



**Comment submitted on the Draft General Comment No. 25 on
Children’s Rights in relation to the digital environment of the
UN Committee on the Rights of the Child**

Hélène Bruderer/Ana Andrijevic

Legal Researchers at the Digital Law Center

of the University of Geneva

14 November 2020

I. General Comments

We warmly welcome the Draft General Comment No. 25 on Children’s Rights in relation to the digital environment of 13 August 2020 of the UN Committee on the Rights of the Child (hereinafter DGC No. 25) which provides a comprehensive commentary on the way the Convention on the Rights of the Child has to be interpreted in light of the digital environment. That being said, in our opinion, DGC No. 25 may address and recognise additional threats in relation to the video gaming industry, notably in relation to microtransactions. Online microtransactions are the purchase of virtual goods by players within an online video game.¹ They allow players to acquire digital items such as armors, weapons, in-game currency, and other virtual goods.²

These microtransactions represent a tremendous financial windfall for video game publishers and are an increasingly important part of their business models.³ Indeed, in 2018, the Interactive Software Federation of Europe (ISFE) estimated 34% of turnover resulting from in-app purchases and paid apps, including loot boxes.⁴

Among the different examples of microtransactions, loot boxes can be defined as a virtual “mystery box” containing a random item which a player purchases with real

¹ SCHWIDDESEN Sebastian/KARIUS Philipp, Watch your loot boxes! - Recent developments and legal assessment in selected key jurisdictions from a gambling law perspective in: Interactive Entertainment Law Review, 2018, pp. 17-43 (available: <https://www.elgaronline.com/view/journals/ielr/1-1/ielr.2018.01.02.xml>). All links have been last accessed on 14 November 2020.

² EUROPEAN PARLIAMENT, Loot boxes in online games and their effect on consumers, in particular young consumers, p.7 (available: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU\(2020\)652727_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU(2020)652727_EN.pdf))

³ SCHWIDDESEN Sebastian/Karius Philipp, (note 1) p. 18.

⁴ INTERACTIVE SOFTWARE FEDERATION OF EUROPE (ISFE), Europe’s Video Games Industry, Key Facts 2019, 2018 trends & data, p.4 (available: <https://www.isfe.eu/wp-content/uploads/2019/08/ISFE-Key-Facts-Brochure-FINAL.pdf>).

money,⁵ so the players do not know what they will get before opening them.⁶ These items, aimed at keeping games interesting for gamers through variety and novelty, can be either cosmetic for game customization (e.g. skins and new looks for the player's avatar) or items affecting gameplay (e.g. tools, weapons, levels, maps, in-game currency).⁷

As such, loot boxes are similar to the mystery sticker packs or cards (e.g. with football or baseball players) which one can purchase at a newsstand, with one key difference: contrary to the tangible world in which the seller of the sticker/card pack has no means of knowing exactly which cards are missing from a buyer's collection, video game publishers gather a substantial amount of data about their players and are therefore able to manipulate the mystery content's drop odds (i.e., favour the drop of some common digital items such as weapons, armors, etc., rather than the rare ones).

In this context, there are different issues at stake that need to be addressed including the lack of transparency regarding the algorithms used in the gaming industry, the data collection process, and the risk of dependency similar to gambling.

Indeed, some concerns have recently arisen regarding the video game industry's lack of transparency regarding its algorithms (for instance some patents were registered in the USA aimed at encouraging players to spend more money⁸).⁹ Thus, some have designated these practices as "predatory monetization schemes".¹⁰ In a report dated 2019, a Committee of the British Parliament acknowledged that the video game industry has put in place scientifically proven mechanisms to create repetitive habits even if they are reluctant to admit it.¹¹ In this

⁵ DRUMMOND Aaron/SAUER James, Video game loot boxes are psychologically akin to gambling in: *Nature Human Behaviour*, 2, 2018, pp. 530–532 (available : <https://doi.org/10.1038/s41562-018-0360-1>), p. 530 ; GRIFFITHS Mark D., Loot Boxes in Video Games as form of Gambling or Gaming? (2018) 22(1) *Gaming Law Review*, pp. 52–54, p. 52.

⁶ EUROPEAN PARLIAMENT (note 2), p.7.

⁷ EUROPEAN PARLIAMENT (note 2), p.7.

⁸ See Patent US No. 10,080,972 of 25 September 2018 on "*a System and method for varying the distribution probabilities of individual potential awards associated with probability item bundles depending on a purchase history of a user activating a probability item bundle*" (see: <https://patentimages.storage.googleapis.com/0b/81/44/e0b180fb740e99/US10080972.pdf>); see also Patent US No. US 2019 0275422 of 12 September 2019 on "*A system and method configured to enhance gameplay between users in an online game and to provide enhanced interest in virtual goods associated with collections of virtual goods through the ability to rotate drop rates associated with these virtual goods from time to time. The system and method include the provision of functionality which allows providers of online games to periodically rotate drop rates associated with mystery boxes in order to maintain and/or generate additional interest in specific mystery boxes. As a result, it is possible for game operators to enhance revenue opportunities associated with these boxes even in the case where such boxes have been available for a relatively lengthy period of time and/or where players would have otherwise lost interest in specific boxes*" (available: <https://patentimages.storage.googleapis.com/82/54/3d/f3bc1ad176aded/US20190275422A1.pdf>).

⁹ See KING Daniel et al., Unfair Play? Video games as exploitative monetized services: An examination of game patents from a consumer protection perspective in: *Computers in Human Behavior*, vol. 101, December 2019, pp. 131–143 (available: <https://www.sciencedirect.com/science/article/pii/S0747563219302602#tbl1fnb>).

¹⁰ KING Daniel/DELFABBRO Paul, Predatory monetization schemes in video games (e.g. "loot boxes") and internet gaming disorder in : *Addiction*, Vol. 113, Issue 11, pp. 1967–1969 (available: <https://onlinelibrary.wiley.com/doi/full/10.1111/add.14286>).

¹¹ UK Parliament, Study on Immersive and addictive technologies, available: https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/184609.htm#_idTextAnchor075, point 14: "*The games industry's emphasis on player choice does not acknowledge the way in which many games use random reward mechanisms that have been scientifically proven to create repetitive behaviors, and the effect that this might have on the meaningful exercise of choice. Moreover, the reluctance to discuss engagement metrics or to acknowledge the psychological impact of core design principles in evidence to us suggests that highly skilled designers either do not know the data and psychological studies and strategies that underpin their industry or, what is more likely, do not feel comfortable admitting it in a public*

respect, the European Parliament stated that “loot boxes could lead to excessive screen times and trigger broader psychological and financial consequences if players and parents do not control their own or their children’s play habits and spending.”¹²

The video game industry is data driven, intensively exploits the data of their users (“data-driven industry”), and deliberately uses information asymmetry.¹³ The lack of transparency also raises important legal issues with respect to the data collection process as expressed by the Swiss Federal Council in 2019.¹⁴

Finally, some studies have shown that loot boxes may trigger the same dependency systems as gambling¹⁵ and may be particularly detrimental to children who could be more vulnerable to problematic game designs since they have a reduced ability to exert self-control and more difficulties in understanding valuation and probabilities in games.¹⁶ The European Parliament has underlined that some loot boxes are surrounded by game designs which could have adverse psychological and financial consequences similar to the addictive designs of conditioning known from slot machines.¹⁷

These gaming mechanisms were recognised by the Children’s Commissioner of England who stated in a 2019 report that the monetisation of gaming brought children closer to gambling.¹⁸ In this respect, the Commission called for the limitation of the role of money in online games for children (for instance, limitation of spending, etc.).¹⁹ In addition, Director of the UK Kingdom National Health Service (NHS), Claire Murdoch, underlined that loot boxes are “setting kids up for addiction” by building gambling tasks into their games and has called on gaming companies to ban sales of games with loot boxes.²⁰ UNICEF has also categorised gambling as a potential harm to children in the broader context of commercial exploitation.²¹ It is worth mentioning that under some jurisdictions, loot boxes are already regulated as gambling, as is the

forum. For an industry generating such high revenues from so many millions of players worldwide, that lack of transparency is unacceptable.”

¹² EUROPEAN PARLIAMENT (note 2), p.10.

¹³ UK Parliament, Study on Immersive and addictive technologies, available: https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1846/184609.htm#_idTextAnchor075, point 15: “During this inquiry we have heard that online games and social media are both data-driven industries that use asymmetrical information and deliberate design practices to manipulate users into spending more time or money on their platforms. The argument that engagement is purely a user’s free choice is undermined by the amount of data collected about them and the use of that data alongside design features, such as random reward mechanics, that have been proven to have powerful psychological effects”.

¹⁴ CONSEIL FÉDÉRAL, Message concernant la loi fédérale sur la protection des mineurs dans les secteurs film et du jeu vidéo, Berne, 2019, p.16 (available: <https://www.news.admin.ch/news/message/attachments/62824.pdf>).

¹⁵ KING Daniel L., RUSSELL Allan et al., The cost of virtual wins: an examination of gambling-related risks in youth who spend money on social casino games.

¹⁶ EUROPEAN PARLIAMENT, (note 2) p.8.

¹⁷ EUROPEAN PARLIAMENT, (note 2) p.8.

¹⁸ Children’s Commissioner of England, Gaming the system, October 2019, p. 25 (available: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf>).

¹⁹ Children’s Commissioner of England, Gaming the system, October 2019, (note 14) p. 27.

²⁰ NATIONAL HEALTH SERVICE, Country’s top mental health nurse warns video games pushing young people into ‘under the radar’ gambling, January 28, 2020 (available: <https://www.england.nhs.uk/2020/01/countrys-top-mental-health-nurse-warns-video-games-pushing-young-people-into-under-the-radar-gambling/>).

²¹ UNICEF, The State of the World’s Children, Children in the Digital World, 2017, p. 34 (available: https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf).

case in Belgium²² or in some US states.²³ Thus, as such, those loot boxes should not be accessible for children provided that they fall within this regulation. Nonetheless, the legal framework is still scattered,²⁴ although there are some encouraging legislative discussions such as for example in the United States.²⁵ In addition, some platforms, such as Google Play and Apple's App store now require that games containing loot boxes display the probabilities of winning different items.²⁶

Therefore, for these reasons, we believe that DGC No. 25 should address these concerns and foster the implementation of appropriate safeguards in the state's national law.

II. Specific comments

In light of the foregoing, the following comments can be formulated with respect to DGC No. 25, under the following sections:

Section III. C. Right to life, survival and development (art. 6)

- **under para. 16:** The development of a child also encompasses the right not to be manipulated, notably by predatory scheme. Thus, one should add the following wording in **[in bold]** to this paragraph:

"16. States shall take all appropriate measures to protect children from the risk and threat to their right to life, survival and development in the digital environment. These include content, contact and conduct risks, and threats that include bullying, [intensive data processing of a minor's data for commercial gain,] gambling, sexual exploitation and abuse, persuasion relating to suicide and other life-threatening activities including by criminals, armed groups and those designated as terrorist groups. States should identify and address emerging risks children face in diverse contexts by consulting them

²² In Belgium, the Belgian Gaming Commission conducted an investigation in 2018 into four games (Star Wars Battlefront II, Overwatch, FIFA 18 and Counterstrike Offensive). With the exception of Star Wars Battlefront II, the Commission considered that the loot boxes available in the other games constituted games of chance subject to Belgian legislation in this area.

²³ In the United States, the regulation of gambling houses is in the competence of the states. Thus, there are states where legislation has been enacted, for example in the State of Hawaii, or in the State of Washington, where the 9th Circuit case of *Kater v. Churchill Downs Inc.*, held that the game "Big Fish Casino" rewarding players with virtual chips constituted a game of chance and money subject to the regulatory framework of the Washington State Gaming Act (*Kater v. Churchill Downs Inc.*, No. 16-35010 (9th Cir 2018)). Indeed, the Court found that these virtual tokens had a definite value since players could use them to purchase additional games. Thus, they were likely to be the subject of this law.

²⁴ For instance, in France and the UK, loot boxes are not considered as gambling. In France, the online gaming regulatory authority ("ARJEL") pointed out in its 2018 activity report that, under French law, loot boxes do not as such constitute gambling (Report ARJEL 2018, p. 58 (available: <http://www.arjel.fr/IMG/pdf/rapport-activite-2018.pdf>)). Nonetheless, in France, a lawsuit was filed by two lawyers against Electronic Arts publishing the FIFA Ultimate Team game mode considering that the loot boxes available in these games fell within the scope of games of chance and requiring EA to publish the algorithms underlying this game. In the UK, in a report dated 2017, the UK Gambling Commission published a position paper on virtual tokens, e-sport, and social gambling, recognised the risks of skin gambling on secondary sites and considered that loot boxes do not necessarily fall within the scope of UK gambling house legislation because the gains must be "cashed out". That being said, the UK Gambling Commission has recognised that the boundaries between gambling and video gambling are becoming increasingly blurred and that the protection of minors must be ensured (see UK-GAMBLING COMMISSION, *Virtual currencies, eSports and social casino gambling*, p. 7 (available: <https://www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf>)).

²⁵ S.1629 - A bill to regulate certain pay-to-win microtransactions and sales of loot boxes in interactive digital entertainment products, and for other purposes. 116th Congress (2019–2020).

²⁶ EUROPEAN PARLIAMENT (note 2), p.8.

as children have an important insight into the particular and emerging risks they face.”

- Section V. E. Data collection and research

- **under para. 31:** The section pertaining to research and data conducted with and by children is not in line with data protection standards set forth by the General Data Protection Regulation (GDPR) and existing law in the European Union or the Swiss Data Protection Act in Switzerland. This type of data cannot be in the public domain unless they are anonymised. The following wording [**in bold**] should be implemented:

*“Data collection and research are vitally important as a means of mapping and understanding the implications of the digital environment for children’s rights, and for evaluating its impact on children, and the effectiveness of State interventions. States should ensure the production of robust, comprehensive data that is adequately resourced. Such data and research, including research conducted with and by children, should inform regulation, policy and practice and should be in the public domain [**provided that they are anonymous and comply with the relevant Data protection regulations**].”²⁷*

Section IV. E. Right to privacy (art. 16)

Under para. 72 : It is of outmost importance that the information given to a child in relation to the processing of its data is clear and does not rely on any imbalance in power. Therefore, we suggest the wording in [**bold**]:

*“States shall take legislative and other measures to ensure that children’s privacy is respected and protected by all organizations and in all environments that process their data. Such legislation should include strong safeguards, independent oversight and access to remedy. States should encourage the adoption of privacy-by-design, such as end to end encryption, in services that impact on children. States should regularly review such legislation and ensure that procedures and practices prevent deliberate infringements or accidental breaches of children’s privacy. States should ensure that consent to process a child’s data is informed [**in a clear way**] and freely given by the child or, depending on the child’s age and maturity, by the parent or caregiver, and obtained prior to the processing. [**When consent is the basis of data processing, states should ensure that there is no imbalance of power.**]”*

- We also suggest adding a new paragraph for more transparency of algorithms or automated decision-making reading:

In the case of automated decision-making or algorithms in online services (such as the gaming industry), states shall foster the transparency of those algorithms and promote the adoption of a behavioural design code of practice for online services (as mentioned in para. 39).

²⁷CRC/GC/2003/5, paras. 48, 50.

Section X. Basic health and welfare (art. 24)

- **Under para. 104.** There should be a mention of gambling in relation to loot boxes. We suggest adding the wording in **[bold]** :

*“States should regulate against known harms and proactively consider emerging research and public health evidence to prevent the spread of misinformation that may harm children, materials damaging to children’s mental or physical health, and services that undermine children’s development, for example through persuasive design, excessive gaming, **[gambling,]** or age-inappropriate features.²⁸”*

* * *

²⁸CRC/C/GC/15, para. 84.