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ARJEL's position on loot boxes

On 28 June 2018, the French gambling authority ('ARJEL') released its activity report for 2017-2018, ('the Report') which sets out ARJEL's position on loot boxes, specifically on whether loot boxes can be classified as gambling, raising awareness of the risks involved in loot box trading and protection of minors. Rhadamès Killy and Jean-François Vilotte of De Gaulle Fleurance & Associés provide insight into the Report and discuss how loot boxes may be treated in France going forward.

In video games, a loot box 'is a consumable virtual item which can be redeemed to receive a randomised selection of further virtual items, ranging from simple customisation options for a player's avatar or character, to game-changing equipment such as weapons and armour. A loot box is typically a form of monetisation, with players either buying the boxes directly or receiving the boxes during play and later buying "keys" with which to redeem them.' The UK Gambling Commission defines loot boxes in video games as providing 'players with the opportunity to pay to open and acquire an unknown quantity and quality of in-game items for use within the game'. ARJEL has defined them as treasure chests 'whose access, for a fee, gave the opportunity to randomly obtain a virtual object useful or indispensable to the game progression'.

In its latest Report, ARJEL published its position on loot boxes in video games. Loot boxes have attracted a lot of criticism internationally of late, especially in light of the Star Wars Battlefront II controversy. The Electronics Arts video game, published in 2017, irritated some users by making an 'overly aggressive use of loot boxes and microtransactions tied to a progression system that incentivized spending real money'. In addition to the purchase price of the video game, and without any prior information, Battlefront II required repeated payments to open loot boxes. Without realising it, consumers bought a game that they could fully enjoy

only if they purchased numerous other in-game items. The first issue raised by ARJEL is whether loot boxes fall within the definition of 'gambling'. It concludes that, in general, they do not. In France, gambling is prohibited unless explicitly stated otherwise. Gambling and games of chance are regulated by the following laws:

- the Homeland Security Code, which establishes, in particular, the regime applicable to gambling;
- Law No. 2010-476, dated 12 May 2010, on the opening to competition and regulation of the online gambling sector, which governs games offered online;
- Law dated 17 March 2014 on consumption (also known as Loi Hamon), which amended the previous laws and extended the prohibition of lotteries and gambling to games of skill and ability; and
- Law No. 2016-1321, dated 7 October 2016, for a digital republic.

The notions of 'gambling' and 'chance' refer to the transactions defined in Articles L.322-2 and L.322-2-1 of the Homeland Security Code:

- Article L.322-2: 'The following are deemed to be lotteries and prohibited as such: sales of real estate, furniture or goods made by lottery, or for which premiums or other profits have been collected even partially, at random and, in a general manner, all transactions offered to the public, under any name whatsoever, to give rise to the

expectation of a gain that would be due, even partially, at random, and for which a financial sacrifice is required by the operator from the participants.'

- Article L.322-2-1: 'This prohibition covers games whose functioning is based on the player's know-how. The financial sacrifice is established in cases where the organiser requires a financial advance from the participants, even if a subsequent refund is made possible by the rules of the game.'

Hence, gambling is prohibited, unless statutorily authorised or regulated. According to the Homeland Security Code, a game will be considered 'gambling' if it meets the following cumulative requirements:

- existence of a public offering;
- presence of chance;
- expectation of a gain; and
- player participation involving some kind of disbursement or costs.

Except in rare cases, loot boxes fulfil only three out of those four requirements:

- Public offering: this condition is fulfilled when the offer to participate in the game is made through a medium to which the public has access. This is the case with video games, as they are played on the internet.
- Chance requirement: ever since the adoption of Loi Hamon, the presence of even a small amount of chance is sufficient to satisfy this requirement. It



1. UK Gambling Commission, 13 July 2018 : <http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx>.
2. The Report, pg. 4.
3. The Verge, 13 April 2018, 40.
4. 'Gambling', 'games of chance' and 'lotteries' are synonymous terms.
5. The Report, pg. 5.

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even applies to games the operation of which is based primarily upon the skill or abilities of the player. This element is therefore fulfilled in all types of games - including those involving loot boxes, where players generally do not even know which items they are purchasing from the box.

- Expectation of a gain: a lottery is prohibited only if it gives rise to the expectation of a gain - however small, and whatever its nature. Generally, this requirement is not met in respect of loot boxes, because most items acquired by players via them are used in-game, so no financial gain is to be expected from players in return. However, this will not be the case where the in-game item can be traded.
- According to ARJEL, 'If, given the French definition of gambling, not all "loot boxes" qualify as gambling; it is not the same when the prize can be traded. The legality of this type of game is questionable when the prize is transferable outside the gaming platform and the publisher allows the use of prizes acquired elsewhere on its platform⁵.'
- Requirement of a disbursement or cost: to count as prohibited gambling, players must be required to pay a sum or incur a cost, however minimal, that takes the form of a right of entry, registration fees, etc. Article L. 322-2-1 of the Homeland Security Code further specifies: 'The financial sacrifice is established in cases where the organiser requires a financial advance from players, even if a

subsequent refund is made possible by the rules of the game.' This requirement is clearly fulfilled by loot boxes, because a price is paid for opening the box and purchasing the items inside.

Hence, in general, loot boxes will not fall within the statutory definition of 'gambling,' which means that they are legal. Nevertheless, they appear to be dangerous to players, especially minors, and contrary to the public policy goals of preventing excessive or compulsive gambling and protecting minors. Such goals were addressed by the Law of 12 May 2010, and are the cornerstone of ARJEL's regulatory mission. Indeed, in-game items can be acquired by minors, because they can play video games and no identity check is required for opening loot boxes. ARJEL says that, as a result, minors who play video games become used to a repeated pattern of buying in-game items that could result in creating the basis of a gambling habit.

Therefore, ARJEL's stance is twofold. Firstly, it will report video game publishers and operators to the public prosecutor, in cases in which the use of loot boxes in video games qualifies as gambling. Criminal prosecutions can then be undertaken. As explained above, this is where in-game items obtained via loot boxes can be cashed out or traded on different platforms. However, because the use of in-game items purchased via loot boxes is generally confined to the game, this will seldom happen.

Secondly, ARJEL is intent on promoting international cooperation in order to provide solutions to the risks inherent in loot boxes and microtransactions in video games. In this regard, it has been working with other European regulators in the Gaming Regulators European Forum, which will soon publish a joint paper:

- setting out their common rules;
- raising awareness among video game publishers;
- increasing consumer awareness of the dangers of microtransactions, in relation to both integrity and addiction; and
- warning parents about the dangers for minors, and encouraging them to remain vigilant.

Although the Dutch and Belgian regulators have announced action on loot boxes, ARJEL's approach is similar to that of the UK Gambling Commission. It will promote criminal prosecution of video game publishers or operators where in-game items acquired via loot boxes can be traded on different platforms. It will work, including through international cooperation, on raising the awareness of all interested parties - above all, parents who need to protect their children. However, in light of the ever-increasing use of loot boxes, and the corresponding revenue for video game publishers, one wonders whether this will be sufficient to achieve the public policy goals of preventing excessive or compulsive gambling and protecting minors.