

U.K.'s Loot Box Report Tangles a Web of Global Gaming Regulations

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Carlton Fields' electronic gaming attorneys look at international and U.S. loot box regulations and problems and suggest ways gaming companies might avoid risks associated with the microtransactions that might be interpreted as gambling.

In September, the U.K.'s House of Commons Digital, Culture, Media and Sport Committee published a sprawling report on "immersive and addictive technologies." The report addresses a wide variety of topics related to video games and other interactive technology, including data collection, esports, virtual reality, and cyber bullying.

One notable finding addresses loot boxes, a form of in-game microtransaction that works much like the pull of a slot machine: players can pay real or in-game currency for the chance to obtain randomized in-game items of various worth.

Although the mechanism differs game by game, usually the player is guaranteed to get something. However, the quality, quantity, or rarity of the items are subject to chance—a loot box might end up containing the most sought-after item in the game, or it could just hold junk.

The decision whether to regulate loot boxes often comes down to whether the mechanism constitutes gambling or negatively impacts children. The report acknowledges "there is not yet enough evidence to reliably conclude that loot boxes cause problem gambling." Even so, it recommends that selling loot boxes for real money not be "permitted in games played by children until the evidence proves otherwise." Instead, the report asserts, loot boxes should be available only in exchange for in-game currency earned by playing the game.

This prohibition on real-money loot boxes, if adopted, would be the latest in a long and tangled web of disparate loot box regulations around the world.

International Differences

For example, in South Korea, loot boxes are permitted, but the Electronic Commerce Act requires developers to publish the odds of receiving certain items in loot boxes. Belgium, on the other hand, has through its Gaming Commission declared all loot boxes to be games of chance, thereby subjecting them to heavy gambling regulations.

Japan's regulatory scheme is less restrictive but more complicated; its Consumer Affairs Agency has interpreted Japan's consumer protection laws to prohibit the use of mechanisms that require users to combine randomly awarded in-game items to obtain rarer and more valuable items (a system known as "complete gacha"). Otherwise, loot boxes in Japan are permitted.

U.S. Efforts a Mixed Bag

In the United States, where there is no law directly on point, loot boxes are governed by the Federal Trade Commission Act, which generally prohibits "unfair and deceptive acts or practices in or affecting commerce." Under this framework, loot boxes are permitted so long as they do not deceive customers or otherwise involve unfair practices affecting commerce.

However, in May, the Protecting Children from Abusive Games Act was proposed—a federal bill that specifically seeks to govern loot boxes and other microtransactions. If passed, the bill would broadly ban loot boxes from games geared at children and subject all other loot boxes to a heavy regulation and enforcement system. The bill quickly garnered bipartisan support, but has not passed.

Various states have also advanced proposed loot box regulations. California, Hawaii, Washington, Minnesota, and Indiana have proposed bills that seek to regulate loot boxes in various degrees, from banning the sale of games containing loot boxes to children, to requiring strict labeling, to simply setting up agencies to study and regulate them. To date, none has passed.

In the context of this regulatory framework, in August the Federal Trade Commission held a public workshop to "examine consumer protection issues related to" loot boxes. At the hearing, the Electronic Software Association announced that the three largest console companies—Nintendo, Sony, and Microsoft—had each agreed to require game publishers to disclose the chances of receiving specific items in loot boxes. The disclosure policy is intended to begin in 2020, and several major game publishers have already agreed to comply by the end of that year.

Options for Gaming Companies Considering Loot Boxes

Amid this shifting and uncertain regulatory landscape, video game developers and publishers should pay careful attention to the risks associated with loot boxes. Although loot boxes present tremendous revenue potential, they could end up locking the game out of a potentially lucrative geographic market in which loot boxes are prohibited—either currently, or by post-launch regulatory or legislative development.

Or, their cost could outweigh their benefit if the additional revenue they generate ends up having to be spent on defending regulatory or class actions that challenge the company's loot box mechanism.

There are a few things game companies can do to minimize their risk in this regard. The simplest answer from a legal standpoint is to forgo loot boxes in their entirety and focus on other microtransactions that do not rely on chance mechanics.

Although that potentially gives up significant revenue, it eliminates the substantial costs of complying with the often-conflicting loot box regulatory schemes of various jurisdictions and of defending the company from claimed violations. Doing so can also garner substantial goodwill with consumers, many of whom disapprove of loot boxes, thereby constituting a public relations win.

Alternatively, game companies that decide to include loot boxes can reduce their legal exposure by tailoring their mechanisms to address the concerns raised by regulators around the world. For example, restricting the transferability of items obtained from loot boxes reduces their value in a secondary market, thereby lowering the risk of contributing to gambling addiction and making it less likely that a governing body would consider the mechanism gambling.

Further, incorporating measures to increase transparency, such as disclosing the odds of receiving various items, or even disclosing the items themselves — called “visible loot boxes” — can significantly undercut any claims of consumer deception.

At bottom, although the U.K. report is the latest pronouncement in the ongoing saga of loot box regulation, the story is far from over. Anyone considering implementing a loot box mechanism in a video game should stay abreast of the shifting and conflicting regulatory schemes both in the United States and abroad, and should carefully evaluate the associated risks and benefits before taking any action. The decision should certainly not be left to chance.

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Esports and Electronic Gaming

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