘GDPR’) and the E-Privacy Directive (and proposed Regulation). In the EU, the protection of personal data is a fundamental right which is confirmed in its treaties.⁹⁹⁴ The chapter focuses specifically on the key provisions relevant to the video gaming environment, namely those regarding the concept of children’s consent to data processing in the signing up process for video games and applications, as well as the provisions related to profiling and automated decision-making practices (e.g. behavioural targeting or nudging).⁹⁹⁵ Similar to chapter 5, before discussing the EU legal framework on data protection, it is important to first provide additional information on the concept of data collection and the use of cookies in video games and the importance of the recently adopted EU Data Strategy for these practices.

⁹⁸⁷ See e.g. Children’s Commissioner (UK), *Who Knows What About Me?*, 2018, 3; VAN DER HOF, S. (n 156), 103-109.

⁹⁸⁸ CHAUDRON, S., DI GOIA, R. and GEMO, M. (n 87).

⁹⁸⁹ Children’s Commissioner (UK), *Who Knows What About Me?*, 2018, 3.

⁹⁹⁰ ZHAO, J. et al., *‘I make up a silly name’: Understanding Children’s Perception of Privacy Risks online*, 2019; MILKAITE, I., DE WOLF, R., LIEVENS, E., DE LEYN, T. and MARTENS, M., *Children’s reflections on privacy and the protection of their personal data*, in *Children and Youth Services Review*, 2021, 129.

⁹⁹¹ See e.g. WILLIAMSON, B. and LUPTON, D., *The datified child: The dataveillance of children and implications for their rights*, in *19 News Media & Society* 780, 2017, 201; PANGRAZIO, L. and SELWYN, N., *‘It’s Not Like It’s Life or Death of Whatever’: Young People’s Understandings of Social Media Data*, in *Social Media + Society* 1, 2018.

⁹⁹² STOILOVA, M., LIVINGSTONE, S. and NANDAGIRI, R., *Children’s data and privacy online – Growing up in a digital age*, 2019; STOILOVA, M. and LIVINGSTONE, S., *Digital by Default: Children’s Capacity to Understand and Manage Online Data and Privacy*, in *8 Media and Communication* 197, 2020.

⁹⁹³ See also MONTGOMERY, K., CHESTER, J. and KOPP, K. (UNICEF), *Data governance for young people in the commercialised digital environment*, Issue brief no. 3, 2020 or House of Commons DCMS Committee, *Immersive and addictive technologies*, 2019, 35-41 for specific examples of data use in commercial practices and game design features.

⁹⁹⁴ Article 8 CFEU, Article 39 TEU, Article 16 TFEU.

⁹⁹⁵ For a more comprehensive analysis of EU data protection law and its key concepts such as data processors and controllers, data protection impact assessments, or supervisory authorities the reader is advised to consult other sources on the subject: see EDPB, *Guidelines 07/2020 on the concepts of controller and processor in the GDPR*, 2021; VAN DER HOF, S. and LIEVENS, E., *The importance of privacy by design and data protection impact assessments in strengthening protection of children’s personal data under the GDPR*, in *1 Communications Law* 33, 2018; VAN DER HOF, S., LIEVENS, E. and MILKAITE, I., *The protection of children’s personal data in a data-driven world*, in LIEFAARD, T., RAP, S. and RODRIGUES, P., *Monitoring Children’s Rights in the Netherlands. 30 Years of the UNCRC* (Leiden University Press, 2020); LIEVENS, E. and VERDOODT, V., *Looking for needles in a haystack: Key issues affecting children’s rights in the GDPR*, in *34 Computer Law & Security Review* 269, 2018.

Section I – Preliminary considerations

DATA COLLECTION AND COOKIES IN VIDEO GAMES. Before discussing the applicable legal framework, it is useful to give some additional information on how data is collected by video game companies. This collection is described in the privacy policies of several major entities in the video game industry, who are the developers or publishers of video games both on mobile and on other platforms (PC or consoles), such as Epic Games⁹⁹⁶, Activision⁹⁹⁷, Electronic Arts (‘EA’)⁹⁹⁸, Sony⁹⁹⁹, or Nintendo¹⁰⁰⁰. As most of these policies have similar provisions, what follows are some **key takeaways on data collection, usage and sharing**.

First, with regard to the **collection of data**, all privacy policies mention the types of data that are collected (e.g. account data, data related to purchases, mobile data when using smartphone to play games, social media data, or data from websites that were visited before and after playing of the game)¹⁰⁰¹. Several policies provide in-depth information about which data is (automatically) collected, notable examples being commercial information (e.g. order information, payments, subscriptions), communication information, geo(location) data, personal identifiers, technical information about the device or software used in the service, information and statistics on how users interact with the services (including URLs of visited websites, the time spent on the websites, or how many clicks were done), general gameplay data or, particularly relevant, ‘social media data’^{1002, 1003}. This data is either automatically collected (e.g. technical information, commercial information and gameplay data), or provided by the users (e.g. personal identifiers), although it has to be noted that different companies state different practices.¹⁰⁰⁴ For this automatic data collection, the concept of ‘cookies’ is important, both on mobile devices and other devices. Cookies are small text files that a website stores on your computer or mobile device when you visit the site.¹⁰⁰⁵ The use of cookies in video games is related to the use of the providers’ online services and websites, or interactions with their services via online platforms such as social media services. For example, the privacy policy of EA states that “*we and our third-party partners use cookies and similar tracking technologies to help us understand things like what web pages, features, or ads you view and what games you play*”.¹⁰⁰⁶ In addition to cookies, similar technologies and analytical features are used. For example, the privacy policy of Epic Games includes that they “*collect information automatically through technologies such as web browsers, cookies, log*

⁹⁹⁶ Epic Games’ privacy policy available at <<https://www.epicgames.com/site/en-US/privacypolicy>>.

⁹⁹⁷ Activision’s privacy policy available at <<https://www.activision.com/legal/privacy-policy#toc5>>.

⁹⁹⁸ Electronic Arts’ privacy policy available at <<https://www.ea.com/nl-nl/legal/privacy-policy>>.

⁹⁹⁹ Sony’s privacy policy available at <<https://www.sonypictures.com/corp/privacy.html#section1B>>.

¹⁰⁰⁰ Nintendo’s privacy policy available at <<https://www.nintendo.com/privacy-policy/>>.

¹⁰⁰¹ For example in Activision’s privacy policy, this is phrased as such, which is potentially problematic under the GDPR’s processing principles (*infra*).

¹⁰⁰² Social media data is an example of data that is collected by video game companies that is not related directly to the game, but to the services on online platforms such as social media that are linked to the game company’s services. Examples are linking your game account with your social media account, or accessing the game company’s page on social media.

¹⁰⁰³ See e.g. the privacy policies of Epic Games, Activision, Sony or EA, or for a detailed overview, see Blizzard’s privacy policy, available at <<https://www.blizzard.com/en-us/legal/a4380ee5-5c8d-4e3b-83b7-ea26d01a9918/blizzard-entertainment-online-privacy-policy>>. It should be noted that not all policies mention the types of data that are collected, with examples of more concise provisions being Nintendo and Tencent, available at <<https://www.tencent.com/en-us/privacy-policy.html>>.

¹⁰⁰⁴ E.g. geolocation data is in Blizzard’s policy stated as provider by the user, and in Epic Games’ policy as automatically collected.

¹⁰⁰⁵ Definition used by the European Union, see <https://ec.europa.eu/info/cookies_en#whatarecookies>. There are first party cookies (set by the visited website) and third-party cookies (when the website uses external services)

¹⁰⁰⁶ Electronic Arts’ privacy policy, 2.A.

files, web beacons, and our back-end servers collect usage data transmitted from the Epic services”.¹⁰⁰⁷ Second, video game companies more or less state the same **purposes for collecting data**:¹⁰⁰⁸ for communication purposes; to better understand users and their preferences; to personalise experiences; to develop and improve products; or to ensure security on their services. Third, privacy policies include provisions on how the collected data is **shared with ‘third parties’**, as well as how they receive information from these other parties.¹⁰⁰⁹ This sharing of data is related to the interaction between the game providers’ services and other online platforms such as social media websites.¹⁰¹⁰ Broadly speaking, video game companies share player data with third parties (including marketing partners, business partners or social features) if the player interacts with the video game service and the third party service (e.g. sending content from game to social media, liking and sharing game-related content, using hashtags in tweets). Simultaneously, video game companies can use data from these third parties when players interact with them. Here, the third parties use the collected data through their own cookies (e.g. social media services) and share it with the video game company. Importantly, video game companies oftentimes explicitly state that data received from third parties does not fall under the scope of their privacy policy, but under the policy of the other online service (where limitations can apply).¹⁰¹¹

These examples illustrate the potentially far-reaching consequences for data collection, usage and sharing between different actors. To give a clear example, Activision’s privacy policy states that they collect, process and *combine* your data (including the data obtained through third parties such as social media) to tailor content and marketing, or to personalise and optimise game experiences.¹⁰¹² Furthermore, these policies also include a section on the choices and rights of users to disable some of this data collection, but with potential consequences such as limited access to the company’s services.¹⁰¹³ Finally, more specifically in the context of this report, the privacy policies sometimes include a section about children’s protection and mention concepts such as parental consent or appropriateness of services (accompanied by an age threshold).¹⁰¹⁴ Therefore, in the next section, the

¹⁰⁰⁷ The technicalities of these options fall outside the scope of this report. However, they are similar to cookies in that they collect and store data automatically.

¹⁰⁰⁸ These purposes are generally formulated very broadly. See also *infra* on Article 5(1)(b) GDPR.

¹⁰⁰⁹ In 2020, the European Commission adopted the EU strategy on data and the subsequent proposals for regulations on Data Governance and Data in general. Relevant in the video gaming environment is the availability of data in the context of business-to-business (B2B) and business-to-government (B2G). Requirements are included regarding data transfers between video game companies and third parties as stated *supra*, where ISFE has stated that data is usually shared for optimisation of gameplay, to allow in-game purchases, or to personalise gameplay experience. See ISFE, *Public consultation on the Data Act*, 2021.

¹⁰¹⁰ See for example UNICEF, *Recommendations for the online game industry on assessing impact on children*, 2020, 22-23, where it is recommended that users should be proactively informed about what data is collected and how it is used (e.g. game time, purchase history, player skill), and about possibilities to opt out of the privacy policy and still play the game, or how data is shared with third parties and if their privacy policies offer the same protection.

¹⁰¹¹ E.g. in Section 6 of Sony’s privacy policy, it is stated that **data obtained from third parties is not subject to the limitations of Sony’s policy**, and that third party data remains subject to their own privacy policies and practices.

¹⁰¹² Section 3 of Activision’s privacy policy.

¹⁰¹³ Here, questions arise related to what was written in chapter 5 on the unfairness of these terms, for example if a company’s policy states that if you do not accept the privacy policy you will not be able to log in to your game account (which means *de facto* that it becomes impossible to play the game).

¹⁰¹⁴ Sony has a specific children’s privacy policy, available at <<https://www.sonypictures.com/corp/childrensprivacy/html>>. Note that a specific children’s privacy section is become more and more standardised, as was recommended by UNICEF in 2020, see *Recommendations for the online gaming industry on assessing impact on children*, 2020, 23, stating that the default privacy settings for children should set to minimal data collection and be formulated in child-friendly language.

data protection framework is discussed, in order to enable the assessment of the benefits and risks associated with these provisions included in video game companies’ policies.¹⁰¹⁵

Section II – Legal framework

EU FRAMEWORK. The GDPR is the central legislative instrument regarding data protection in the EU since it became applicable in May 2018. Additionally, the EU E-Privacy Directive and the proposal for an e-Privacy Regulation contain relevant provisions, serving as a *lex specialis* to the general requirements of the GDPR. Below, their applicable provisions are discussed.¹⁰¹⁶

1 General Data Protection Regulation

SCOPE AND DEFINITIONS. The GDPR was adopted by the EU Parliament and Council on 27 April 2016 and became applicable on 25 May 2018.¹⁰¹⁷ It lays down rules to protect natural persons regarding the whole or partial processing of their personal data by automated means, and rules relating to the free movement of personal data.¹⁰¹⁸ Due to the cross-border character of video games, it is important to note that the territorial scope of the GDPR includes processing by controllers or processors not established in the EU.¹⁰¹⁹ In other words, foreign video game companies processing EU residents’ personal data will have to comply with the rules of the GDPR. For the purposes of this report, the following definitions within Article 4 GDPR are particularly relevant:

Definition
“(1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
(2) ‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
(4) ‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;

¹⁰¹⁵ In this regard, see e.g. Privacy Policies’ website where they have created generators for privacy policies, EULAs, terms of service, or cookie consent tools for website and app developers, specifically taking into account the legal requirements for children, at <<https://www.privacypolicies.com/blog/legal-requirements-kids-game-apps/>>.

¹⁰¹⁶ The Council of Europe’s Convention 108+ is the most relevant non-EU legislative instrument, the discussion of which falls outside the scope of this report.

¹⁰¹⁷ European Union (Parliament and Council) (2016) Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

¹⁰¹⁸ Articles 1(1) and 2 GDPR. The processing in the context of this report is included under the material scope of the GDPR

¹⁰¹⁹ Article 3(2)(a) GDPR.

(11) ‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

(23) ‘cross-border processing’ means either:

- (a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or
- (b) (b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.”

Table 12 - Definitions in the GDPR.

These definitions relate to the nature of data processing in the video gaming context, where video gaming companies collect and process children’s personal data in a myriad of ways. These applications or games often have a cross-border character and, as we have seen in previous chapters, can include commercial practices which rely on automated processing or profiling to personalise game experiences and, in certain instances, influence children’s behaviours within their games.

1.1 General applicable provisions

As stated, the GDPR includes several provisions that are applicable to data processing in general – and therefore also important to the topic of gambling(-like) elements in video games – but are not discussed in this report. Nevertheless, some of these provisions are still an important part of the applicable legal framework. Therefore, they are listed below, with references to sources containing additional information.

Provision	Paraphrased text
Article 5: Principles	<p>Personal data shall be:</p> <ul style="list-style-type: none"> (a) processed lawfully, fairly and in a transparent manner in relation to the data subject; (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed¹⁰²⁰; (d) accurate and, where necessary, kept up to date, inaccurate data erased or rectified without delay; (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; (f) processed in a manner that ensures appropriate security of the personal data.
Article 6(1): Lawfulness	<p>Processing shall be lawful only if and to the extent that at least one of the following applies:</p> <ul style="list-style-type: none"> (a) Consent;

¹⁰²⁰ See Article 29 Data Protection Working Party, *Opinion 03/2013 on purpose limitation*, WP203, 2013.

	(b) Necessary for the performance of a contract; (c) Necessary for compliance with a legal obligation of the data controller; (d) Necessary to protect the vital interests of the data subject or another natural person; (e) Necessary for a task carried out in the public interest; (f) Necessary for the purposes of the legitimate interests of the controller, except when overridden by interests or fundamental rights of the data subject, <i>in particular where the subject is a child</i> . ¹⁰²¹
Article 12	Transparent information, communication and modalities for the exercise of the rights of the data subject.
Article 13	Information to be provided where personal data are collected, such as identity and contact details of the controller, purposes of and legal basis for the processing, period of storage, or existence of automated decision-making (including profiling).
Article 15	Right of access by the data subject to obtain this information on the processing of data.
Article 16	Right to erasure of personal data without undue delay and erasure when consent is withdrawn, objection to processing is given, unlawful processing, or data collection in relation to the offer of ISS.
Article 17	Right to restriction of processing, e.g. when the personal data is inaccurate, unlawful, or no longer necessary for the purposes.
Article 21	Right to object, e.g. in profiling situations or direct marketing purposes.
Article 25	Data protection by design and default. ¹⁰²²
Article 34	Communication of personal data breach. ¹⁰²³
Articles 35-36	Data protection impact assessment.

Table 13 - Applicable provisions of the GDPR.

In general, these provisions are important for the processing of children’s data in the video gaming environment. In particular, the principles of lawfulness, transparency and fairness, as well as the principles of purpose and storage limitation are important when children’s data are processed in video games, and might be at stake when profiling allows for personalised offers of in-game content without respecting these limitations. Transparency and information requirements ensure that children know which data is collected, what they are giving their consent for, or what types of cookies are used by apps and games as well as their purposes.¹⁰²⁴

¹⁰²¹ See Article 29 Data Protection Working Party, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, WP217, 2014.

¹⁰²² See e.g. EDPB, *Guidelines 4/2019 on Article 25 Data Protection by Design and Default*, 2020;

¹⁰²³ Article 29 Data Protection Working Party, *Opinion 03/2014 on Personal Data Breach Notification*, WP213, 2014.

¹⁰²⁴ See e.g. Article 29 Data Protection Working Party, *Opinion 02/2013 on Apps on Smart Devices*, WP202, 3-4, 27 or *Opinion 10/2004 on More Harmonised Information Provisions*, WP100, 8-9. In non-EU context, see also e.g. OECD, *Consumer Policy Guidance on Intangible Digital Content Products*, 2014, 11-12, stating that businesses should provide consumers with clear and conspicuous information about the collection and use of their personal data and the measures that consumers can take to manage this data (e.g. permissions in privacy settings, choice mechanisms, data minimisation).

1.2 Protection of children's data under the GDPR

In the context of this report it is important to assess the protection children's data enjoys under the provisions of the GDPR. In Recital 38, it is stated that:

“Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child.”

There are other specific references to children included in the GDPR. For instance, recital 75, which relates to data protection impact assessments, refers to the processing of vulnerable data subjects, such as children, when it discusses how personal data processing which could lead to physical, material or non-material damage can put the rights and freedoms of natural persons at risk. I.a. these provisions confirm that similar to what is required in the area of consumer protection, a specific, higher level of protection is also required for children in the area of data processing. It has to be noted that the GDPR does not include a definition of a child. In that regard, the European Data Protection Board ('EDPB') refers to the UNCRC and the general definition of children as everyone below the age of 18 (*supra*).¹⁰²⁵ In addition to the protection for children provided by the general provisions of the GDPR, there are two aspects that deserve special attention: children's consent and profiling.

1.2.1 Consent

DATA COLLECTION AND PROCESSING IN VIDEO GAMES. In the video game context, consent for data collection/processing is not the same as agreeing to the video game companies' EULA, terms of service and privacy policy. In some cases (not always), consent for data collection/processing can be given by agreeing to the company's privacy policy, however consent for data collection/processing is not given when agreeing to the terms of service or the EULA. As stated in chapter 5, these documents that are part of video game contracts between the company and the players also contain provisions that are not related to data collection/processing. In the video game environment, other lawful grounds for processing personal data are more commonly used than the lawful ground of consent, such as processing necessary for the performance of a contract or processing based on the legitimate interests of the video game company. Nevertheless, consent as a lawful ground for processing personal data remains relevant, for example where – based on the purposes of the data processing – the mentioned other lawful grounds cannot be used or should not have been used by the company.¹⁰²⁶ Therefore, what follows below concerns the situation where video game companies use consent as the lawful ground for processing data.

CONCEPT. Aside from the possibility for data controllers to rely on other lawful grounds for data processing (e.g. necessary for the performance of a contract, necessary for compliance with a legal obligation), consent is an important lawful ground within the GDPR. This means that a data subject agrees in a freely given, specific, informed and unambiguous manner to having his or her personal data

¹⁰²⁵ See EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 26.

¹⁰²⁶ Particularly with regard to children, invoking the grounds of necessity for the performance of a contract or legitimate interests of the company could be insufficient taking into account the different purposes of the data processing. Then, consent will be the required processing ground to be used.

processed.¹⁰²⁷ The data subject needs to be able to make an informed decision based on a transparent and simple explanation of the purpose(s) of the data processing by the controller.¹⁰²⁸ For children, the process of obtaining consent needs to adhere to specific requirements.¹⁰²⁹ A recent study has shown that children often do not feel that they have meaningful control over their personal data or that they can truly choose whether to give their consent for data processing or not, oftentimes resulting in them automatically pressing ‘agree’.¹⁰³⁰ Aside from consent given by children themselves, Article 8 states that when consent is used as the lawful ground for processing children’s data, parental consent is required for children below the age of 13-16, depending on the Member States’ choice in national legislation.

CONDITIONS OF VALID CONSENT. According to Article 7 GDPR, the data controller has to be able to demonstrate that the data subject has consented to processing of his or her data. It is therefore necessary to assess which requirements must be met for this consent to be valid. As stated, Article 4(11) puts forward requirements for consent to be valid: the data subject has to agree to the processing of his or her data via a **freely given, informed and unambiguous** indication. These aspects deserve special attention. First, ‘freely given’ means that the consent will be invalid if the data subject has no real choice or feels compelled to consent, for example if consent “*is bundled up as a non-negotiable part of terms and conditions*”.¹⁰³¹ Similarly, consent will not be considered ‘free’ when the child is unable to refuse or withdraw consent without detriment.¹⁰³² According to Recital 43, consent is also not presumed to be freely given if it does not allow separate consent to be given to different data processing operations.¹⁰³³ This requirement is linked to the principles of purpose limitation and data minimisation (Articles 5(1)(b) and (c) GDPR) and it could be important in the video gaming environment, where data processing operations can be different (e.g. data processing to improve gameplay experience vs. data processing to offer personalised in-game content). Second, the data subject needs to be informed before being able to give a valid, specific consent. Specific consent means that the data subject has to be clearly informed (i.e. knowing what they agree to and know that they can withdraw their consent), for example by being provided with information on the identity of the controller, the purposes of data processing, what types of data are collected, or if automated decision-making techniques are used.¹⁰³⁴ Informing data subjects about the purposes of data processing is, according to the EDPB, a “*safeguard against the gradual widening or blurring of purposes for which data is processed*”,¹⁰³⁵ a concept also known as **function creep**.¹⁰³⁶ For children, this ‘informed’ consent is particularly relevant, for example when digital service providers use consent as the lawful ground for processing for their privacy policies. As stated in Recital 58, given that children merit specific protection, any information and communication addressed to them should be provided in a clear, plain

¹⁰²⁷ Article 4(11) juncto Article 6(1)(a) GDPR.

¹⁰²⁸ Recital 42 GDPR; see also FISK, N., *The Limits of Parental Consent in an Algorithmic World*, 2016, <<https://blogs.lse.ac.uk/mediase/2016/11/28/the-limits-of-parental-consent-in-an-algorithmic-world/>>.

¹⁰²⁹ KOSTA, E., *Article 8. Conditions Applicable to Child’s Consent in Relation to ISS*, in KUNER, C. et al., *The EU GDPR: A Commentary* (Oxford University Press, 2020) 359.

¹⁰³⁰ STOILOVA, M., LIVINGSTONE, S. and NANDAGIRI, R., *Children’s data and privacy online – Growing up in a digital age*, 2019, 23.

¹⁰³¹ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 7.

¹⁰³² *Id.*

¹⁰³³ Separate consent for different processing operations should be obtained through opt-in, not opt-out; *Ibid.*, 12.

¹⁰³⁴ *Ibid.*, 15; see also Articles 13 and 14 GDPR.

¹⁰³⁵ *Ibid.*, 14.

¹⁰³⁶ Function creep occurs when information (data) is used for purposes other than the original specified purpose. See KOOPS, B.J., *The Concept of Function Creep*, in *13 Law, Innovation and Technology* 29, 2021.

language that is easily understandable. In this regard, it is up to the data controller to assess what kind of audience is giving their personal data.¹⁰³⁷ According to the EDPB, in cases where the targeted audience includes data subjects that are underage, the controller is expected to make sure that the information is understandable for minors.¹⁰³⁸ This requirement can be linked to the transparency requirements included in Article 12 GDPR. The EDPB has stated in its guidelines on transparency that the “*vocabulary, tone and style of the language used is appropriate to and resonates with children so that the child recognises that the message/information is being directed at them*”.¹⁰³⁹ Third, unambiguous means a clear and affirmative act, which is for example not the case for silent consent, pre-ticked boxes, or inactivity.¹⁰⁴⁰ As mobile games are an important part of the video gaming environment, it has to be noted that the EDPB has recommended that here, since the small screen causes additional difficulties (a lot of information needs to be provided clearly on a small screen), a layered approach can be used, with different layered boxes providing the information to the child in a transparent manner.¹⁰⁴¹

AGE THRESHOLD AND PARENTAL CONSENT. Article 8 GDPR is a specific provision for children’s consent and includes several notions that need to be addressed. For this, it is useful to cite Article 8(1) GDPR in full:

“[When consent is used as lawful ground for data processing], in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.”

The age threshold for consent is therefore between 13-16 years old, depending on the Member State. In practice, the whole range of ages has been implemented in practice:

¹⁰³⁷ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 26.

¹⁰³⁸ The EDPB does not specify what is ‘underage’ or ‘minor’. In a subsequent example given, they use the digital age of consent as threshold to decide what is ‘underage’. MILKAITE argues that there are three possibilities: 1) according to the UNCRC, all persons under 18; 2) all children under the age allowed to use the particular service; or 3) all children between the age from which they are allowed to use the service and 18. See MILKAITE, I., *A children’s rights perspective on privacy and data protection in the digital age – A critical and forward-looking analysis of the EU GDPR and its implementation with respect to children and youth*, 2021, 153.

¹⁰³⁹ Article 29 Working Party, *Guidelines on Transparency under Regulation 2016/679*, 10; see also LIEVENS, E. and VERDOODT, V., *Looking for needles in a haystack: Key issues affecting children’s rights in the GDPR*, in *34 Computer Law & Security Review* 269, 2018, 103-104.

¹⁰⁴⁰ Recital 32 GDPR; EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 18.

¹⁰⁴¹ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 17.

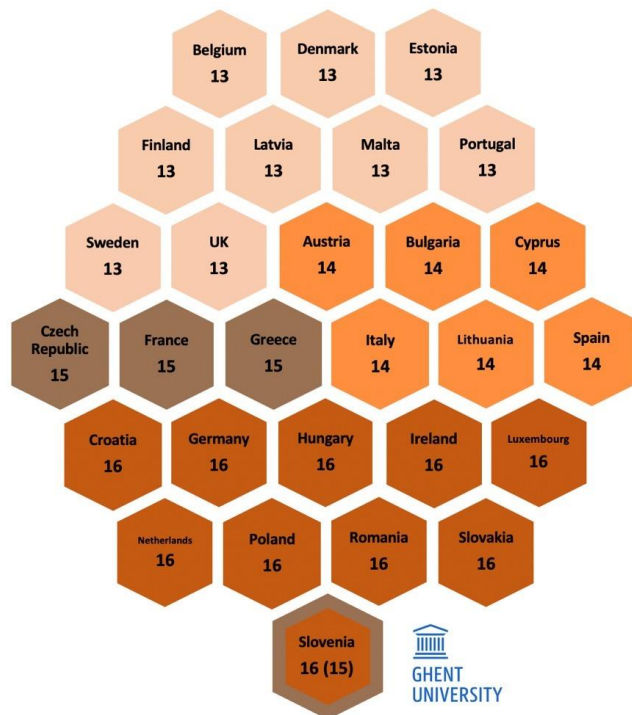


Figure 3 - Age threshold for consent in the EU. Source: MILKAITE, I. and LIEVENS, E. (Better Internet for Kids), *The GDPR child's age of consent for data processing across the EU – one year later (July 2019), 2019 – updated version 2021*.

This lack of unified age threshold has been the subject of criticism. First, the European Commission has stated that “*this fragmentation is contrary to the objective of the GDPR to provide an equal level of protection to individuals*”.¹⁰⁴² Second, as argued by LIEVENS and VERDOODT, this implies that different age thresholds apply throughout the EU in practice, which entails that companies providing online services in different Member States will have to respect different rules, requiring extra efforts and investments.¹⁰⁴³ Third is the criticism related to the adoption of an age threshold as such and its potential impact on children’s rights. Children become more commercially and media literate as they grow older, and a high age threshold could encourage circumvention of the existing protection mechanisms, due to the important role of online platforms in children’s lives.¹⁰⁴⁴ Further, adolescents should not be forgotten, as social networking services and mobile applications are immensely popular within their age group. According to MONTGOMERY and CHESTER, adolescents deserve specific guidelines and policies due to their special position within the digital environment.¹⁰⁴⁵ These examples refer back to the evolving capacities of the child (chapter 2), where it was argued that it is difficult to balance on the one hand the recommendation to perform individual (consent) assessments for each case, and on the other hand the acknowledgment that this is particularly challenging in the digital environment. For example, MACENAITE and KOSTA argue that this is difficult because different ISS can carry different risks to children’s online safety and privacy, and that the same child may need protection against one data

¹⁰⁴² European Commission, *Commission Staff Working Document on Data Protection Rules as a Pillar of Citizens Empowerment and EU’s Approach to Digital Transition - Two Years of Application of the General Data Protection Regulation, 2020*, 17.

¹⁰⁴³ LIEVENS, E. and VERDOODT, V., *Looking for needles in a haystack: Key issues affecting children’s rights in the GDPR*, in *34 Computer Law & Security Review* 269, 2018, 272; furthermore, most offer their online services in the US as well, where the COPPA requirements provide for an additional (although similar) set of rules and interpretations.

¹⁰⁴⁴ E.g. communicating with friends, expressing their creativity, or accessing information. See LIVINGSTONE, S. and OLAFSSON, K., *Children’s commercial media literacy: new evidence relevant to UK policy decisions regarding the GDPR*, 2017.

¹⁰⁴⁵ MONTGOMERY, K. and CHESTER, J., *Data Protection for Youth in the Digital Age: Developing a Rights-Based Global Framework*, in *1 European Data Protection Review* 277, 2015.

processing purpose, but can autonomously consent to another.¹⁰⁴⁶ Furthermore, it has been argued that instead of protecting the most vulnerable internet users from harm, the consent requirement of Article 8 risks limiting all children in their online activities and restricting their opportunities.¹⁰⁴⁷ These criticisms show that the discussion on protection vs. empowerment of the child is also relevant in the context of children's consent.

Another aspect of Article 8 is the notion of parental consent. First, the difference between 'given' and 'authorised' consent is unclear.¹⁰⁴⁸ Second, one of the relevant questions is what happens with the parental consent when the child reaches the age of digital consent. According to the EDPB, the parental consent can be confirmed, modified or withdrawn by the child, "*implying in practice that if no action is undertaken, the parental consent will remain a valid ground for processing*".¹⁰⁴⁹ Similarly, MILKAITE has argued that in line with children's rights and the data subject's control and autonomy, children should be allowed to withdraw the consent given by their parents themselves.¹⁰⁵⁰ In the video gaming context, this is relevant for example when children would wish to close their game account or social media account.¹⁰⁵¹ Important to note is that here, data controllers would have to be able to verify if the child has reached the age of consent (*infra*). In general, to be able to withdraw their parents' consent, children would have to be informed about their right to do so.¹⁰⁵² Third is the question as to how parental consent needs to be obtained. According to the EDPB, this is a proportionality exercise, which depends on the risks of the data processing and has to respect the principle of data minimisation.¹⁰⁵³ In practice, this means that high-risk processes need more 'proof' of parental consent and low-risk processes (such as signing up for a game) only require e.g. an e-mail authorisation.¹⁰⁵⁴ It is important to note however that even though the EDPB mentions games as an example of low-risk, it has to be acknowledged that this may not apply to all games. For example, as argued by MACENAITE, using behavioural advertising or disclosing data to third parties is a high-risk process.¹⁰⁵⁵ Thus, behavioural targeting and personalisation of in-game offers through profiling could also constitute high-risk processes. Finally, in this regard it is relevant to mention the role of age-verification in Article 8 GDPR. Article 8(2) states that data controllers shall make 'reasonable efforts' to verify if consent is given or authorised by the parent, taking into consideration available technology. The notion of reasonable efforts implies that the measures should be proportionate to the nature and risks of the processing activities. The EDPB also says that when users state that they are over the age of digital consent (so-called self-reporting, e.g. by filling in a data of birth), the controller must check whether this statement is true, even if this is not explicitly mentioned in the GDPR, because when a child gives consent while not old enough to provide it on their own behalf, the data processing will be rendered unlawful.¹⁰⁵⁶ Yet, as argued above, even though some age-verification methods are promising, at this

¹⁰⁴⁶ MACENAITE, M. and KOSTA, E., *Consent for processing children's personal data in the EU: following in US footsteps?*, in *26 Information & Communications Technology Law* 146, 2017, 189.

¹⁰⁴⁷ MACENAITE, M., *From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU GDPR*, in *19 News Media & Society* 765, 2017, 772.

¹⁰⁴⁸ The EDPB has yet to publish its guidelines regarding this concept.

¹⁰⁴⁹ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 29.

¹⁰⁵⁰ MILKAITE, I. (n 1038), 156.

¹⁰⁵¹ See also for example the provisions in video game companies' privacy policies on children's protection and the importance of parental consent (*supra*).

¹⁰⁵² Article 7(3) GDPR.

¹⁰⁵³ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 28.

¹⁰⁵⁴ *Id.*

¹⁰⁵⁵ MACENAITE, M. (n 1047), 772-773.

¹⁰⁵⁶ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 27.

point in time no method of age-verification is rock-solid.¹⁰⁵⁷ On a final note, the age-verification method should not lead to unlawful (excessive) data processing in itself and must respect the data processing principles of Article 5 GDPR.¹⁰⁵⁸

INFORMATION SOCIETY SERVICE OFFERED DIRECTLY TO A CHILD. An equally important aspect of Article 8 is that it only applies when information society services are offered directly to a child. First, as we have discussed in chapter 5, it is likely that in practice the vast majority of video games can be classified as ISS, although some degree of caution is recommended regarding a universal inclusion of video games under the scope of ISS.¹⁰⁵⁹ Importantly, if a video game would not be classified as an ISS, Article 8 would not apply. Second, the same holds true if the service is not offered directly to a child. This means, for example, that if the ISS provider has a clear indication that its target audience is 18+, Article 8 does not apply, on the condition that this indication cannot be undermined by other evidence (e.g. the content of the service or the marketing plans).¹⁰⁶⁰ Similarly, the EDPB has referred to this concept as ‘actual knowledge’ by the provider that children use the service.¹⁰⁶¹ The assessment of whether or not services are used or are likely to be used by children is influenced by factors such as the subject matter of the service, its visual content, the use of animated characters or child-oriented activities and incentives, music or other audio content, the age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, or whether advertising promoting or appearing on the website or online service is directed to children.¹⁰⁶² Depending on these factors, the provided services will fall under the scope of Article 8 GDPR.

LINK WITH ARTICLE 6(1)(B) GDPR. One of the other, more commonly used lawful ground for processing in the in the video game context is processing **necessary for the performance of the contract**. The link between this lawful ground and consent as a lawful ground deserves special consideration. According to the EDPB, to invoke Article 6(1)(b) two factors are needed: a valid contract and the necessity of data processing for its performance.¹⁰⁶³ First, the validity of the contract is interesting due to the problems regarding children’s legal capacity to enter into contracts as discussed in chapter 5. Second is the qualification of ‘necessary’ for the performance of the contract. Nowadays, data controllers have the ability to include generally formulated processing terms into contracts to maximise possible collection and uses of data, without specifying the purposes or taking into account data minimisation.¹⁰⁶⁴ The starting point for determining necessity is to look at the purposes of the processing.¹⁰⁶⁵ Then, the pursued objective of the contract needs to be assessed, as well as the potential existence of less-

¹⁰⁵⁷ Examples of age-verification are third party verification, two-step verification, AI tools, or self-declaration. Although some are promising, none of these methods is sufficiently developed at this point in time.

¹⁰⁵⁸ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 27; KOSTA, E., *Article 8. Conditions Applicable to Child’s Consent in Relation to ISS*, in KUNER, C. et al., *The EU GDPR: A Commentary* (Oxford University Press, 2020), 361.

¹⁰⁵⁹ See e.g. TOSONI, L., *Article 4(25). Information Society Service*, in KUNER, C. et al., *The EU GDPR: A Commentary* (Oxford University Press, 2020), 298. Video games offered by educational organisations are debatably not included under the scope of ISS, see MACENAITE, M. and KOSTA, E. (n 1046), 170-171.

¹⁰⁶⁰ EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, 2020, 27.

¹⁰⁶¹ Article 29 Data Protection Working Party, *Guidelines on Transparency under Regulation 2016/679*, WP260, 2017, 10; see also MONTGOMERY, K., CHESTER, J. and MILOSEVIC, T., *Ensuring Young People’s Digital Privacy as a Fundamental Right*, in *International Handbook of Media Literacy Education* (Routledge, 2017).

¹⁰⁶² MACENAITE, M. and KOSTA, E. (n 1046), 173-174, where they refer to the US Federal Trade Commission’s FAQ on COPPA compliance and give additional information about its application in US case law.

¹⁰⁶³ EDPB, *Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects*, 2019, 7.

¹⁰⁶⁴ *Ibid.*, 5.

¹⁰⁶⁵ *Ibid.*, 7. The EDPB highlights that necessity has an independent meaning under EU law.

intrusive alternatives for its performance.¹⁰⁶⁶ The processing needs to be objectively necessary for the delivery of the online service to the data subject, whereby the essential elements of the contract, the nature of the service (e.g. its distinguishing characteristics) are additional criteria to take into consideration.¹⁰⁶⁷ Data controllers cannot unilaterally impose what is necessary for the contract and can also not artificially expand processing purposes; they need to justify their necessity.¹⁰⁶⁸ In the video game environment this is particularly relevant. An assessment will need to be made on whether the processing activities included in the terms of use or privacy policy are necessary for the delivery of the video game. For example, processing related to gameplay activities could be seen as necessary, whereas processing for the purposes of tracking, behavioural targeting, cookies, or building profiles could be seen as not necessary to provide the video game service.¹⁰⁶⁹ The **EDPB also notes that processing to ‘improve the service’ is not considered appropriate under Article 6(1)(b)** because it is not objectively necessary, which is relevant considering that a lot of video game terms of service include a statement that collected data will be used to improve gameplay experience.¹⁰⁷⁰ In this regard, the EDPB has stated that personalisation of content *may* be allowed, depending on the nature of the service, the expectations of the average data subject, or the extent to which the service can be provided without the personalisation (e.g. where it is intended to increase user engagement but not integral to using the service, using Article 6(1)(b) will not be possible).¹⁰⁷¹ Such an assessment in the video game environment will be influenced by the type of game, the way the game is played, or its characteristics. Finally, the link with consent is that when the processing is necessary for the performance of the contract, then consent is not the appropriate ground for processing. However, if the purposes are mixed or if services are bundled, then it may be more appropriate (or even obligatory) to rely on consent.¹⁰⁷² In any event, if the processing is not deemed necessary for the performance of the contract, then consent (or legitimate interests as included in Article 6(1)(f) GDPR) will need to be used. In this regard, the EDPB has noted that controllers should avoid confusion and be transparent about the lawful grounds they rely upon.¹⁰⁷³

1.2.2 Automated decision-making and profiling

CONCEPT. As has been described earlier in this report, automated decision-making and profiling¹⁰⁷⁴ are often deployed mechanisms in the digital environment.¹⁰⁷⁵ Advances in technology and the capabilities of big data analytics, AI and machine learning have made it easier to create profiles and make automated decisions with the potential to significantly impact individuals’ rights and freedoms.¹⁰⁷⁶

¹⁰⁶⁶ *Id.*

¹⁰⁶⁷ *Ibid.*, 8-9.

¹⁰⁶⁸ *Id.*

¹⁰⁶⁹ *Ibid.*, 8 and 13

¹⁰⁷⁰ *Ibid.*, 12. Here, the processing will oftentimes be justified by the lawful ground of legitimate interests under Article 6(1)(f) GDPR.

¹⁰⁷¹ *Ibid.*, 13.

¹⁰⁷² *Ibid.*, 6. Even though in practice it is more likely that the legitimate interests ground will be chosen.

¹⁰⁷³ *Ibid.*, 6. For example, it is important to distinguish between entering into a contract and giving consent in the meaning of Article 6(1)(a).

¹⁰⁷⁴ See *supra* for its definition. The EDPB defines profiling as: “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”. EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 1.

¹⁰⁷⁵ For an in-depth analysis of these concepts, see MILKAITE, I. (n 1038), 265-292.

¹⁰⁷⁶ Recital 75 “[...] where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or

Automated decision-making and profiling have many commercial applications, and can pose significant risks, for example because they can be opaque and individuals might not know that they are being profiled,¹⁰⁷⁷ or because they can maintain existing stereotypes and lock a person into a specific category and restrict them to their suggested preferences, thereby undermining their freedom of choice.¹⁰⁷⁸ Children, while engaging in a lot of online activities, reveal a significant amount of information on their lives, personal interests and preferences. Their information is continuously collected, processed and stored within detailed profiles, through for example cookies or other tracking tools.¹⁰⁷⁹ These profiles can be used to categorise individuals, by gathering information and evaluating their characteristics¹⁰⁸⁰ or behaviour patterns, in order to predict their preferences or future behaviours or interests.¹⁰⁸¹ As stated in chapter 2, these techniques are also applied to children's activities in the video gaming environment. Companies may collect data not only on users' behavioural patterns but also on their interactions with other users, on online behaviour before and after playing an online game, or on behaviour across multiple devices and services linked to their gaming device.¹⁰⁸² Similarly, social media platforms that have business models purely based on data collection can sometimes be used to sign into video games, causing these platforms to also collect data related to these video games (e.g. where you can use 'Log in via Facebook' in a game instead of the standard log in process).¹⁰⁸³ (Solely) automated decision-making can overlap with or result from profiling and means the ability to make decisions by technological means without human involvement.¹⁰⁸⁴ Both concepts are relevant for the video gaming environment and therefore we will now discuss the relevant provisions within the GDPR.

RELEVANT PROVISIONS IN THE GDPR. As stated *supra*, the definition of profiling is included in Article 4(4) GDPR:

“[P]rofilinɡ’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”

In the context of children's profiling in the video gaming environment, the central provision is Article 22 GDPR. First, Article 22 GDPR is applicable to decisions based (1) solely on automated processing (including profiling) that produce (2) legal effects for the data subject **or** similarly significantly affects

movements, in order to create or use personal profiles”; EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 2018, 1.

¹⁰⁷⁷ See e.g. KEYMOLEN, E., *Trust on the Line: A Philosophical Exploration of Trust in the Networked Era*, 2016, where the concept of 'invisible visibility' was coined.

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ BORGESIU, F., *Improving Privacy Protection in the Area of Behavioural Targeting* (University of Amsterdam, 2015); KOSTA, E., *Peeking into the Cookie Jar: The European Approach towards the Regulation of Cookies*, in *21 International Journal of Law and Information Technology* 380, 2013.

¹⁰⁸⁰ See e.g. for social media prediction, SETTANNI, M., AZUCAR, D. and MARENGO, D., *Predicting Individual Characteristics from Digital Traces on Social Media: A Meta Analysis*, in *21 Cyberpsychology, Behaviour and Social Networking* 217, 2018.

¹⁰⁸¹ Council of Europe, *Recommendation CM/Rec(2010)13 on the Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling*, 2013; EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 7; BEUC, *The manipulated consumer, the vulnerable citizen*, 2020.

¹⁰⁸² UNICEF, *Child Rights and Online gaming: Opportunities & Challenges for Children and the Industry*, 2019, 22.

¹⁰⁸³ *Id.*

¹⁰⁸⁴ EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 8. Note that these decisions can be made with or without profiling and that profiling can occur with or without automated decision-making.

the data subject. Even though the GDPR phrases it as a ‘right’ to not be subjected to such decisions, the EDPB has clarified that it is actually a general prohibition (with exceptions), as long as the two underlined conditions are met.¹⁰⁸⁵ The first condition is that it is ‘solely’ based on automated processing, which means that there is no human involvement in the decision process.¹⁰⁸⁶ To qualify as human involvement, the controller must ensure that any oversight of the decision is meaningful and carried out by someone who has the authority and competence to change the decision.¹⁰⁸⁷ As such, minor human involvement does not change the character of solely based on automated processing.¹⁰⁸⁸ However, according to VAN DER HOF ET AL., this element may not be straightforward in practice, given that even where discretionary power exists, in theory a tendency may emerge to - by definition - automatically follow generated results.¹⁰⁸⁹

The second condition is that there are legal or similarly significantly affecting effects for the data subject, which is particularly relevant for children. According to the EDPB:

“Article 22 does not prevent controllers from making solely automated decisions about children, if the decision will not have a legal or similarly significant effect on the child. However, solely automated decision making which influences a child’s choices and behaviour could potentially have a legal or similarly significant effect on them, depending upon the nature of the choices and behaviours in question.”¹⁰⁹⁰

First, the notion of legal effects could include the violation of the rights enshrined in the UNCRC.¹⁰⁹¹ This interpretation would follow the statements by the CRC Committee in its most recent General Comment 25:

*“States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling”.*¹⁰⁹²

“Automated systems may be used to make inferences about a child’s inner state. They should ensure that automated systems or information filtering systems are not used to affect or influence children’s behaviour or emotions or to limit their opportunities or development.”¹⁰⁹³

As discussed in chapter 2, there are several children’s rights that are potentially endangered in the online environment because of commercial practices using profiling techniques, such as the freedom of thought and expression, the right to protection against economic exploitation, the right to health, or the right to play. Second, in addition to legal effects as such, automated decision-making processes can influence children’s choices and behaviours and therefore cause the ‘similarly significant effects’

¹⁰⁸⁵ *Ibid.*, 19.

¹⁰⁸⁶ *Ibid.*, 20.

¹⁰⁸⁷ *Ibid.*, 21.

¹⁰⁸⁸ *Id.*, for example when someone routinely applies automatically generated profiles to individuals without any actual influence on the result.

¹⁰⁸⁹ The so-called ‘computer says no’ effect. 109.

¹⁰⁹⁰ *Ibid.*, 29.

¹⁰⁹¹ See e.g. VERMEULEN, J., *Recommended for You: “You Don’t Need No Thought Control”*. An Analysis of News Personalisation in Light of Article 22 GDPR, in *Privacy and Identity Management. Data for Better Living: AI and Privacy* (Springer International, 2020), where the author argues that the EDPB states fundamental rights as examples of legal rights, which could be analogously applied to the children’s rights that are seen as fundamental.

¹⁰⁹² CRC Committee, *General comment No. 25 on children’s rights in relation to the digital environment*, 2021, 7.

¹⁰⁹³ *Ibid.*, 11.

required under Article 22(1).¹⁰⁹⁴ According to the EDPB, ‘similarly significant effects’ are those that significantly affect the circumstances, behaviour or choices of the individuals concerned, have a prolonged or permanent impact on the data subject, or lead to the exclusion or discrimination of individuals.¹⁰⁹⁵ A study in the EU has shown that marketing practices have a clear impact on children’s behaviours.¹⁰⁹⁶ Such marketing practices use similar techniques as the commercial practices in the video game environment, such as behavioural targeting, nudging and profiling for personalisation. As stated by UNICEF in their discussion paper on children’s rights and businesses in the digital world, such practices “include not only tracing how data subjects engage with a specific online service but data subjects’ behaviour on other websites, services and the Internet in general.”¹⁰⁹⁷ This is particularly important because – as stated above – children’s data is nowadays collected from a very early age. In this regard, a relevant question is whether these effects include ‘future’ effects. As stated by VAN DER HOF et al., Article 22 does not mention (nor do the Recitals) future consequences of automated decision-making. They argue that an argument can be provided for at least informing data subjects of “potentially negative consequences of data processing and automated decision-making and profiling more specifically.”¹⁰⁹⁸ Children are not necessarily capable of foreseeing the long-term consequences of their behaviour and choices that may inform these automated decision and profiling processes¹⁰⁹⁹ and the evidence on this topic is inconclusive at this point. On the latter, the UK’s ICO has stated that data controllers should apply the precautionary principle,¹¹⁰⁰ which is relevant because many current practices associated with children’s profiling and behavioural targeting have not led to the required evidence or insights at this point in time.¹¹⁰¹ As a final remark, it has been argued that businesses can adopt codes of conduct to include default limitations on the processing of children’s personal data (through Article 40(2) GDPR), or similarly, that they standardise the use of Data Protection Impact Assessments for automated processes regarding children (Article 35 GDPR).¹¹⁰²

If both conditions are met (solely automated decision-making and producing legal or similarly significant effects), the general prohibition applies. However, Article 22(2) provides three exceptions: necessary for performance of a contract, authorisation by Union or Member State law, or based on the data subject’s explicit consent. If the first or last exception applies, the controller must implement specific safeguards, including at minimum the right to obtain human intervention, to express their point of view, and to contest the decision.¹¹⁰³ This provision has specific relevance when applied to children, which we will discuss now.

¹⁰⁹⁴ BYGRAVE, L., *Article 22. Automated Individual Decision-Making, Including Profiling*, in KUNER, C. et al., *The EU GDPR: A Commentary* (Oxford University Press, 2020), 534.

¹⁰⁹⁵ EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 21.

¹⁰⁹⁶ LUPIANEZ-VILLANUEVA, F. et al. (n 232), 2016.

¹⁰⁹⁷ UNICEF, *Children’s Rights and Business in a Digital World. Privacy, Protection of Personal Information and Reputation*, 2017, 12.

¹⁰⁹⁸ VAN DER HOF, S., LIEVENS, E. and MILKAITE, I., *The protection of children’s personal data in a data-driven world* (n 995), 111.

¹⁰⁹⁹ *Id.*

¹¹⁰⁰ ICO, *Age-appropriate Design Code*, 2020, 44; see also MAZUR, J., *Automated Decision-Making and the Precautionary Principle in EU Law*, in 9 *TalTech Journal of European Studies* 3, 2019.

¹¹⁰¹ MILKAITE, I. (n 1038), 278-279.

¹¹⁰² LIEVENS, E. and VERDOODT, V., *Looking for needles in a haystack: Key issues affecting children’s rights in the GDPR*, in 34 *Computer Law & Security Review* 269, 2018, 277; EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 29.

¹¹⁰³ *Ibid.*, 27

Article 22 GDPR does not distinguish between adults and children. However, as stated, Recital 38 provides for additional protection of children, especially when it comes to profiling. Although it is not further specified how this additional protection is to be achieved, it can be derived from a combined reading of Recital 60 (stating that the data controller has to provide any information necessary to ensure fair and transparent processing) and Article 13(2)(f) GDPR (what this information entails) that data controllers have to, *inter alia*, increase the understanding of the (child) data subject, to let him/her know that profiling exists and its consequences, or how automated decision-making processes can affect him/her.¹¹⁰⁴ Furthermore, Recital 71 mentions that ‘such measure’ (i.e. measures in a solely automated decision-making process which evaluate personal aspects of the data subject and produce legal effects or similarly significantly affect him or her) **should not concern a child**. These provisions have caused legal uncertainty, because even though they seem to imply a prohibition of such processes for children, it has been accepted both by the EDPB and by legal scholars that strictly, an absolute prohibition does not exist.¹¹⁰⁵ Even though a strict prohibition does not exist, there is also no *carte blanche* for the profiling of children. For example, the EDPB underlines that because children represent a more vulnerable group of society, organisations should in general refrain from profiling them for marketing practices.¹¹⁰⁶ An additional example is given by the EDPB in the video gaming context, regarding profiling “used to target players that the algorithm considers are more likely to spend money on the game as well as providing more personalised adverts”.¹¹⁰⁷ It is clear that the EDPB considers such profiling of children as contrary to Article 22 GDPR.

Moreover, the EDPB has stated that controllers should not rely on the aforementioned exceptions to justify automated decision-making processes regarding children.¹¹⁰⁸ At the same time, the EDPB has stated that profiling of children can be performed if it is necessary for the child’s welfare. Although the notion of welfare is not further elaborated upon by the EDPB, others have given an interpretation. One example is given in the UK’s Age-appropriate Design Code, where it is stated that using profiling in age-verification mechanisms to ensure that children can be provided with age-appropriate information and access to age-appropriate services and materials could be permitted.¹¹⁰⁹ Another example relates to protecting children against harmful content or other risks (see *supra* chapter 2). As argued by VAN DER HOF et al., this would basically mean that profiling of children would be prohibited unless it is in the child’s best interests. Children’s profiling can thus be used to profile them as children *at risk* (e.g. as victims of abuse) or *as risk* (e.g. when they are showing criminal behaviour), to prevent them from harm and other negative developmental effects.¹¹¹⁰ The approach where children’s profiling is

¹¹⁰⁴ See *supra*. Recital 60 states that profiling and automated decision-making are still subjected to the general provisions of Article 5 GDPR, which encompasses Articles 12-14 GDPR on transparency and information, Article 15 and Recital 63 on the right to access, or Article 21(1)(2) and Recital 70 on the right to object to profiling; see in general EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 24-26; WACHTER, S. et al., *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the GDPR*, in 7 *Int’l Data Privacy Law* 76, 2017, 14-16.

¹¹⁰⁵ This is also due to the fact that the Recitals of the GDPR are not strictly legally binding. See EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 28; VAN DER HOF, S., LIEVENS, E. and MILKAITE, I., *The protection of children’s personal data in a data-driven world* (n 995), 112.

¹¹⁰⁶ EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018., 29.

¹¹⁰⁷ *Id.*

¹¹⁰⁸ EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 28

¹¹⁰⁹ ICO, *Age-appropriate Design Code*, 2020, 35. Note that they admit that there is a tension between age-verification and compliance with the GDPR due to possible intrusive data collection.

¹¹¹⁰ VAN DER HOF, S., LIEVENS, E. and MILKAITE, I., *The protection of children’s personal data in a data-driven world* (n 995), 112-113.

prohibited unless it is done in their best interests is also adopted by the Council of Europe.¹¹¹¹ Aside from how broad children’s welfare is interpreted, the EDPB still requires the automated decision-making to be *necessary* for this welfare, without elaborating what this implies. Taking into account what they have stated regarding for example the concept of ‘necessary for the performance of a contract’, this would mean that there can be no less intrusive measures to protect the child’s welfare.¹¹¹² In any case, if one of the exceptions of Article 22(2) is used to profile children because it is necessary, the controller is required to implement safeguards under Article 22(3). These safeguards, aside from what was mentioned *supra*, imply additional information requirements for controllers vis-à-vis children, due to the additional protection they enjoy under the objectives of the GDPR.

2 E-Privacy framework

E-PRIVACY DIRECTIVE. Another legal instrument at the EU level is the E-Privacy Directive¹¹¹³, which provides specific rules for electronic communications and complements the GDPR. It is the main legal instrument implementing the fundamental right to respect for private life as enshrined in Article 7 CFEU in EU secondary law (that is, until the E-Privacy Regulation is adopted, see *infra*).¹¹¹⁴ It is important to note that its relevance for the topic of gambling in video games specifically is limited due to its focus on electronic communications.¹¹¹⁵ Nevertheless, some general implications are relevant to the broader context of video gaming. The first one is that consumers’ private **communications must be respected and protected from unwanted intrusions or interference**, regardless of whether or not personal data are involved.¹¹¹⁶ If through the (unlawful) accessing of terminal equipment (e.g. PC or smartphone) information is obtained without the user’s knowledge or the user’s activities are traced, this can “*seriously intrude upon these users’ privacy*”.¹¹¹⁷ Second, Article 5 of the Directive aims to ensure confidentiality of communications by **prohibiting the interception or surveillance of electronic communication**, as well as any storage or subsequent access to information on the terminal equipment of end users, for instance by means of cookies.¹¹¹⁸ Exceptions to this prohibition are consent or explicit legal authorisation.¹¹¹⁹ This scope of this provision is not limited to the electronic communications sector and therefore applies to all games and applications on mobile devices and other devices, and is also relevant for online social network providers, application providers, or trackers.¹¹²⁰ Third, the Directive provides general rules on the use of **location data**. Location data includes data indicating the geographic position of the terminal equipment of the user or the time of recording of the location information.¹¹²¹ It can be useful for video game companies who want to base

¹¹¹¹ Council of Europe, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (n 72), 17.

¹¹¹² EDPB, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, WP251, 2018, 23. Arguably, if the profiling would be far-reaching (which it oftentimes is), there may well be alternatives to protect the child.

¹¹¹³ Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 2002.

¹¹¹⁴ Article 1 E-Privacy Directive; BEUC, *Position Paper: Proposal for a Regulation on Privacy and Electronic Communications*, 2017, 2.

¹¹¹⁵ Even though gambling(-like) elements in video games are not directly linked to electronic communications, the provisions can be relevant when players can communicate in the video game.

¹¹¹⁶ Recital 24 states that “Terminal equipment of users of electronic communications networks and any information stored on such equipment are part of the private sphere of the users requiring protection under the ECHR”.

¹¹¹⁷ Recital 24 E-Privacy Directive. This could include information about gambling practices or tracking gambling activities by the user.

¹¹¹⁸ Article 5(3) E-Privacy Directive.

¹¹¹⁹ Article 5(1) E-Privacy Directive.

¹¹²⁰ VAN ALSENOY, B., *Rights and Obligations of Actors in Social Networking Sites*, 2014, 33.

¹¹²¹ Article 2(c) E-Privacy Directive.

the offer of gambling activities based on location of their users. However, the Article 29 Working Party has stated in 2011 that the E-Privacy Directive does not apply to processing of location data by information society services, which would exclude most video game companies depending on the interpretation of an ISS (see *supra* chapter 5).¹¹²² Note that this does not take away the fact that location data are generally regarded as personal data and that video game companies therefore have to comply with the GDPR if they want to use this data for commercial purposes.

E-PRIVACY REGULATION. On 10 January 2017 the European Commission published its Proposal for a Regulation on Privacy and Electronic Communications, and the Council of the EU published its latest position on 10 February 2021.¹¹²³ This latest proposal contains new and more stringent privacy obligations that aim to aligned with the GDPR to ensure a consistent EU framework on data protection and privacy.¹¹²⁴ For this report, the most important changes of this Regulation are discussed, which relate to its scope, the rules on terminal equipment (including cookies) and the confidentiality of communications. The rules on cookies are important in the video game environment due to the data sharing practices of video game companies with third parties (see *supra*).

First, the **territorial scope** is expanded, including not only entities in the EU, but also any electronic communication service provided to end-users within the EU and devices located in the EU, regardless of the service provider's location. This scope includes the protection of terminal equipment information of end-users in the EU, or the sending of direct marketing communications to end-users in the EU.¹¹²⁵ Moreover, the general scope is broadened to include more electronic communications (social media apps, email, texts) transmitted through publicly available services/networks, and their related metadata (information on location, time and recipient of the communication).¹¹²⁶ As we have seen, children are an important group of users of these services, and it is therefore important to see whether the proposed rules take into account their rights and interests.

Second, the Proposal introduces the **consent-threshold** as included in the **GDPR**, also for the placement and accessing of cookies. As discussed *supra*, in line with Article 7(4) GDPR, this means that consent needs to be freely given, specific, informed and unambiguous, and must be expressed by way of a clear affirmative action. In Recital 20 of the proposal, the notion of 'genuine choice' is included. A genuine choice is when the end-user is able to choose between accessing the service with use of cookies and accessing a version of the service without cookies, based on clear information which informs him of the purposes and uses of the cookies. There is no real choice if the only way to access the service is to accept the cookies and if few alternative services exist for the user. Additionally, the Proposal recognises the existence of excessive consent banners and consumer fatigue, and states that it should be able to give consent for types of data through browser software on the market where it is technically possible and feasible.¹¹²⁷

¹¹²² Article 29 Working Party, *Opinion 13/2011 on Geolocation Services on smart mobile services*, WP185, 2011, 9.

¹¹²³ Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)*, 10 February 2021.

¹¹²⁴ Note that it is a Regulation and therefore directly applicable in and binding for all EU Member States.

¹¹²⁵ Article 3 Proposal for E-Privacy Regulation.

¹¹²⁶ Article 4(3)(d) Proposal for E-Privacy Regulation for the definition of publicly available directories; Article 2(1)(a) for the inclusion of metadata, which is one of the more recent additions.

¹¹²⁷ Article 4a(2) E-Privacy Regulation Proposal. Note that this can be very burdensome for browser providers.

Third, one of the key takeaways of the Proposal concerns information on **end-user terminal equipment** (e.g. by means of cookies). Article 8(1) includes a general prohibition to the use and storage capabilities of terminal equipment, as well as the collection of information from them. The broad scope of this provision has been welcomed by consumer protection organisations due to the fact that “*extensive tracking and profiling techniques can be (ab)used to discriminate consumers and to influence their behaviour, which can have serious implications for their fundamental rights and freedoms.*”¹¹²⁸ However, several exceptions exist. One exception relates to the fact that the prohibition does not apply when using the processing/storage capabilities of terminal equipment and collecting its information is necessary for providing an electronic communication service.¹¹²⁹ This implies that consent will not always be required here, which can be potentially dangerous for privacy if the condition of necessity is not interpreted strictly. If consent is required because the exception of Article 8(1)(a) does not apply (e.g. for tracking cookies), the user needs to take affirmative action for it to be valid. In addition to Article 8(1), Article 8(2) also tackles terminal equipment and states that collecting information emitted by terminal equipment to enable it to connect to another device and/or to network equipment shall be prohibited.

Fourth and last, the Proposal states that **consent is needed for the delivery of direct marketing communications**, regardless of their form.¹¹³⁰ However, some aspects related to direct marketing are still up for discussion. In Article 16(2) it is stated that it is possible to use the contact information of users who have made a purchase for direct marketing purposes if the users are given the opportunity to object to this.¹¹³¹ Another aspect is that the Proposal always uses the words ‘*sending* direct marketing communications’. According to the BEUC, it should be ensured that the definition also covers communications that are not ‘sent’ to users in the strict sense of the term (e.g. targeted advertising served or presented to the users in a given website).¹¹³² Whether this is useful in the video game environment depends on the classification of in-game notifications as communications that are ‘sent directly to a specific end-user’.¹¹³³ This is because the February 2021 Proposal states that the provisions on direct marketing do not apply to the display of advertising on visited websites or within information society services requested by users.¹¹³⁴

One final important note is that neither the provisions nor the recitals of the Proposal include any reference to children. This is something that will hopefully be addressed by the time of the adoption, especially since it would be in line with its objective of forming a comprehensive protection framework together with the GDPR, which does recognise the vulnerable position of children.¹¹³⁵

¹¹²⁸ It includes location data and other metadata, as well as cookies and other tracking techniques. BEUC, *Position Paper: Proposal for a Regulation on Privacy and Electronic Communications*, 2017, 8.

¹¹²⁹ Article 8(1)(a) E-Privacy Regulation Proposal.

¹¹³⁰ Article 4(3)(f) juncto Article 16(1) of the Proposal. Again, a general prohibition is the standard.

¹¹³¹ This may be contrary to the principle of privacy by default, although it has to be noted that this approach is already more strict than what exists under the E-Privacy Directive.

¹¹³² BEUC, *Position Paper: Proposal for a Regulation on Privacy and Electronic Communications*, 2017, 13.

¹¹³³ Recital 32 E-Privacy Regulation Proposal.

¹¹³⁴ If this means that communications which do not target specific users are excluded, then it depends on the type of in-game notification. If it concerns a general notification used for all players, then it probably does not fall under the scope. If it is personalised, specific notification, then it could be seen as included.

¹¹³⁵ BEUC, *Position Paper: Proposal for a Regulation on Privacy and Electronic Communications*, 2017, 15; VERDOODT, V. and LIEVENS, E., *Targeting Children with Personalised Advertising: How to Reconcile the Best Interests of Children and Advertisers* (n 230).

Section III – Key takeaways

General takeaways:

- ❖ The right to data protection is a **fundamental right in the EU**. The potentially harmful character of many commercial practices or marketing techniques used in the digital environment is linked to the collection and processing of children’s (personal) data.
- ❖ The **privacy policies of video game companies** include provisions on the collection (via cookies) of different types of data (e.g. account data, gameplay data, user-provided data), its purposes (e.g. communication, understand user preferences, personalise experiences, ensure security), and its sharing with third parties (e.g. between social media platforms and video game companies).
- ❖ These policies show the **potentially far-reaching consequences for children** and how their (personal) data is handled, where it should be noted that children are often not aware of what happens with their data, where it is kept, or with whom it is shared.

On the GDPR:

- ❖ Due to the **cross-border character of video games**, it is important to note that the territorial scope of the GDPR includes processing of EU residents’ personal data by controllers and processors not established in the EU.
- ❖ The **data processing principles** of lawfulness, transparency, fairness, purpose limitation, data minimisation, storage limitation, accuracy, integrity and confidentiality must be respected when personal data is processed related to gambling(-like) elements in video games.
- ❖ Children enjoy a **higher level of data protection** under the GDPR, due to their lesser awareness of the risks, consequences, safeguards and their rights in relation to processing of personal data. This protection is especially applicable to personalisation or profiling of children when they use services offered directly to them, which is very relevant in the video game context.
- ❖ Data processing in the video game environment will oftentimes be based on the grounds of necessity for the performance of a contract or processing for the purposes of the legitimate interests pursued by the video game company. As this may not always be justified based on the purposes of the data collection/processing, it is equally relevant to look at consent as a lawful ground for processing.
- ❖ Consent of children for the processing of their data is different from agreeing with the terms and conditions or EULA of the video game company, which include other provisions that are not related to data collection and processing. In some cases, agreeing to the company’s privacy policy implies consent for data processing, however this is not always the case.
 - For example, the privacy policy is oftentimes included as a part of the terms and conditions, however taking into account the separate consent required for the different purposes of data processing this can be contrary to Article 7 GDPR.
- ❖ **Consent** needs to be freely given, informed and unambiguous.
 - On **‘freely given’**, for example, if consent is bundled up as a non-negotiable part of terms and conditions, it will be invalid. Another example is when children are unable to refuse or withdraw consent without detriment. Separate consent needs to be given to different data processing operations.
 - On **‘informed’**, the child needs to be clearly informed about identity of the controller, the purposes of data processing, the types of data collected or if automated decision-making techniques are used. This information needs to be easily understandable for children, and communication needs to be adapted to the audience (cfr. transparency).

- On ‘**unambiguous**’, this means a clear and affirmative act (e.g. not silent consent or pre-ticked boxes)
- ❖ The **age threshold** for children to independently give their consent for processing of their personal data when information society services are offered directly to them is not unified in the EU and varies between 13-16 years, which has been subjected to criticism.
 - For children below this age, parental consent is required. How this consent is obtained is subject to a risk-based proportionality exercise, which for video games is interesting due to different aspects of video games (e.g. signing up for a video game is low-risk, whereas high-risk processing such as personalisation or profiling would need more ‘proof’ of parental consent).
 - This parental consent and the age threshold are also directly linked to the concept of age-verification.
- ❖ The lawful processing ground of ‘**necessary for the performance of a contract**’ is particularly interesting in the video game context, based on what was written about video game contracts and the unilateral presentation of video game companies of the contract terms. For example, processing related to gameplay activities could be seen as necessary, whereas processing for the purposes of tracking, behavioural targeting, cookies, or building profiles could be seen as not necessary to provide the video game service.
- ❖ **Automated decision-making** (including profiling) is generally prohibited under the GDPR if the decision is solely based on automated processing and if there are legal or similarly significant effects for the data subject (exceptions exist).
 - ‘**Solely**’ means no human involvement in the process, where the human involvement requires meaningful oversight which is carried out by someone who has the authority and competence to change the decision.
 - ‘**Legal or similarly significant effects**’ could include both the violation of children’s rights under the UNCRC (legal) as well as processes which influence the child’s choices and behaviours (e.g. nudging, behavioural targeting or other persuasive/manipulative practices) (significant effects).
 - For children, even though a strict prohibition does not exist, there is no *carte blanche* for the profiling of children and organisations are recommended to refrain from profiling them for marketing purposes.

On the E-Privacy Framework:

- ❖ The E-Privacy Framework has limited relevance for gambling(-like) elements in video games specifically, due to its focus on electronic communications and its inapplicability to the processing of location data by information society services (see discussion on how video games can likely be classified as ISS in chapter 5).
- ❖ The E-Privacy Regulation Proposal introduces a few relevant provisions, for example the **consent-threshold** as included in the GDPR for the (prohibition of) placement, storage, use and accessing of **cookies** in general and on end-user terminal equipment.
- ❖ The Proposal includes **no reference to children**, as opposed to the GDPR which does recognise the vulnerable position of children.

Chapter 7 – Audiovisual media regulation

INTRODUCTION. In this chapter, the relevance of audiovisual media law in light of gambling(-like) elements within video games will be studied. More in particular, the chapter will look at video game content on (live) streaming platforms (e.g. Twitch or YouTube) through the lens of the Audiovisual Media Services Directive ('AVMSD').¹¹³⁶

Section I – Legal framework

AVMSD. The AVMSD is the cornerstone of media regulation in the EU. It brings about a minimum harmonisation of certain aspects of national legislation facilitating the provision of audiovisual media services ('AVMS') in the EU market, based on the country of origin principle. Audiovisual media services cover mass media which serve to inform, entertain or educate. The Directive is built upon the principle of technological neutrality: it covers all services with audiovisual media content, irrespective of the technology used to deliver it. The AVMSD was amended in 2018 in order to keep up with the continuous technological evolutions affecting the audiovisual market.¹¹³⁷ The most controversial novelty was the introduction of video-sharing platforms to the scope of the directive, considering the absence of editorial responsibility on behalf of the platforms.

EXCLUSION OF VIDEO GAMES AND GAMBLING? The EU legislator has **excluded both gambling services and video games from the scope of the directive**.¹¹³⁸ What is remarkable is that the services are solely excluded within the recitals and not explicitly within the provisions of the directive, as is the case for other directives (*cf.* e.g. E-commerce Directive). This could be problematic as recitals have an interpretative value, and are not binding as such.¹¹³⁹ Adding to the confusion is that in the AVMSD 2018 the exclusion of gambling and video games was not explicitly repeated. However, the exclusion was not repealed or contradicted, which according to the drafting guide of the EU institutions implies that the exclusion is still applicable.¹¹⁴⁰ The reason for the exclusion of gambling services and video games lies in the consideration that for these services, the audiovisual media element is merely incidental and does not constitute the main aim of the service.¹¹⁴¹ While this was true a decade ago, nowadays, certain video games integrate purely audiovisual elements such as concerts or movie trailers. SAX and AUSLOOS recently referred to the video game Fortnite as a content delivery platform, implying that the game serves as a means to deliver other services, such as audiovisual media

¹¹³⁶ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (hereafter: AVMSD).

¹¹³⁷ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on audiovisual media services in view of changing market realities (hereafter: AVMSD 2018).

¹¹³⁸ Recital 22 of AVMSD 2010.

¹¹³⁹ DEN HEIJER, M., VAN OS VAN DEN ABEELLEN, T. and MASLYKA, A., *On the Use and Misuse of Recitals in European Union Law*, Amsterdam Center for International Law No. 2019-15.

¹¹⁴⁰ The revised AVMSD did extend its scope to include other services such as video-sharing platforms and (some) user-generated content, however, no mention was made of video games and gambling services. See EU, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, 2015, 61-62.

¹¹⁴¹ Recital 22 AVMSD 2010.

content.¹¹⁴² This raises questions regarding the justifiability of the exclusion of video game and gambling content from the AVMSD scope today.

GAMBLING BROADCASTS. Even though gambling services and video games are excluded, the AVMSD can still be relevant regarding gambling(-like) elements within video games. Recital 22 clearly states that **broadcasts devoted to gambling or games of chance are not excluded from the scope**. In practice, this means that a programme which is entirely devoted to games of chance does fall within the scope of the Directive.¹¹⁴³ This part of the recital is interesting in light of the phenomenon of **game streamers**. Social media influencers who stream their gameplay, take up a very prominent role in the current ecosystem of video games. One of the most popular types of content on video-sharing platforms is the (live) streaming of video games: video gaming has become a full-fledged form of entertainment which can be passively consumed by users of video-sharing platforms (e.g. on Twitch or YouTube).¹¹⁴⁴ Some streamers devote entire videos or streams to opening lootboxes or unpacking FIFA packs, potentially turning it into a programme entirely devoted to gambling-like activities.¹¹⁴⁵ This sparks concern as these streamers could serve as a gateway to participating in in-game gambling (or gambling(-like) activities) to young audiences.¹¹⁴⁶ In such an event, the audiovisual media aspect is no longer incidental, and hence, potentially triggers the applicability of the AVMSD.

MATERIAL SCOPE. The AVMSD applies only to ‘**audiovisual media services**’. This notion forms the foundation of the AVMSD as it delineates the scope *ratione materiae*.¹¹⁴⁷ The definition of an audiovisual media service can be divided into six cumulative criteria.¹¹⁴⁸ Video game streamers will be covered by the Directive when they meet all following criteria:

¹¹⁴² SAX, M. and AUSLOOS, J., *Getting Under Your Skin(s): A Legal-Ethical Exploration of Fortnite’s Transformation Into a Content Delivery Platform and Its Manipulative Potential*, in *Interactive Entertainment Law Review*, 2021, 1-24.

¹¹⁴³ This is not the case for online gambling as such. For example, a sports betting website which merely shows sports matches to support its service is excluded. See HOEKX, N. (n 449), 50.

¹¹⁴⁴ SJÖBLOM, M. and HAMARI, J., *Why do people watch others play video games? An empirical study on the motivations of Twitch users*, in *75 Computers in Human Behaviour* 985, 2017.

¹¹⁴⁵ See e.g. <https://www.youtube.com/watch?v=iuhbTPRraLI> or <https://www.youtube.com/watch?v=JzonUA4aU6Q>; <https://m.twitch.tv/safetscissor/clip/OutstandingEnjoyablePonyRalpherZ>.

¹¹⁴⁶ WOODCOCK, J. and JOHNSON, M., *Live Streamers on Twitch.tv as Social Media Influencers: Chances and Challenges for Strategic Communication*, in *International Journal of Strategic Communication*, 2019, 321-335; SAX, M. and AUSLOOS, J. (n 1142), 20.

¹¹⁴⁷ CASTENDYK, O., DOMMERING, E. and SCHEUER, A., *European Media Law* (Kluwer, 2008), 812.

¹¹⁴⁸ Article 1(a)(i) AVMSD. For more information, see VERDOODT, V. and FECL, N., *Digital Influencers and Vlogging Advertising: Calling for Awareness, Guidance and Enforcement*, in *A&M*, 2019, 13-16.



Figure 4 – The defining criteria for audiovisual media services.

HARMFUL CONTENT. Finally, when browsing the AVMSD in light of gambling(-like) elements within video games, the most relevant provision is Article 6a covering the protection of minors against harmful content. What is considered to be harmful content, however, is not defined. Besides bad language and violence, gambling(-like) elements in video games shown by streamers could potentially constitute harmful content.

VIDEO-SHARING PLATFORMS. Besides for game streamers themselves, the AVMSD also contains obligations for video-sharing platforms. Considering the lack of editorial responsibility on behalf of the platform provider in relation to user-generated content on there, video-sharing platform providers can still avail themselves of the liability exemptions and general monitoring prohibition in Articles 12-15 Ecommerce directive. Nevertheless, as organiser of the content on platform, video-sharing platforms are required to take appropriate measures to protect:

- minors from programmes, user-generated content and audiovisual commercial communication that may impair their physical mental or moral development, so that they do not normally hear or see it,¹¹⁴⁹
- the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the EU Charter of fundamental rights (i.e. sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation),¹¹⁵⁰
- the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which

¹¹⁴⁹ Article 28b(1)(a) AVMSD.

¹¹⁵⁰ Article 28b(1)(b) *Id.*

is a criminal offence under EU law, namely public provocation to commit a terrorist offence, offences concerning child pornography and offences concerning racism and xenophobia.¹¹⁵¹

APPROPRIATE MEASURES. These new rules encourage video-sharing platform providers to be transparent towards users by including certain AVMSD requirements in their terms of use. In addition, video-sharing platforms are expected to facilitate the provision of information through technical mechanisms (e.g. reporting mechanisms for harmful or inappropriate content¹¹⁵², parental control systems managed by the end user, age verification systems). Finally, the providers of video-sharing platform services must implement transparent, user-friendly and effective complaints procedures in case users have complaints regarding the implementation of the measures.¹¹⁵³ The measures must be determined in light of the nature of the content, the potential harm, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake (including those of the video-sharing platform providers and the uploading users, as well as the general public interest). The measures should be practicable and proportionate, taking into account the size of the video-sharing platform and the nature of its service.¹¹⁵⁴

ENFORCEMENT. Enforcement remains a national matter to be carried out by independent regulatory authorities.¹¹⁵⁵ Within Belgium, audiovisual media is a community competence.¹¹⁵⁶ In Flanders, enforcement of the Flemish Media Decree – transposing the AVMSD – is carried out by the Flemish Media Regulator.¹¹⁵⁷ The main task of the regulator is to supervise and enforce compliance with media regulations within the Flemish Community, to settle disputes relating to media regulations and to grant media recognitions and licences. Besides competences relating to television broadcasting and on-demand audiovisual programmes (e.g. Netflix or Disney+), the Flemish Media Regulator is now – since the AVMSD revision of 2018 – also competent to deal with certain user-generated content and video-sharing platforms established on its territory. The regulator has not (yet) had to deal with game streamers.

Section II – Self- and co-regulatory framework

ENCOURAGED. The AVMSD encourages Member States to opt for self- and co-regulation when governing certain aspects of the audiovisual media landscape.¹¹⁵⁸ Currently, a variety of audiovisual media related self- and co-regulatory instruments already exist at the national, EU and international level. However, it mainly concerns the regulation of commercial communication (e.g. ICC-Code), which is outside the scope of this report and will be dealt with in a subsequent report.

PROTECTION OF MINORS. Another aspect of audiovisual media law which is often made subject to self- or co-regulation is the protection of consumers, and minors in particular. The AVMSD requires Member States, among other things, to ensure that media service providers **provide sufficient information to**

¹¹⁵¹ Article 28b(1)(c) *Id.*

¹¹⁵² Many big video-platforms already have such mechanisms in place, e.g. the reporting ('flagging') mechanism on YouTube and TikTok.

¹¹⁵³ Article 28b(3) *in fine* AVMSD.

¹¹⁵⁴ Article 28b(3) *Id.*

¹¹⁵⁵ Article 30 *Id.*

¹¹⁵⁶ Article 4, 6°, Bijzondere wet 8 augustus 1980 tot hervorming der instellingen (BWHI) [The special law of 8 August 1980 on institutional reforms], BS 15 August 1980.

¹¹⁵⁷ In Wallonia this is done by the Conseil Supérieur de l'Audiovisuel (CSA) and in the German-Speaking Community by the Medienrat.

¹¹⁵⁸ Article 4a AVMSD.

viewers about content which may impair the physical, mental or moral development of minors. For this purpose, it is required to use a system describing the potentially harmful nature of the content of an audiovisual media service. The use of co-regulation is recommended in this regard.¹¹⁵⁹

KIJKWIJZER. One interesting example of such a co-regulatory system is the Dutch ‘Kijkwijzer’.¹¹⁶⁰ A number of countries (e.g. Belgium, Slovenia and Iceland) have obtained licences from NICAM – i.e. the Dutch Institute for the Classification of Audiovisual Media and the organisation behind *Kijkwijzer*¹¹⁶¹ – in order to establish the same system in their respective countries.¹¹⁶² It concerns co-regulation as on the one hand, the implementation of the system is based on a legal basis¹¹⁶³ and there is governmental oversight by the Dutch media authority¹¹⁶⁴ on the functioning of NICAM, while on the other hand, the suppliers (i.e. distributors or producers) do the actual classification of the content.¹¹⁶⁵ Important to note is that *Kijkwijzer* only informs viewers about the suitability of audiovisual content as a warning or a recommendation, it is not binding legislation. Parents bear the final responsibility for deciding which content their children are allowed to watch. Film theatre owners or other audiovisual media providers, are, however, responsible for correctly informing visitors, so that parents can base their choice on truthful information.¹¹⁶⁶ Interesting to note here is that NICAM is also largely responsible for the implementation of the PEGI system (*supra* chapter 4).¹¹⁶⁷

APPLICATION. In the Netherlands, video-on-demand platforms (e.g. Netflix, Disney+) are already deploying the *Kijkwijzer* system. It even has been extended to user-generated content creators on video-sharing platforms.¹¹⁶⁸ In Belgium, the use of the *Kijkwijzer* is still limited to theatre movies, however, the Flemish Government is - at the time of writing - working on the extension of the system to other audiovisual media services as well.¹¹⁶⁹

ICONS. The *Kijkwijzer* system informs viewers by means of icons. Below, the icons of the Belgian system are set out. In Belgium, *Kijkwijzer* works on the basis of seven age classifications: all ages, 6 years old, 9 years old, 12 years old, 14 years old, 16 years old and 18 years old. In addition, it has six content classifications that are potentially unsuitable for minors and their development: respectively fear, violence, sex, bad language, discrimination and drug or alcohol abuse:

¹¹⁵⁹ Article 6a, (3) AVMSD.

¹¹⁶⁰ See <<https://www.kijkwijzer.nl/>>; <<https://www.kijkwijzer.be/nl-be/filmkeuring/>>.

¹¹⁶¹ For more information, see <<https://nicam.nl/en>>.

¹¹⁶² Turkey has a licence for linear TV and theatre movies, Slovenia has a licence for linear TV, theatre movies and video on demand services, Iceland has a licence for for linear TV, theatre movies, video on demand service and DVD’s. Each country has adapted the system to their own specific situation.

¹¹⁶³ Based on Article 4 Mediawet, providers of audiovisual media services in the Netherlands are obliged to join and comply with ‘Kijkwijzer’ if they want to provide audiovisual content which could be harmful to children. See <https://wetten.overheid.nl/BWBR0025028/2020-11-01>.

¹¹⁶⁴ In Dutch: Commissariaat voor de Media, <https://www.cvdn.nl/>.

¹¹⁶⁵ For the Belgian regulation, see: Reglement voor de classificatie van films die voor het eerst vertoond worden in een Belgische bioscoop van 15 februari 2009, BS 4 June 2019, <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2019021524&table_name=wet>.

¹¹⁶⁶ See <<https://www.kijkwijzer.be/nl-be/kijkwijzer/regelgeving/samenwerkingsakkoord/>>.

¹¹⁶⁷ <https://nicam.nl/en/project/pegi>.

¹¹⁶⁸ See <<https://www.kijkwijzer.nl/kijkwijzer-voor-youtube/page18-0-544.html>>.

¹¹⁶⁹ VANDENBERGHE, H., DONOSO, V. and D’HAENENS, L.. (KU Leuven Institute for Mediastudies), *Advies over implementatie Kijkwijzersysteem bij (niet-)lineaire tv-diensten. Een case binnen de doorlichting van het Vlaams mediawijsheidsbeleid*, <https://www.vlaanderen.be/cjm/sites/default/files/2021-05/Deelrapport%20advies%20Kijkwijzer_FINAL_April2021.pdf>.



Figure 5 - Kijkwijzer age classification icons (upper) and content classification icon (lower).

For reasons of clarity, a Kijkwijzer recommendation consists of a maximum of four icons.

NO GAMBLING ICON. At the moment, the Kijkwijzer system **does not (yet) contain a gambling or video gaming related icon**. However, in the Netherlands, *Kijkwijzer* is paying attention to the popularity of video games by advising on the appropriateness and risks related to some of the most popular games.¹¹⁷⁰ One of the aspects discussed in their assessment are in-game purchases.

ENFORCEMENT. Finally, with regard to monitoring the correct application of the *Kijkwijzer* system in Belgium, there is the complaints committee (Dutch: ‘klachtencommissie’). A person who was adversely affected by a possible infringement has, from then onwards, two weeks to submit a complaint relating to a classification that is considered to be incorrect, the absence of a classification, or the incorrect communication of the classification.¹¹⁷¹ If the complaint is deemed founded, a sanction is possible.¹¹⁷²

Section III – Key takeaways

- ❖ The AVMSD is of **rather limited relevance** for gambling(-like) elements within video games, as both video games and gambling services *in se* are excluded from the scope of the AVMSD.
- ❖ Nevertheless, the AVMSD can be relevant when game streamers are concerned. The latter are covered by the Directive when they meet all six criteria set out above. If so, they will have to comply with the relevant provisions on content and commercial communication (which is the subject of the second report).
- ❖ It remains to be seen whether game streamers and video-sharing platforms could be held accountable in light of gambling(-like) elements in, or relating to, video games they are streaming: can such content be considered harmful in the sense of the AVMSD?
- ❖ In some countries, game streamers have to take into account the Kijkwijzer system (or another classification system). Even though there is no gambling icon, the violence and bad language icons could be relevant for game streaming.

¹¹⁷⁰ See <<https://www.kijkwijzer.nl/populaire-games/page488.html>>.

¹¹⁷¹ Article 6 Reglement voor de classificatie van films die voor het eerst vertoond worden in een Belgische bioscoop.

¹¹⁷² Article 8, § 1 en 2 Reglement voor de classificatie van films die voor het eerst vertoond worden in een Belgische bioscoop.

Conclusion and next steps

This report offers a mapping of the relevant provisions concerning gambling(-like) elements in video games. Based on the analysis performed in this report, the following aspects are important to highlight.

First, even though more and more research suggests that video games increasingly contain features that are akin to gambling, which might lead to (problematic) gambling behaviour at a young age, a classification of such features as ‘gambling’ is not that straightforward. Our analysis has shown that these gambling(-like) elements do not always fall within the scope of gambling regulation, due to complexities regarding the interpretation of the different criteria that are used to define what constitutes ‘gambling’. Here, it has to be noted that the EU does not have exclusive competence vis-à-vis gambling activities and that therefore instead of harmonised EU law the centre of gravity is found at the national level. Even though many of the video games are available across borders, there is a variety of national regulatory frameworks on gambling that might apply, each adopting their own approach towards the legal classification of different gambling(-like) elements. In this report, the national gambling regulation of Belgium, the United Kingdom and the Netherlands was analysed. Their comparison illustrated the difficulties of bringing gambling(-like) elements in video games under the scope of gambling regulation and the differences in national definitions of what constitutes gambling.

Second, in the video game environment self-regulatory initiatives exist (e.g. PEGI, ESRB) which provide age-ratings and content labels for video games and other rules regarding the video game environment such as privacy or gameplay environments. These labels and descriptors include gambling or in-game purchases (with random items), however they do not always apply to, or are useful for, all types of gambling(-like) elements in video games.

Third, in addition to these diverging national gambling frameworks and self-regulatory initiatives, other legal instruments at the European level might apply to gambling(-like) elements in videogames. Two important frameworks are consumer protection and data protection and media regulation, which is also relevant to a lesser extent, was also included in the discussion. Different EU Directives and Regulations contain provisions which aim to tackle harmful commercial practices or unfair and unlawful data collection and processing activities.

Regarding **consumer protection**, first the uncertain legal status of virtual content was explained, together with the three types of documents that are part of the contract between video game companies and players: the terms of service, the EULA and the privacy policy. Here, it is important to clarify that in practice these terms of service include provisions which exclude a transfer of ownership of virtual content when making in-game purchases. After these preliminary considerations, we have discussed the different Directives of the EU that include provisions regarding information obligations, unfair contract terms and transparency. Video game companies need to *inter alia* inform players about in-game purchase mechanisms, costs, or the main characteristics and functionalities of gambling(-like) elements in their video games to comply with these obligations. Further, commercial practices can be seen as unfair if they either distort the economic behaviour of consumers, mislead (child-)consumers or are aggressive, which are all relevant taking into account the variety of techniques used in the video game environment concerning behavioural targeting, manipulation, nudging, or other dark design patterns.

In the **data protection** chapter, we first introduced the different ways in which video game companies collect, process and use the data of their players and the potential far-reaching consequences of these practices. Then, the EU data protection framework was discussed, where the GDPR is the key Regulation. In the video game environment, the lawful grounds for processing most commonly used are processing necessary for the performance for a contract, processing for the purposes of the company's legitimate interests, or processing based on consent. After stating the importance of the data processing principles (such as data minimisation or purpose limitation) and highlighting the specific protection that children merit under the GDPR, we focussed first on consent in the video game context, as well as its link with processing necessary for the performance of a contract, which showed the importance of clearly distinguishing and informing users of the different purposes of data processing. In general, when consent is used as a lawful ground for processing by video game companies, it needs to be freely given, specific and unambiguous and when the child is below the digital age of consent, parental consent is required when information society services are offered directly to a child. The second concept concerned automated decision-making and profiling, which is related to the different commercial practices used by video game companies that profile their users, personalises their experiences, or alters their behaviour or choices based on automated decision-making. In many cases, these practices can have legal or similarly significant effects on children and are thus prohibited by the GDPR. Even though exceptions to this prohibition exist, there is still no *carte blanche* for the profiling of children. Finally, the E-Privacy framework was discussed, where mostly the E-Privacy Regulation Proposal includes a few relevant provisions for example the consent-threshold as included in the GDPR for the (prohibition of) placement, storage, use and accessing of cookies in general and on end-user terminal equipment.

In the chapter on **audiovisual media regulation** we focussed on video game content on (live) streaming platforms through the lens of the AVMSD. Here, as both video games and gambling services as such are excluded from its scope, the relevance of the AVMSD is limited and concerns video game streamers and their potential accountability regarding gambling(-like) elements in, or related to, the video games they are streaming and the question whether this content is considered harmful under the AVMSD.

To summarise, it can be concluded from this report that providers of video games containing gambling(-like) elements will have to navigate through a patchwork of legislative and self-regulatory rules spread across different instruments and touching upon different legal domains at different levels. Throughout the analysis performed in this report, we have adopted a children's rights perspective and have used the children's rights framework which exists at the international and European level to map and analyse the different frameworks. In many cases it was apparent that children merit specific protection against practices or activities of video game companies, or against elements present in video games which resemble gambling. This specific protection is not always easy to implement and, hence, lacking at the moment, which potentially threatens children's rights, such as their rights to privacy, development, play or protection against economic exploitation.

Aside from the regulatory framework applicable to gambling(-like) elements in video games as such, an equally important aspect of the blurring lines between video gaming and gambling relates to the rules that are applicable to commercial communication and advertising. The mapping of this legal framework for advertising related to gambling(-like) elements in video games will be carried out in a second report.

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