

# Mapping and analysis of the current regulatory framework on advertising for 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 ‘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 video 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 online videogaming environment.

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

- University of Ghent: Department 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](http://www.gameable.info)) or Twitter ([https://twitter.com/gameable\\_youth](https://twitter.com/gameable_youth)).

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## Executive summary

**RESEARCH CONTEXT.** This report is situated within the framework of the Gam(e)(a)ble project which studies the blurring lines between video gaming and gambling, and the implications thereof on children and adolescents. It focuses on the legal framework governing digital and online advertising for gambling and gambling-like elements (i.e. elements which resemble gambling but do not necessarily qualify as such under the applicable national law) in video games, such as loot boxes, social casino games, and token wagering.

**PRACTICES COVERED.** The report covers in-game advertising for gambling(-like) elements, including showcasing newly released in-game items that can be acquired from loot boxes, promoting a prize wheel to acquire additional virtual currencies or items in a social casino game, or displaying prominent in-game banners and pop-ups encouraging the purchase of loot boxes. Certain forms of advertising for gambling(-like) elements outside of the game are also within the scope of the report, for example promotions by game streamers or other influencers (e.g. paid loot box openings), ad breaks on video-sharing platforms, or advertisements on social media platforms.

**CHILDREN'S RIGHTS (SECTION I).** Given the Gam(e)(a)ble project's focus on children and adolescents, Section I explores how advertising for gambling(-like) elements in video games can impact children's rights under the UN Convention on the Rights of the Child. The analysis points out that such elements may have an impact on various children's rights and principles, including the child's right to development, the best interests of the child, or the child's right to privacy.

**GAMBLING ADVERTISING (SECTION II).** The next two sections distinguish between regulations specifically targeting gambling advertising and broader advertising rules. Section II sets out the rules regulating gambling advertising *sensu stricto*. There is no EU legal instrument specifically dealing with gambling or gambling advertising, therefore the EU perspective for this section of the report is limited to policy documents and CJEU jurisprudence. Through its case law on gambling services, the court sets the boundaries for national gambling advertising laws, based on the internal market rules. Member states enjoy significant freedom to regulate gambling advertising in their national territory. Therefore, the next part of Section II shifts the focus from EU to a Belgian/Flemish perspective. The Royal Decree of 27 February 2023 determining the details of advertising for games of chance and the Flemish Media Decree are scrutinised in light of their relevance to advertising for gambling elements in video games.

**GENERAL ADVERTISING LAWS (SECTION III).** The following section adopts a broader view by exploring other relevant advertising regulation at EU level. It examines the eCommerce Directive and Digital Services Act (DSA), the Unfair Commercial Practices Directive (UCPD), the Audiovisual Media Services Directive (AVMSD), the General Data Protection Regulation (GDPR) and the E-Privacy Directive. These instruments potentially provide an answer to undesirable advertising for gambling and gambling-like elements in video games.

SELF-REGULATION (SECTION IV). Next, the role of industry self-regulation in light of advertising for gambling(-like) elements in video games is discussed. International, European and national codes are analysed, as well as platform regulation.

KEY FINDINGS. The report concludes by highlighting the pervasive nature of advertising in the lives of children and adolescents, and its association with increased gambling intentions and participation among teenagers. This underlines the importance of the regulation of gambling advertising. This report provides an overview of the most relevant rules in terms of advertising for gambling(-like) elements in video games, and the fact that they are dispersed in several regulatory instruments, both binding and non-binding, and on several levels (international, EU, national, sub-national). Current research demonstrates that distinct rules are in place depending on whether a particular activity qualifies as gambling under the applicable national law or whether it merely exhibits gambling-like characteristics without meeting the criteria of a legal definition (“gambling-like” elements). The analysis of the legal instruments reveals challenges in interpreting and applying legal instruments to gambling-like elements within video games. Even though significant steps were taken by the EU legislator, including the GDPR and DSA, the regulatory framework is not keeping pace with the evolving market reality. Across all the legal instruments examined in this report, there is a consistent emphasis on transparency and the protection of minors. Nevertheless, the research at hand shows the presence of significant legal challenges surrounding advertising for gambling(-like) elements in video games, emphasising the urgent need for legal certainty and comprehensive regulatory measures to safeguard children and adolescents in an evolving digital landscape. Finally, the report advocates for enhanced advertising literacy of citizens – children and adolescents in particular – as an important part of the solution.

# Introduction

The research within the Gam(e)(a)ble project is focused on the blurring lines between video gaming and gambling and the impact thereof on children (i.e. persons below the age of 18). This report maps and analyses the legal framework that is applicable to advertising for gambling and gambling-like elements in video games. The concept of ‘gambling-like elements’ refers to video game elements which resemble gambling but do not necessarily qualify as such under the applicable national law. Here one can think of loot boxes<sup>1</sup>, social casino games or other in-game virtual casinos<sup>2</sup>, and token wagering.<sup>3</sup>

## 1. Context

### 1.1 Advertising in general

Advertising is omnipresent in our day-to-day lives, where it serves as a means to inform consumers about the existence and specificities of available goods and services. This should allow individuals to make informed choices regarding the goods and services concerned.<sup>4</sup> In this way, advertising – as a form of commercial communication – plays an influential role in shaping consumer behaviour in society.<sup>5</sup> Moreover, it is argued that freedom of commercial communication contributes to the establishment and functioning of the EU internal market, as it allows businesses to reach and inform consumers in all Member States, providing consumers with the confidence to engage in cross-border transactions.<sup>6</sup> However, advertising can also be harmful to consumer well-being.<sup>7</sup> Examples of harmful advertising are excessive or false advertising, undue influence or manipulation via (targeted and/or behavioural) advertising and advertising for harmful or ethically questionable goods or services – such as dangerous or illegal dietary supplements, vapes and in the case of children, gambling.

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<sup>1</sup> ‘Lootboxes’ 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 (Belgian Gaming Commission, Research Report on Lootboxes, 2018, 5).

<sup>2</sup> ‘Social casino games’ or ‘virtual casino games’ refer to games where gambling is simulated with virtual currencies that can be earned through playing, or bought with real money.

<sup>3</sup> N. Greer, M. Rockloff, M. Browne, N. Hing and D. King, “Esports Betting and Skin Gambling: A Brief History” *Journal of Gambling Issues* 2019, 43, 128; M. Denoo, B. Dupont, B. Zaman, E. Grosemans and S. Malliet, “Making Complexity Measurable in Practice: A Formal Analysis of Gamble-Play Media”, *Games and Culture* 2023; H. Kim et al., “A scoping review of the association between lootboxes, esports skin betting, and token wagering with gambling and video gaming behaviors”, *Journal of Behavioral Addictions* 2023, 12(2), 309; see in general J. Macey, “A Whole New Ball Game – The growing prevalence of video game-related gambling”, Tampere University, 2021.

<sup>4</sup> C. Michel, M. Sovinsky, E. Proto and A.J. Oswald, “Advertising as a Major Source of Human Dissatisfaction: Cross-National Evidence on One Million Europeans” in M. Rojas (ed.), *The Economics of Happiness*, Springer International Publishing 2019, 218.

<sup>5</sup> S. Jakštien, D. Susnien and V. Narbutas, “The Psychological Impact of Advertising on the Customer Behavior”, *Communications of the IBIMA* 2008, 50.

<sup>6</sup> A. Garde, “Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?”, *The International Journal of Children’s Rights* 2011, 19(3), (523) 523-24; European Commission (2007), *Communication on the EU Consumer Policy Strategy for 2007-2013 Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them*, COM(2007) 99 final.

<sup>7</sup> M. Royne Stafford and K. Pounders, “The power of advertising in society: Does advertising help or hinder consumer well-being?”, *International Journal of Advertising* 2021, 40(4), 487.

The notions ‘advertising’, ‘commercial communication’, ‘promotional message’, and ‘marketing’ are used (often) interchangeably throughout academic literature, which additionally acknowledges that the concept of commercial communications may change over time and may also vary across different regulatory instruments.<sup>8</sup> The same approach is adopted within this report, to broadly refer to, in the words of the European Commission, “all forms of communication seeking to promote products, services or the image of a company or organization to final consumers and/or distributors.”<sup>9</sup>

## 1.2 Gambling advertising

Advertisements for gambling activities are widespread. They are disseminated through a variety of channels, ranging from television, radio, newspapers, magazines, sports events, social media, game environments to offline public spaces (e.g. billboards and posters). EU Member States have established their own legal framework regarding advertising for gambling services – ranging from strict approaches (e.g. Cyprus)<sup>10</sup> to more lenient approaches (e.g. Malta)<sup>11, 12</sup>

An often-heard argument in favour of allowing gambling advertising is that it channels consumers to regulated gambling services instead of the illegal offer. The Court of Justice of the European Union (CJEU), for instance, has confirmed this.<sup>13</sup> Nevertheless, such advertising has been argued to carry certain risks to public health and society. Research has shown that advertising for gambling services impacts gambling attitude, intention, and behaviour.<sup>14</sup> It plays an important role in attracting new players, it encourages players to gamble more intensively, and it increases the chance to relapse for gambling addicts.<sup>15</sup>

Within the Gam(e)a)ble project, researchers in the field of media studies and psychology have conducted research amongst Flemish teenagers (ages 11-18). This research indicates that young people are regularly exposed to both gambling ads and gambling-like elements. A large-scale panel study showed that more than one in five of respondents were exposed to online gambling ads on at least a weekly basis, while around 17% was exposed to offline gambling ads on at least a weekly basis.

<sup>8</sup> V. Verdoodt, Children and advertising literacy in the digital age (Ghent University 2018), p. 13-14.

<sup>9</sup> European Commission, Green Paper on Commercial Communications in the Internal Market (2018).

<sup>10</sup> A. Aristomdimou and M. Christodoulou, “A general introduction to gambling law in Cyprus”, *Lexology*, 11 May 2022, <https://www.lexology.com/library/detail.aspx?g=01ef001d-ff54-4232-8baf-10c0d88561fa>.

<sup>11</sup> J. Pluncinska, “Odds stack up against Malta’s online gambling bet”, *Politico*, 26 November 2017, <https://www.politico.eu/article/malta-online-gambling-bet/>; G. Mangion, “Perspective from Malta: Money Laundering and Its Relation to Online Gambling”, *Gaming Law Review and Economics* 14(5), 2010, 366.

<sup>12</sup> See e.g. CJEU 3 June 2010, no. C-258/08, ECLI:EU:C:2010:308, §30; CJEU 8 September 2010, nos. C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, §101, ECLI:EU:C:2010:504.

<sup>13</sup> See e.g. CJEU 3 June 2010, no. C-258/08, ECLI:EU:C:2010:308, §30; CJEU 8 September 2010, nos. C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, §101, ECLI:EU:C:2010:504.

<sup>14</sup> See e.g. E. McGrane e.a., “What is the evidence that advertising policies could have an impact on gambling-related harms? A systematic Umbrella review of the literature”, *Public Health* 2023, (124) 124-130; A. Bouguettaya e.a., “The relationship between gambling advertising and gambling attitudes, intentions and behaviours: a critical and meta-analytic review”, *Current Opinion in Behavioural Sciences* 2020, (89) 89-101.

<sup>15</sup> Preamble to Koninklijk Besluit 27 februari 2023 tot bepaling van de nadere regels betreffende de reclame voor de kansspelen [Royal Decree 27 February 2023 to determine the details of advertising for games of chance], Belgian Official Gazette 8 March 2023.

Moreover, no less than 43.1% of respondents who played video games, indicated to have watched loot box openings in the past year, and more than one in five (22.3%) had watched a video of someone gambling. Bivariate correlations pointed towards a significant correlation between gambling(-like) content and monetary gambling.

The more often teenagers were exposed to gambling ads, loot box openings, or gambling videos, the more positive their attitude towards monetary gambling, the higher their intention to take part in gambling, and the more often they already had participated in monetary gambling activities.

These findings point to the need to regulate gambling advertising in an effective manner.<sup>16</sup> Today, this happens through various instruments – from legislation to self-regulation – and on different levels (i.e. (sub-)national, EU and international).

## 2. Scope of the report

This report focuses on digital or online advertising for gambling and gambling-like elements in the video game environment. On the one hand, there is *in-game* advertising for gambling(-like) elements – e.g. showcasing newly released rare in-game items that can be acquired from loot boxes, promoting a prize wheel to acquire additional virtual currencies or items in a social casino game, or displaying prominent in-game banners and pop-ups showing ads for gambling(-like) activities or encouraging the purchase of loot boxes. Game developers may encourage impulse purchases by granting players only a limited window to acquire the promoted in-game items. On the other hand, there can also be advertising for gambling(-like) elements *outside of the game*, for example ad breaks on video-sharing platforms, advertisements on social media related to a game and including gambling-like elements, or promotions by game streamers or other influencers.<sup>17</sup> Influencers and streamers regularly post videos in which they open loot boxes, potentially in partnership with video game companies, at times attracting millions of viewers.<sup>18</sup> Furthermore, influencers also team up with online casinos acting as “slot influencers/streamers” in particular.<sup>19</sup>

In line with the scope of the Gam(e)able project, this report focuses in particular on children and adolescents. On the one hand, they play a pivotal role in the video game sector, serving not only as active players but also as influential figures (e.g. game streamers). On the other hand, they may be particularly vulnerable to influences from advertising practices due to their young age, underdeveloped cognitive abilities and susceptibility to peer pressure.<sup>20</sup>

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<sup>16</sup> A. Garde, “Harmful Commercial Marketing and Children’s Rights: For a Better Use of EU Powers”, *European Journal of Risk Regulation* 2020, 11(4), 841–850.

<sup>17</sup> Forbrukerrådet, *Insert Coin. How the gaming industry exploits consumers using loot boxes*, 2022, p. 18.

<sup>18</sup> See: J. Duckworth, “FTC Investigation Reveals Streamers Are Paid to Open Loot Boxes”,

<https://gamerant.com/ftc-investigation-streamers-paid-open-loot-boxes/>;

E.g.

<https://www.youtube.com/watch?v=EwbxXm4CmU0>;

<https://www.youtube.com/watch?v=LDoWetMws14>;

[https://www.youtube.com/watch?v=Mx\\_QZnU-IOQ](https://www.youtube.com/watch?v=Mx_QZnU-IOQ);

<https://www.youtube.com/@AuzioMF/featured>;

<https://www.twitch.tv/jamodo>.

<sup>19</sup> E.g. <https://www.twitch.tv/roshtein>.

<sup>20</sup> E. Rozendaal, *Children’s vulnerability to advertising: an overview of four decades of research (1980s-2020s)*, 42 *International Journal of Advertising* 78, 2023.



All of the above leads to concerns from a societal, economic and health perspective. The current report aims to provide an overview of the most relevant regulatory instruments that could apply to advertising for gambling(-like) elements in video games. Section I briefly touches upon the children’s rights framework, while the next two sections distinguish between advertising regulation explicitly pertaining to gambling and the rules applicable to advertising for both gambling and gambling-like activities. Section II sets out the rules regulating gambling advertising, while Section III takes on a broader view by addressing other relevant advertising regulation (at EU level). Section IV discusses self-regulatory instruments and practices of streaming and video-sharing platforms. Concluding thoughts and remarks form the final part of this report.

## I. Children’s rights

As the Gam(e)(a)ble project focuses on children and adolescents, this section highlights the children’s rights and principles potentially impacted by the advertising practices outlined in this report.<sup>21</sup>

UNCRC. The children’s rights framework is found at the international level in the United Nations Convention on the Rights of the Child (UNCRC), adopted in 1989 and legally binding for all States Parties.<sup>22</sup> Over the years, the UN Committee on the Rights of the Child (CRC Committee) has developed additional guidelines and interpretations on the rights enshrined in the UNCRC through its General Comments, of which General Comment 25 on the rights of the child in the digital environment is particularly relevant.<sup>23</sup> The obligations within the children’s rights framework are aimed at States, who are ultimately responsible for ensuring that children’s rights are adequately respected by relevant actors, including those in the video game environment.

RELEVANT PRINCIPLES. The children’s rights principles which may be relevant regarding advertising of gambling(-like) elements in video games are the child’s best interests (Article 3), the right to (life and) development (Article 6) and the right of the child to be heard (Article 12).<sup>24</sup> First, when a decision affecting children is made, for instance adopting legislation on gambling advertising, the child’s best interests should be given primary consideration. These interests need to be balanced against the commercial interests of the video game industry, where advertising (which includes advertising for gambling) is an important source of revenue expected to reach over 150 billion USD by 2028.<sup>25</sup> Nevertheless, children’s interests should

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<sup>21</sup> For a more in-depth discussion of children’s rights and their application to gambling(-like) elements in video games, we refer to our previous report: P. Declerck and N. Feci, Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games, Deliverable 2.1.1. for the Gam(e)(a)ble project (FWO-SBO), 2022, Chapter 2.

<sup>22</sup> The UNCRC is the globally most ratified legal instrument. It has 196 signatories, excluding the United States, which has signed but not yet ratified the document.

<sup>23</sup> CRC Committee, General Comment 25 on the rights of the child in the digital environment (2021) CRC/C/GC/25.

<sup>24</sup> The other principle of non-discrimination (Article 2) is outside the scope of this report.

<sup>25</sup> Statista, In-game Advertising Worldwide (2022), retrieved from <https://www.statista.com/outlook/dmo/digital-media/video-games/in-game-advertising/worldwide>.

have a high priority, and a larger weight must be given to what serves the child best.<sup>26</sup> Second, the right to development encompasses children's physical, mental, psychological and social development.<sup>27</sup> The CRC Committee highlighted that the earliest years are the foundation for children's mental health and developing competencies<sup>28</sup> and that when children turn into adolescents, optimal environments should be built to support their psychological, emotional, cognitive and economic capacities.<sup>29</sup> It has been argued that certain types of advertising may interfere with children's development, for example by profiling and subsequently targeting children with advertisements based on their behaviour, emotions or cognitive biases.<sup>30</sup> In this regard, the CRC Committee has stated that States should prohibit the profiling or target of children for commercial purposes on the basis of a digital record or their characteristics, actual or inferred through analysis, referring to neuromarketing, emotional analytics, or immersive advertising.<sup>31</sup> Third, the right to be heard implies that children must be able to express their views in matters concerning them, for instance, when developing legislation or policies regarding the digital environment. Furthermore, the CRC Committee asserts that States must ensure that digital service providers, such as videogame companies, actively engage with children, applying appropriate safeguards, and give their views due consideration when developing products and services.<sup>32</sup>

RELEVANT RIGHTS. Aside from these principles, the UNCRC also includes children's rights that might be affected by advertising for gambling(-like) elements. First, the child's right to privacy (Article 16) may be impaired when children's data is collected and used to construct profiles,<sup>33</sup> on the basis of which they are subsequently targeted with advertisements for gambling(-like)

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<sup>26</sup> CRC Committee, General comment no. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (2013) CRC/C/GC/14, p. 6.

<sup>27</sup> CRC Committee, General Comment 5 on general measures of implementation of the UNCRC (2003) CRC/C/GC/05, p. 6.

<sup>28</sup> CRC Committee, General Comment 7 on implementing child rights in early childhood (2005) CRC/C/GC/07, p. 3.

<sup>29</sup> CRC Committee, General Comment 20 on the implementation of children's rights during adolescence (2016) CRC/C/GC/20, p. 5.

<sup>30</sup> See also V. Verdoodt, Children's rights and advertising literacy in the digital era (2018), p. 230.

<sup>31</sup> CRC Committee, General Comment 25 on the rights of the child in the digital environment (2021) CRC/C/GC/25, p. 7.

<sup>32</sup> *Ibid.*, p. 3.

<sup>33</sup> Video game companies are able to collect substantial data about children, including personal data. See A. Drachen et al., Game Data Mining, in M. El-Nasr et al. (eds) *Game Analytics: Maximising the Value of Player Data* (Springer, 2013); J. Svelch, Normalizing player surveillance through video game infographics, *New Media & Society* 1, 2022. In the EU, the Digital Services Act (see *infra*) states that online platforms cannot present advertisements based on profiling using personal data of the recipient if they are aware with reasonable certainty that the recipient of the service is a minor. Recital 69 and Article 26 DSA.

elements.<sup>34</sup> Behavioural design practices<sup>35</sup> such as manipulation<sup>36</sup> or nudging based on children's personal data can similarly interfere with children's privacy. Second, the same practices may also interfere with the child's right to protection against economic exploitation,<sup>37</sup> when children are exploited (e.g. manipulated)<sup>38</sup> by video game companies to make profit. The European Parliament has recently stated that video game companies should ensure that games aimed at children respect their rights with regards to targeted advertising and associated manipulative and exploitative design practices.<sup>39</sup> Third, children's right to freedom of thought may be impaired when advertising interferes with children's ability to autonomously (i.e. free from influence) develop thoughts, for example by means of nudging or persuasive design<sup>40,41</sup> Fourth, Article 17 UNCRC holds that States have to encourage the development of appropriate guidelines for the protection of children from information and material that is injurious to their well-being. Finally, when advertising for gambling-like elements occurs in-game in an oppressive manner (e.g. by continuously interfering with gameplay), it could be argued that the child's right to autonomous and free play under Article 31 UNCRC may be impacted.<sup>42</sup>

## II. Regulation of gambling advertising

This report provides an overview of the regulatory framework that is relevant in light of advertising for gambling(-like) elements in video games. From a legal perspective, it is crucial to differentiate between activities that legally qualify as gambling and those that may bear a resemblance to gambling but do not meet the precise legal criteria defining gambling

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<sup>34</sup> See also E. Petrovskaya and D. Zendle, Predatory Monetisation? A Categorisation of Unfair, Misleading and Aggressive Monetisation Techniques in Digital Games from the Player Perspective, 181 *Journal of Business Ethics* 1065, 2022, p. 1072.

<sup>35</sup> See A. Nadler and L. McGuigan, An impulse to exploit: the behavioral turn in data-driven marketing. 35 *Critical Studies in Media Communication* 151, 2017; S. van der Hof, S. van Hilten, S. Ouburg, M. Birk and A. van Rooij, "Don't Gamble With Children's Rights" – How behavioral design impacts the right of children to a playful and healthy game environment, *Frontiers in Digital Health* 4, 2022.

<sup>36</sup> See also D. Susser, B. Roessler and H. Nissenbaum, Online manipulation: Hidden influences in a digital world. 4 *Georgetown Law Technology Review* 1, 2019.

<sup>37</sup> See in general S. van der Hof, E. Lievens, I. Milkaite, V. Verdoodt, T. Hannema and T. Liefwaard, The Child's Right to Protection Against Economic Exploitation in the Digital World, 28 *Int'l Journal of Children's Rights* 833, 2020.

<sup>38</sup> See P. Hacker, Manipulation by Algorithms. Exploring the Triangle of Unfair Commercial Practice, Data Protection, and Privacy Law. *European Law Journal* (forthcoming). Retrieved from <<https://ssrn.com/abstract=3835259>>.

<sup>39</sup> European Parliament, Resolution of 18 January 2023 on consumer protection in online video games: a European single market approach (2023) (2022/2014(INI)), at 15.

<sup>40</sup> See B.J. Fogg, A Behavioral Model for Persuasive Design (Persuasive Technology Lab, Stanford University), 2009; B. Kidron, A. Evans and J. Afia, Disrupted Childhood: The cost of persuasive design (5Rights Foundation), 2018, retrieved from <<https://5rightsfoundation.com/uploads/Disrupted-Childhood-2023-v2.pdf>>.

<sup>41</sup> See F. Lupianez-Villanueva et al. (European Commission), Study on the impact of marketing through social media, online games and mobile applications on children's behaviour (2016);

<sup>42</sup> CRC Committee, General Comment 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (2013) CRC/C/GC/17; Y. Colliver and H. Doel-Mackaway, Article 31, 31 Years On: Choice Autonomy as a Framework for Implementing Children's Right to Play in Early Childhood Services, 21 *Human Rights Law Review* 566.

("gambling-like"). This section deals with advertising for video game elements that are considered gambling under the applicable national law.

# 1. European Union

## 1.1 Lack of EU competence

EU COMPETENCE. Gambling services are not an exclusive competence of the European Union. According to the principle of subsidiarity<sup>43</sup>, the EU can only act in areas which do not fall within its exclusive competence in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (*decentralisation criterion*),<sup>44</sup> but can rather – by reason of the scale or effects of the proposed action – be better achieved at Union level (*efficiency criterion*)<sup>45</sup>.<sup>46</sup> Additionally, the proportionality principle stipulates that EU actions cannot exceed what is necessary to achieve the objectives of the Treaties.<sup>47</sup> Based on the aforementioned principles of EU law, Member States decided that gambling services, nor advertising for such services, are to be subject to specific Union regulation.<sup>48</sup> Nevertheless, the CJEU did set some boundaries for the national regulation of gambling advertising through its jurisprudence on gambling services, based on the internal market rules (1.2.).<sup>49</sup> Additionally, the EU is able to exert some influence on national gambling advertising laws and policies through soft law instruments (1.3.).

## 1.2 Jurisprudence of the Court of Justice of the EU (CJEU)

This section provides a brief overview of some interesting take-aways from CJEU case law dealing with gambling advertising, setting boundaries for national laws and policies.

Case	Take-aways
Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/0 – Stoß e.a.	Advertising by the holder of a public monopoly must be measured and strictly limited to what is necessary in order to channel consumers towards authorised gaming networks. Advertising cannot aim to encourage consumers’ natural propensity for gambling by stimulating their active participation in it, such as by trivialising gambling or by increasing the attractiveness of gambling by means of
C-79/17 – Gmalieva	

<sup>43</sup> Art. 5(3) TEU.  
<sup>44</sup> N. Hoekx, *Kansspelen op het internet*, Larcier, 2011, 48.  
<sup>45</sup> Ibid.  
<sup>46</sup> A. Aquilina, *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>>.  
<sup>47</sup> Art. 5(4) TEU.  
<sup>48</sup> For a more detailed discussion of the (lack of) EU competence in light of gambling, see P. Declerck and N. Feci, Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games, Deliverable 2.1.1. for the Gam(e)(a)ble project (FWO-SBO), 2022, Chapter 3, Section I.  
<sup>49</sup> Gambling activities are economic activities of a peculiar nature. The qualification as economic service implies that the fundamental freedoms underpinning the EU internal market apply. (See e.g. CJEU C-275/92, §§ 37 and 59) By answering preliminary references by national courts seeking guidance on the compliance of national systems with EU rules on the freedom to provide services and the freedom to establish businesses throughout the EU, 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, including advertising in this regard.

	enticing advertising messages holding out the prospect of major winnings. <sup>50</sup>
Case C-347/09 – Jochen Dickinger & Franz Ömer	<p>A Member State can restrict the number of licences granted to gambling operators in its national territory and allow them to intensively advertise their services, if:</p> <ul style="list-style-type: none"> <li>- the scale of the unlawful gambling activity in the Member State concerned is significant and the measures adopted are aimed at channeling consumers propensity to gamble into activities that are lawful<sup>51</sup>;</li> <li>- Any advertising issued by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order to channel consumers towards authorized gaming networks. Such advertising cannot in particular aim to encourage consumers natural propensity to gamble by stimulating their active participation in it.<sup>52</sup></li> </ul>
Case C-176/11 – HIT and HIT LARIX	<p>Member States are allowed to issue legislation permitting the advertising in that State of gambling establishments located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to national legislation, to the extent that it serves the legitimate aim of protecting individuals against the risks connected with games of chance.</p> <p>However, that latter member state may not lawfully require that the rules in the Member State of establishment should be identical to those provided by its own national law and it may not also impose obligations that are not specifically related to protection against the risks of gaming.<sup>53</sup></p> <p>Requiring the rules in the other Member State to be identical or imposing rules not directly related to protection against the risks of gaming would be disproportionate.<sup>54</sup></p>

CONCLUSION. The imposition of any legislative restriction on the freedom to provide services must pursue a genuine public interest objective in a consistent and systematic manner – also

<sup>50</sup> CJEU 8 September 2010, no. C-316/07, ECLI:EU:C:2010:504, §103; CJEU 6 September 2018, no. C-79/17, ECLI:EU:C:2018:687, §28.

<sup>51</sup> CJEU 15 September 2011, no. C-347/09, ECLI:EU:C:2011:582, §67.

<sup>52</sup> Ibid., §68.

<sup>53</sup> CJEU 12 July 2012, no. C-176/11, ECLI:EU:C:2012:454, §§34 and 36.

<sup>54</sup> Ibid., §33.

referred to as the “hypocrisy test”.<sup>55</sup> Translated to a gambling advertising context, the requirement for consistency and systematicity presupposes coherence between the legislative restrictions imposed on the provision of gambling services by a Member State and the extent of advertising of those services allowed in its national territory. A case-by-case assessment of advertising legislation of a Member State is needed to determine its compatibility with EU law.

### 1.3 EU Policy documents

Within this section the relevant, yet non-binding, initiatives by the EU institutions in the field of gambling advertising are set out.

#### 1.3.1 EC Communication on Gambling

EC COMMUNICATION. Within the Communication “Towards a comprehensive European framework for online gambling”<sup>56</sup>, the European Commission stresses that responsible advertising is essential to ensure that all EU citizens are well-informed about the following key aspects:

- 1) The existence of age restrictions;
- 2) The potential harm associated with irresponsible gambling;
- 3) The various risks involved, spanning financial, social, and health-related consequences.<sup>57</sup>

#### 1.3.2 EP Resolution on online gambling in the internal market

EP RESOLUTION. In 2013, the European Parliament adopted a Resolution on online gambling in the internal market.<sup>58</sup> The 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 minimum standards, for instance regarding responsible advertising and the protection of vulnerable groups, are adopted. The European Parliament emphasises both the need for the protection of minors in particular, and the right for Member States to regulate and enforce this matter. This Resolution demonstrates the difficult delineation between gambling activities as such and gambling activities integrated in other entertainment forms such as video games. It recommends that services which include distinguishing features of the gambling sector should fall under gambling legislation.<sup>59</sup> The Resolution advises that advertising should be responsible, contain clear warnings regarding the risks of gambling addiction and be neither excessive nor displayed on content specifically targeted at minors or

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<sup>55</sup> CJEU 6 November 2003, no. C-243/01, ECLI:EU:C:2003:597, §65; A-L. Verbeke, “Gambling Regulation in Europe: Moving Beyond Ambiguity and Hypocrisy” in A. Littler, N. Hoekx, C. Fijnaut and A-L. Verbeke (eds.), *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling: EU and National Developments in the Regulation of Gambling*, Leiden, Martinus Nijhoff Publishers, 2011, (250) 254.

<sup>56</sup> Communication (comm.) Towards a comprehensive European framework for online gambling, 23 October 2012, COM(2012) 596 final.

<sup>57</sup> *Ibid.*, no. 11.

<sup>58</sup> Resolution (EP) on online gambling in the internal market, OJ C 9 March 2016, 93, 42.

<sup>59</sup> *Ibid.*, no. 12.

where there is a higher risk of targeting minors (e.g. social media advertising).<sup>60</sup> Advertising should exclusively be allowed for legal gambling products and should contain explicit information regarding the potential consequences of compulsive gambling. Furthermore, the Resolution opposes any form of advertisement that exaggerates the likelihood of winning.<sup>61</sup>

### 1.3.3 EC Recommendation on protecting consumers of online gambling

EC RECOMMENDATION. 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”<sup>62</sup> was adopted. Member States are recommended to achieve a high level of protection for consumers, players and minors through the adoption of principles for online gambling services and for responsible commercial communications of those services, in order to safeguard health and to minimise economic harm potentially resulting from compulsive or excessive gambling.<sup>63</sup> This Recommendation acknowledges that minors are frequently exposed to gambling as they use the internet and mobile applications and media that display gambling advertising. The same goes for outdoor gambling advertising, including at sports competitions. With this Recommendation the European Commission intended to prevent minors from being harmed or exploited by gambling.<sup>64</sup>

PROTECTION OF MINORS. Member States are required to ensure that commercial communications for online gambling services:

- do not harm minors or induce them to view gambling as a natural element of their leisure time activities.<sup>65</sup>
- carry a clear ‘no underage gambling’ message indicating the minimum age<sup>66</sup>
- are not broadcast, displayed or facilitated:
  - a) in media, or around programmes, where minors are expected to be the main audience;
  - b) on websites with minors as the audience profile;
  - c) in close proximity of places where minors normally spend time and are expected to be the main audience including at least schools.<sup>67</sup>
- Do not:
  - a) exploit the inexperience or lack of knowledge of minors;
  - b) use images of minors or young persons or campaigns that particularly appeal to minors;
  - c) appeal to minors, or to young persons by reflecting or associating gambling with youth culture activities;

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<sup>60</sup> Ibid., no. 20.

<sup>61</sup> Ibid., no. 24.

<sup>62</sup> Recommendation (comm.) on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, OJ L 19 July 2014, 214, 38.

<sup>63</sup> Point 1 Ibid.

<sup>64</sup> Rec. 13 Ibid.

<sup>65</sup> No. 11 Ibid.

<sup>66</sup> No. 12 Ibid.

<sup>67</sup> No. 13 Ibid.

d) suggest that to gamble marks the transition from adolescence to adulthood.<sup>68</sup>

COMMERCIAL COMMUNICATION. Besides identifying the operator responsible for the advertisement, Member States should ensure that commercial communications of online gambling services carry messages clearly including at least the risks for health of problem gambling.<sup>69</sup> Additionally, commercial communications should not target vulnerable players such as problem gamblers.<sup>70</sup> Also relevant in light of this report are the prohibitions for commercial communications to:

- make unfounded statements about chances of winning and the expected return
- exert pressure to gamble or disparage abstention through timing, location or nature of the commercial communication;
- portray gambling as socially attractive or contain endorsements by well-known personalities or celebrities that suggest gambling contributes to social success.<sup>71</sup>

SPONSORSHIP. Sponsorship entails “a contractual relationship between an operator and a sponsored party under which the operator provides financing or other support to any sporting or artistic event, organisation, team or individual in order to establish an association between the operator's image, brands or products and a sponsorship property, in return for commercial communications or other benefits”.<sup>72</sup> According to the recommendation, the sponsorship as well as the sponsoring party need to be made clearly identifiable.<sup>73</sup> Further, the sponsorship should not adversely affect or influence minors. In line with the foregoing, no sponsorship is allowed of events designated for or mainly aimed at minors, nor should promotional material of the sponsoring party be used in merchandising designed for or mainly aimed at minors.<sup>74</sup> In the context of this report, this means, for instance, that influencers/streamers livestreaming on video-sharing platforms such as YouTube and Twitch and whose content is aimed at children – or particularly appealing to children – cannot be sponsored by gambling websites.

## 2. Belgium

Due to the lack of EU competence in the field of gambling, Member states enjoy significant freedom to regulate gambling and gambling advertising in their national territory. Given that the research activities in the Gam(e)(a)ble project are predominantly conducted in Belgium, with a particular emphasis on the Flemish Community, this report focuses on the Belgian and Flemish legislation.

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<sup>68</sup> No. 14 Ibid.

<sup>69</sup> Nos. 39 and 40 Ibid.

<sup>70</sup> No. 43 Ibid.

<sup>71</sup> No. 41 Ibid.

<sup>72</sup> Point II.3(h) Ibid.

<sup>73</sup> No. 46 Ibid.

<sup>74</sup> No. 47 Ibid.



## 2.1 Royal Decree of 27 February 2023

CONTEXT. In Belgium, the Royal Decree of 27 February 2023 recently updated the regulatory framework on gambling advertising.<sup>75</sup> It introduced detailed rules on advertising for games of chance motivated by the need to combat the normalisation and trivialisation of gambling, which is harmful for more vulnerable groups, such as young people and gambling addicts.

RELEVANT PROVISIONS. The Royal Decree contains some provisions that – in theory – could seem interesting in the context of gambling within video games. It determines, for example, that advertising cannot be specifically aimed at vulnerable groups – including minors<sup>76</sup>, advertising cannot be personalised<sup>77</sup> and advertising cannot depict natural persons or fictional characters nor use voices of well-known natural persons or well-known fictional characters.<sup>78</sup> In particular, advertising cannot make use of drawings or marketing techniques that refer to characters, images or expressions popular or fashionable among vulnerable people (e.g. influencers).<sup>79</sup>

SCOPE ROYAL DECREE. However, the Royal Decree on gambling advertising only applies to certain licenced gambling operators (mentioned in Article 1). For all other gambling operators, advertising is not allowed. There is no rule in the regulation nor in the licensing policy of the Gaming Commission that game developers could not be licensed to operate games of chance. However, no licences are currently provided for the activities of this sector (i.e. 'regular' video games). Licences are only granted for the classic forms of games of chance that the legislator has provided in the Gaming and Betting Act, such as casinos, amusement arcades, drinking establishments, betting, etc.

APPROACH TO LOOT BOXES. The Gaming Commission in Belgium considers loot boxes<sup>80</sup> obtained against payment to be a game of chance (gambling) if the constitutive elements set forth in Art. 2(1) of the Gaming and Betting Act of 7 May 1999 are complied with<sup>81</sup>:

a game of chance is any game whereby a bet of any kind that is placed leads to the loss of this bet by at least one of the players, or a win of any kind for at least one of the players or organisers of the game, and whereby chance may even be a secondary element in the course of the game, indication of the winner or determination of the size of the winnings.

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<sup>75</sup> Koninklijk Besluit 27 februari 2023 tot bepaling van de nadere regels betreffende de reclame voor de kansspelen [*Royal Decree 27 February 2023 to determine the details of advertising for games of chance*], *Belgian Official Gazette* 8 March 2023. (Hereafter: Royal Decree Gambling Advertising)

<sup>76</sup> Art. 15 Royal Decree Gambling Advertising.

<sup>77</sup> Art. 16 Ibid.

<sup>78</sup> Art. 17 Ibid.

<sup>79</sup> Art. 18, 10° Ibid.

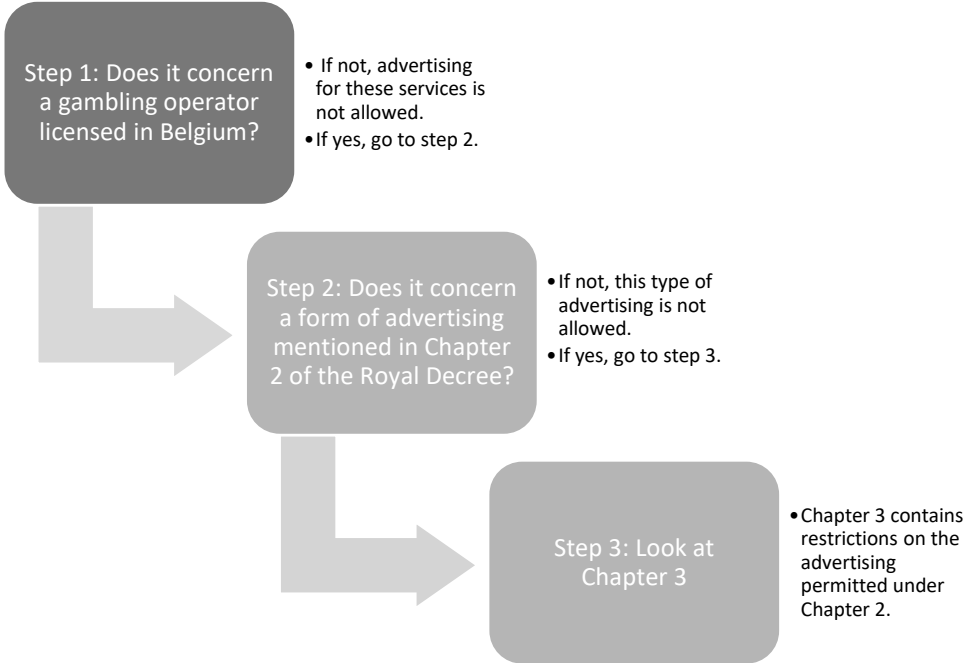
<sup>80</sup> "Loot boxes is the umbrella term for one or more game elements that are integrated into a video game whereby the player acquires game items either for payment or for free in an apparently random manner." Gaming Commission, *Research Report on Lootboxes*, 2018, 5.

<sup>81</sup> Wet op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de spelers [*Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players*], *Belgian Official Gazette* 30 December 1999 (hereafter: Gaming and Betting Act).

Once these constitutive elements are cumulatively present, the Gaming and Betting Act applies.<sup>82</sup> Based on Art. 4 of the Gaming and Betting Act, it is in principle forbidden to operate a game of chance without obtaining a permit from the Gaming Commission.<sup>83</sup> Yet, a licence for offering loot boxes does not exist. Moreover, some types of licences are limited in number, so no new licence holders can be added. Considering that the Gaming and Betting Act does not provide a license for the operation of loot boxes, game developers cannot be licensees in this respect. Consequently, paid loot boxes and other in-game gambling functionalities (if the constitutive elements are present) are illegal in Belgium.<sup>84</sup> This automatically means that advertising for such functionalities is also illegal.

Additionally, a second facet within the Royal Decree suggests its inapplicability to the functionalities concerned: Article 2 entails the principle that only advertising covered by Chapter 2 of the Royal Decree is allowed. In other words, Chapter 2 provides the forms of advertising which are permissible; all other forms of advertising for games of chance – including advertising pertaining to gambling elements in video games – are prohibited.<sup>85</sup>

The following visual represents the applicability of the Royal Decree:



<sup>82</sup> See also P. Declerck, “Diablo: Immortal – The regulatory devil is in the details” (2022), retrieved from <<https://www.gameable.info/post/diablo-immortal-the-regulatory-devil-is-in-the-details>>.

<sup>83</sup> Gaming Commission, *Research Report on Lootboxes*, 2018, 8.

<sup>84</sup> In a more recent opinion, the Gaming Commission noted that such a general ban is difficult to enforce. They therefore call for a wider consultation to explore the desirability to allow certain loot boxes and similar in-game elements, as well as a better legal framing; See Gaming Commission, *Preliminair Advies - Spelen met beperkte inzet en winst (art. 3, laatste lid van de Kansspelwet) [Preliminary opinion - Playing with limited stakes and profits (art. 3, last paragraph of the Gaming Act)]*, 2022, 7-8.

<sup>85</sup> Esports betting provided by licensees is covered by the Royal Decree, however, this is outside the scope of the project.

CONCLUSION. The exclusion contained in the Royal Decree means that it is forbidden to advertise gambling in video games without a licence to operate gambling activities. As such, advertising for gambling in video games is currently already excluded at step 1, considering there are currently no licensed game developers. However, this prohibition is not really enforced at the moment and, additionally, it does not solve the problem related to gambling-like elements in video games that do not constitute gambling under Belgian gambling law. At present, only loot boxes purchased directly or indirectly with real money constitute gambling in Belgium according to the Gaming Commission, which has not been confirmed by the legislator or by a court.<sup>86</sup> Therefore, the application of the Gaming and Betting Act – and subsequent prohibition for gambling advertising in video games – is subject to uncertainty regarding gambling-like elements in video games. Furthermore, gambling-like elements without monetary payment (e.g. loot boxes obtained through playing the game and not through payment) are not claimed to fall under the scope of Belgian gambling law and would therefore not be covered by the prohibition in the Royal Decree in any case.

## *2.2 The Flemish Media Decree*

THE FLEMISH MEDIA DECREE. As gambling is a federal matter in Belgium, the Flemish Media Decree does not contain specific provisions in this field.<sup>87</sup> However, Article 52 is indirectly relevant as it stipulates that providers of broadcasting services may not broadcast any commercial communication or public service announcements that are in conflict with legal provisions. The Flemish Regulator for the Media (VRM)<sup>88</sup> has already relied on Article 52 of the Media Decree to decide on whether or not certain commercial communications violate the federal legislation on gambling advertising.<sup>89</sup>

## **III. Other relevant regulation at the EU level**

Section II has demonstrated that there currently is no sector-specific EU legal instrument regulating gambling advertising. The present section shifts the focus to more general EU advertising regulation which could potentially provide an answer to undesirable advertising for gambling(-like) elements in video games. A selection of the most relevant instruments is set out below.

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<sup>86</sup> Should the interpretation by the Gaming Commission be accepted, then advertising for paid loot boxes would be prohibited because paid loot boxes would classify as gambling.

<sup>87</sup> Decr.VI. 27 maart 2009 betreffende radio-omroep en televisie, Belgian Official Gazette 16 September 2009, 34470 (as amended). (Hereafter: Flemish Media Decree)

<sup>88</sup> Retrieved from <<https://www.vlaamseregulatormedia.be/en>>.

<sup>89</sup> See e.g. VRM (General Chamber), VRM t. NV Vlaamse Radio- en Televisieomroeporganisatie, 13 February 2023, Decision no. 2023/005, <https://www.vlaamseregulatormedia.be/nl/beslissingen/2023/uitzenden-reclame-bij-live-kijken-sporza-frm-legt-vrt-boete-op-van-5000-euro>: The broadcasting of a commercial spot for UNIBET during the live stream via the Sporza website and app was considered a violation of the Belgian legal framework on gambling advertising and, as a result, also of Article 52 of the Flemish Media Decree.

## 1. The eCommerce Directive and Digital Services Act (DSA)

The first instruments to be examined are the eCommerce Directive<sup>90</sup> and the DSA<sup>91</sup>. They are discussed under the same heading as the DSA builds on the eCommerce directive.

### 1.1 The eCommerce Directive

SCOPE. The eCommerce Directive aims to contribute to the proper functioning of the internal market by ensuring the free movement of information society services.<sup>92</sup> The material scope of the eCommerce directive is determined by the notion ‘information society services’. This refers to any service (1) normally provided for remuneration, (2) at a distance, (3) by electronic means and (4) at the individual request of a recipient of a service.<sup>93</sup> A wide variety of online services meet these four criteria, including online advertising and (operations within) online video games.<sup>94</sup> Notwithstanding the fact that the directive does not apply to gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions,<sup>95</sup> the eCommerce Directive can be relevant in light of *advertising* for gambling and gambling-like elements in video games. This is, for instance, the case when such advertising messages are included on websites or social media platforms (which are ‘information society services’).

RELEVANT PROVISIONS. A qualification as an information society service brings along certain obligations.<sup>96</sup> The eCommerce Directive contains a number of general provisions related to the free circulation of online services throughout the EU that can be applied to gambling advertising and advertising for gambling-like elements in video games. Within the ambit of this deliverable, Chapter II, Section 2 on commercial communication constitutes the focus. All relevant provisions relate to transparency. Both commercial communication and the party responsible for it need to be clearly identified.<sup>97</sup> Promotional offers, such as discounts, premiums, gifts and promotional competitions or games, do not only need to be clearly identifiable as such, the conditions for qualification also need to be easily accessible and be presented clearly and unambiguously.<sup>98</sup>

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<sup>90</sup> 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, OJ L 17 July 2000, 178, 1-16. (eCommerce Directive)

<sup>91</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 27 October 2022, 277, 1-102. (Digital Services Act)

<sup>92</sup> Art. 1 eCommerce Directive.

<sup>93</sup> Rec. 17. Ibid; For a more elaborate discussion on the qualification of video games as information society services, see P. Declerck and N. Feci, Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games, Deliverable 2.1.1. for the Gam(e)(a)ble project (FWO-SBO), 2022, p. 119-122.

<sup>94</sup> O. Demchenko, “Electronic Commerce in the Gaming Industry. Legal Challenges and European Perspective on Contracts through Electronic Means in Video Games and Decentralized Applications”, *Pécs Journal of International and European Law* 2019, (58) 60; O. Castendyk, E. Dommering and A. Scheuer, *European Media Law*, Alphen aan den Rijn, Kluwer Law International, 2008, 1083.

<sup>95</sup> Art. 1(5)(d) Ibid.

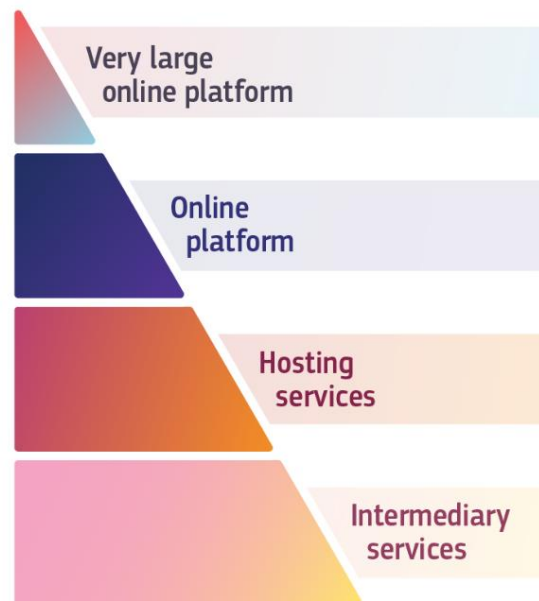
<sup>96</sup> R. van de Laak, ‘Zijn Vloggers Ongrijpbaar Voor Het Commissariaat van de Media?!’ (24 July 2017), <https://ictrecht.nl/2017/07/24/vloggers-ongrijpbaar-commissariaat-media/>.

<sup>97</sup> Art. 6 (a)-(b) Ibid.

<sup>98</sup> Art. 6 (c)-(d) Ibid.

## 1.2 The Digital Services Act

SCOPE. The DSA is an EU regulation which builds upon the eCommerce Directive and aims to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment. The DSA applies to intermediary services. In particular, it imposes responsibilities on different types of information society service providers that act as intermediaries.<sup>99</sup> The obligations imposed on different intermediaries align with their role, size and impact in the online ecosystem:



Source: Website European Commission<sup>100</sup>

INTERMEDIARY SERVICE. There is some uncertainty regarding whether a video game provider or platform may qualify as a ‘hosting’ service<sup>101,102</sup> Video game providers as such are not intermediary services as they provide content created under their editorial responsibility. However, interactive online gaming **platforms** where users can purchase, download, play and stream games, and where they can chat to and share with other users their own self-generated content (e.g. Steam<sup>103</sup> or Roblox<sup>104</sup>), can be intermediaries in relation to content uploaded by users. Video-sharing platforms, on which videos or livestreams of someone playing videogames might be shared, are also intermediaries within the scope of the DSA. Section 1 of Chapter III of the DSA contains provisions applicable to all providers of intermediary services, i.e. due diligence and transparency obligations. A next set of provisions in Section 2 of Chapter III applies specifically to hosting services. As none of these provisions

<sup>99</sup> European Commission, *Questions and Answers: Digital Services Act*, Brussels, 25 April 2023, [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).

<sup>100</sup> European Commission, *The Digital Services Act: ensuring a safe and accountable online environment*, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en).

<sup>101</sup> i.e. a service consisting of the storage of information provided by, and at the request of, a recipient of the service.

<sup>102</sup> Art. 3 (g) DSA.

<sup>103</sup> Available at <<https://store.steampowered.com/about/>>.

<sup>104</sup> Available at <<https://corp.roblox.com/>>.

directly address advertising, they are not discussed in this report. Important to mention, however, are the liability exemptions for intermediary services and the prohibition to impose a general, proactive monitoring obligation on intermediaries.<sup>105</sup> This implies that when an influencer is advertising gambling(-like) features of a video game contrary to EU or national legislation, the video-sharing platform will not be held liable as long as it was not (made) aware of this practice, and if it acts expeditiously upon becoming aware of it.

ONLINE PLATFORMS. The DSA contains specific rules for advertising on online platforms – a subcategory of online intermediaries. The DSA defines an online platform as:

*“A hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation.”<sup>106</sup>*

The communication of information to a limited number of people, such as private chats or restricted group channels, is excluded from the scope of this definition.<sup>107</sup> According to ISFE, it is not clear whether interactive gaming platforms meet the definition of ‘online platform’ as it is difficult to determine whether their storage and dissemination of user content is a “minor and purely ancillary feature” of one or other of their other core or main services.<sup>108</sup> Video-sharing platforms, on the other hand, do clearly qualify as online platforms.

Advertising on online platforms is subject to (1) transparency obligations, (2) obligations protecting minors (no profiling) and (3) the prohibition to use dark patterns.

TRANSPARENCY OBLIGATIONS. First, there are the typical identification and information obligations to empower users in understanding and making informed choices in respect of the advertisements they encounter. It needs to be made clear that a certain message is commercial communication, who is behind the advertisement and why a user receives a certain ad. In light of advertising by users of online platforms (e.g. influencer advertising on video-sharing platforms), the platform has to provide a functionality for users to declare whether the content they provide is or contains commercial communications.<sup>109</sup>

PROTECTION OF MINORS. The DSA also contains provisions relating to advertising and the protection of minors: online platforms cannot present advertisements based on profiling when they are aware with reasonable certainty that the recipient of the service is a minor. Moreover, special categories of personal data (“sensitive data”) cannot be deployed to target advertising.<sup>110</sup> These data include genetic, biometric and health data, as well as personal data

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<sup>105</sup> Articles 4-10 DSA.

<sup>106</sup> Art. 3(i) DSA.

<sup>107</sup> Video game providers do not provide features to share information with a potentially unlimited amount of third parties, hence they are not online platforms.

<sup>108</sup> ISFE Position Paper on the Digital Services Act, May 2021, 3.

<sup>109</sup> Art. 26 DSA.

<sup>110</sup> Art 28 DSA.

revealing racial and ethnic origin, political opinions, religious or ideological convictions or trade union membership.<sup>111</sup>

DARK PATTERNS. Finally, the DSA deals with online interface design and organisation by prohibiting dark patterns.<sup>112</sup> It remains to be seen whether this prohibition of online design interface elements will be relevant in practice, due to the exclusion of dark patterns that are covered by the UCPD and GDPR.<sup>113</sup> As apparent from a report by the EU Commission, the large majority of contemporary dark patterns is covered by these legal instruments.<sup>114</sup> However, the report leaves open the possibility of newly emerging dark patterns which may not fall under the scope of the UCPD/GDPR and are therefore covered by the DSA if deployed by an online platform.

VLOPS AND VLOSEs. The European Commission has drawn up a list of very large online platforms (e.g. YouTube, Instagram and TikTok) and very large online search engines (i.e. Google search and Bing), which are platforms with at least 45 million monthly active users.<sup>115</sup> These types of intermediaries carry additional obligations under the DSA, e.g. they will have to maintain and provide access to ad repositories, allowing researchers, civil society and authorities to inspect how ads were displayed and how they were targeted.<sup>116</sup> Moreover, providers of VLOPs and VLOSEs must conduct risks assessments relating to children's rights. This is to ensure that the design, function or use, including manipulation, of their services or their online interfaces are not intentionally or unintentionally exploiting the weaknesses and inexperience of minors or may cause addictive behaviour.<sup>117</sup> No providers of video games, nor video game platforms, are currently qualified as VLOPs. The Apple AppStore and Google Play, providing a marketplace hosting and transmitting (mobile) applications, are listed as VLOPs. On these services, advertising for the games in their entirety (e.g. by promoting the app on the "Today tab" or at the top of the search results) may occur.

## 2. The Unfair Commercial Practices Directive (UCPD)

SCOPE. The UCPD<sup>118</sup> envisages to achieve a high level of consumer protection through maximum harmonisation.<sup>119</sup> The directive establishes a generic horizontal framework which aims to counter unfair commercial practices influencing consumers in marketing, sales and

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<sup>111</sup> Art. 9 GDPR.

<sup>112</sup> Art. 25 DSA.

<sup>113</sup> For a more detailed discussion, see M. Sas, *The Digital Service Act (DSA): A new hope against the dark side of online interfaces?*, CiTiP Blog 6 September 2022, <https://www.law.kuleuven.be/citip/blog/the-digital-service-act-dsa-a-new-hope-against-the-dark-side-of-online-interfaces/>.

<sup>114</sup> European Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation (2022).

<sup>115</sup> Retrieved from <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_2413](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413)>.

<sup>116</sup> Art. 39 DSA.

<sup>117</sup> Rec. 81 and 84 jo. Art. 34 Ibid.

<sup>118</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 5 June 2005, 149, 22-39.

<sup>119</sup> Art. 4 Ibid.

after-sales activities of traders in business-to-consumer transactions.<sup>120</sup> Thus, unfair business-to-consumer commercial practices make up the scope of application of the UCPD. The directive does not explicitly exclude gambling from its scope. The only reference to gambling activities can be found in recital 9, acknowledging that Member States are free to further regulate commercial practices in this regard. Additionally, the Commission clarified that when Member States consider gambling elements within video gaming to fall under gambling legislation, additional requirements beyond the UCPD can apply.<sup>121</sup>

B2C. An unfair commercial practice within the sense of the directive, presupposes an interaction between a trader and a consumer. A “consumer” is any natural person who, in commercial practices covered by the UCPD, is acting for purposes outside his trade, business, craft or profession.<sup>122</sup> This covers video game players (unless they are professional players). A “trader” is any natural or legal person acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.<sup>123</sup> Video game providers are traders in the sense of the UCPD.

UNFAIR COMMERCIAL PRACTICES. Unfair commercial practices are those which are contrary to the requirements of professional diligence and are likely to materially distort the purchasing behaviour of the average consumer.<sup>124</sup> To examine whether a commercial practice is unfair, the UCPD employs a structure that is threefold.

STEP 1. In the first place, one should check whether the alleged unfair commercial practice is included in the ‘blacklist’ of Annex I. This is a list of practices which are under all circumstances considered unfair in every Member State. Only these commercial practices can be categorised as unfair without a case-by-case assessment against the provision of articles 5 to 9.<sup>125</sup> The table below includes the provisions from the blacklist that are the most relevant in light of advertising for gambling-like elements in video games:

UCPD Blacklist	What is prohibited?
No. 7	<p>The practice of falsely stating that a product will only be available (on particular terms) for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.</p> <p>Game developers sometimes encourage impulse purchases by granting players only a limited window to acquire certain promoted</p>

<sup>120</sup> W. van Boom, "Unfair Commercial Practices" in C. Twigg-Flesner (ed.), Research Handbook on EU Consumer and Contract Law, Cheltenham, Edward Elgar Publishing, 2016, 388.

<sup>121</sup> Guidance (comm.) on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ C 29 December 2021, 526. (Hereafter: Guidance (comm.) UCPD 2021)

<sup>122</sup> Art. 2(a) UCPD.

<sup>123</sup> Art. 2(b) Ibid.

<sup>124</sup> Guidance (comm.) UCPD 2021.

<sup>125</sup> Rec. 17 UCPD.



	in-game items (e.g. by means of using countdown clocks).
No. 11	<p>Using editorial content in the media to promote a product when a trader has paid for this, without disclosing this in the content or by images or sounds clearly identifiable by the consumer.</p> <p>Certain cooperations between influencers/game streamers and video game developers could in certain instances be qualified as such.</p>
No. 20	<p>Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.</p> <p>This implies that a game cannot be marketed as ‘free’ if the consumer cannot play the game in a way that can be reasonably expected without making in-app purchases.<sup>126</sup></p>
No. 22	<p>Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.</p> <p>Again, reference can be made to cooperations between influencers/game streamers and video game developers (e.g. a video game review).</p>
No. 28	<p>Direct exhortations to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.</p> <p>Children are less likely to notice and understand the commercial intent of advertisements in games, as compared to more direct advertisements on television, so</p>

<sup>126</sup> European Commission, In-app purchases: Joint action by the European Commission and Member States is leading to better protection for consumers in online games, Press release, 18 July 2014, [http://europa.eu/rapid/press-release\\_IP-14-847\\_en.htm](http://europa.eu/rapid/press-release_IP-14-847_en.htm).

games cannot contain such direct exhortations to buy to children. <sup>127</sup>
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STEP. 2. When the alleged unfair commercial practice is not included in the blacklist, the second step is to assess whether the practice constitutes an aggressive or a misleading practice.

MISLEADING. The directive prohibits commercial practices which are misleading. The UCPD classifies misleading practices into misleading actions and misleading omissions. A commercial practice is considered misleading if an average consumer is deceived into taking a transactional decision which he would not normally have taken.<sup>128</sup> As mentioned, the benchmark is the average consumer. When the commercial communication is aimed at children, the benchmark will be the average child. In the Guidance to the UCPD, the European Commission explicitly devotes a section to unfair commercial practices in the video game environment.<sup>129</sup> It particularly raises fairness concerns for vulnerable consumers such as children and teenagers, who merit special protection.<sup>130</sup> Video games often include in-game promotions and advertisements, which could be considered hidden marketing. To avoid qualifying as a misleading practice under the UCPD, the commercial element needs to be made clearly identifiable and must be distinguishable from gameplay. The disclosure must be tailored to the medium in which the marketing takes place (incl. context, placement, timing, duration, language and target audience).<sup>131</sup> Furthermore, commercial practices in video games sometimes lack important information, which potentially affects the player's purchasing decision. For instance, the presence of ambiguous odds: in-game banners displaying attractive rewards that are available through loot boxes could lead players to believe they will receive these rewards in exchange for spending a small sum of money, while in reality, the chances are almost non-existent.<sup>132</sup>

AGGRESSIVE. Selling techniques are deemed aggressive when they substantially impair the average consumer's freedom of choice or conduct, thereby inducing or being likely to induce the consumer to make a transactional decision they otherwise would not have made.<sup>133</sup> For this assessment, all features and circumstances need to be taken into account. The directive presents a list of criteria to help determine whether a commercial practice uses harassment, coercion, including physical force, or undue influence.<sup>134</sup> This evaluation encompasses conduct at the marketing phase as well as actions occurring during or after a transaction.<sup>135</sup> Certain commercial practices in video games could amount to an aggressive practice in the

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<sup>127</sup> European Commission, Study on the impact of marketing through social media, online games and mobile applications on children's behaviour (EACH/FWC/2013/85/08), [https://ec.europa.eu/info/sites/info/files/online\\_marketing\\_children\\_final\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/online_marketing_children_final_report_en.pdf).

<sup>128</sup> Art. 6 and 7 UCPD.

<sup>129</sup> Guidance (comm.) UCPD 2021, 103-105.

<sup>130</sup> Art. 5(3) UCPD.

<sup>131</sup> Guidance (comm.) UCPD 2021, 103.

<sup>132</sup> Forbrukerrådet, Insert Coin. How the gaming industry exploits consumers using loot boxes, 2022, p. 18.

<sup>133</sup> Art. 8 UCPD.

<sup>134</sup> Art. 9 *Ibid*; [http://europa.eu/rapid/press-release\\_MEMO-07-572\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_MEMO-07-572_en.htm?locale=EN).

<sup>135</sup> Guidance (Comm.) on the implementation/application of directive 2005/29/EC on unfair commercial practices, 25 May 2016, SWD(2016)163 fin., 79. (Hereafter: Guidance (comm.) UCPD 2016)

sense of the UCPD. In the UCPD Guidance, the European Commission acknowledges that the directive can be used to address unfair data-driven commercial practices in the business-to-consumer relationship. It provides the example of targeting consumers with personalised commercial communications based on their purchase history regarding games of chance or random content in a video game, in order to exploit the higher likelihood of engaging with such products.<sup>136</sup> Besides the use of behavioural biases, one could also think of the use of manipulative elements relating to, e.g. the timing of offers within the gameplay (e.g. offering micro-transactions during critical moments in the game), pervasive nagging or the use of visual and acoustic effects to put undue pressure on the player. Numerous video games employ persuasive design tactics, including persistent and aggressive advertising, to nudge players to spend additional money in the game.<sup>137</sup> Finally, the UCPD Guidance contains a concern particularly referring to gaming content with gambling elements, such as addictive interface designs involving slot machines, certain loot/mystery boxes or betting. It acknowledges that some Member States consider such elements to fall under gambling legislation, which may entail additional requirements going beyond the UCPD (e.g. licencing authorisations or bans on the use of gambling elements in games).<sup>138</sup> The European Commission provides the following example of a potentially aggressive commercial practice in this regard:

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.

STEP 3. As a final resort, the general open norm under Article 5 UCPD can be relied upon. This provision serves as a safety net that only needs to be used for unfair commercial practices not caught by the other provisions.<sup>139</sup> According to this article, a commercial practice is unfair if:

- (a) It is contrary to the requirements of professional diligence<sup>140</sup>, and
- (b) It materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

This provision has been argued to future-proof the Directive as it keeps the door open for emerging unfair practices.<sup>141</sup>

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<sup>136</sup> Guidance (comm.) UCPD 2021, 100.

<sup>137</sup> Forbrukerrådet, Insert Coin. How the gaming industry exploits consumers using loot boxes, 2022, p. 18-19.

<sup>138</sup> Guidance (comm.) UCPD 2021, 104.

<sup>139</sup> CJEU 19 September 2013, no. C-435/11, ECLI:EU:C:2013:574, §45.

<sup>140</sup> i.e. a concept referring to the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice and/or (b) the general principle of good faith in the trader's field of activity. (Art. 2(h) UCPD)

<sup>141</sup> Guidance (comm.) UCPD 2016, 50.

### 3. The Audiovisual Media Services Directive (AVMSD)

RELEVANCE. Besides blurring lines between video gaming and gambling – which are central to the Gam(e)(a)ble research –, there are also spillovers in relation to audiovisual media services today. This can be witnessed, for example, in the form of “gambling streams”, “loot box openings” and influencer advertising for these services by users of video-sharing platforms. The AVMSD is the cornerstone of media regulation in the EU.<sup>142</sup> The EU legislator has excluded both gambling services and video games from the scope of the directive.<sup>143</sup> In this report, however, the focus is on gambling advertising. In this regard, Recital 30 of AVMSD 2018<sup>144</sup> stresses the importance of effectively protecting minors from exposure to audiovisual commercial communications relating to the promotion of gambling and refers to the existence self- and co-regulation in this regard. The EGBA Code – see *supra* Section II 3.1.2.– was developed based on this.

SCOPE. The AVMSD contains provisions for (1) audiovisual media services<sup>145</sup>, including audiovisual commercial communication<sup>146</sup> and (2) video-sharing platforms<sup>147</sup>. The directive only regulates audiovisual content (and hence no static images for example). The AVMSD is relevant in light of influencer marketing for video games and in-game features on video-

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<sup>142</sup> 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, as amended by Directive (EU) 2018/1808 (hereafter: AVMSD). For a more elaborate discussion of the scope of the AVMSD, see P. Declerck and N. Feci, Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games, Deliverable 2.1.1. for the Gam(e)(a)ble project (FWO-SBO), 2022 p. 147-150.

<sup>143</sup> 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 (Audiovisual Media Services Directive, OJ L 15 April 2010, 95, 1. (‘AVMSD 2010’)

<sup>144</sup> 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, OJ 2018 No. L303/69 (hereafter: AVMSD 2018).

<sup>145</sup> i.e. “A service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.” (Art. 1(1)(a)(i) AVMSD).

<sup>146</sup> i.e. “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, a programme or user-generated video in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.” (Art. 1(1)(h) AVMSD).

<sup>147</sup> i.e. “a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.” (Art. 1(1)(aa) AVMSD).

sharing platforms or video advertisements organised by the video-sharing platform itself (e.g. pre-, mid- and post-rolls and banners). The most pertinent provisions for these types of advertising are set out below.

**AUDIOVISUAL COMMERCIAL COMMUNICATION.** An important principle underpinning the AVMSD determines that audiovisual commercial communication shall be made recognisable as such; surreptitious advertising is prohibited.<sup>148</sup> Audiovisual commercial communication shall also not cause physical, mental or moral detriment to minors.<sup>149</sup> It could be argued that advertising for gambling-like elements in video games could potentially have an effect on the mental and moral state of minors: concerns exist that gambling-like activities serve as a steppingstone towards actual gambling.<sup>150</sup> Considering this, advertising for gambling-like elements in video games would have an indirect impact. Moreover, despite similarities, ads for gambling-like elements are not subject to the same regulations as real money gambling, which leads to a lower level of protection (e.g. no warning messages or responsible gambling disclosures are required).<sup>151</sup> Direct exhortations to minors to buy something or to pester their parents to buy something for them are also prohibited under the AVMSD.<sup>152</sup>

**SPONSORSHIP AND PRODUCT PLACEMENT.** The directive also contains rules on sponsorship and product placement<sup>153</sup>. These are relevant, knowing that game developers and/or gambling operators are regularly teaming up with game streamers and other influencers to promote their services via audiovisual content on video-sharing platforms.

**SPONSORSHIP.** Sponsored content shall:

- (a) not affect the responsibility and editorial independence of the media service provider;
- (b) not directly encourage the purchase or rental of goods or services, in particular by making special promotional references;
- (c) be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.

**PRODUCT PLACEMENT.** Product placement is audiovisual commercial communication consisting of the inclusion of, or reference to, a product, a service or the trade mark thereof – *in casu* a video game and/or in-game features – so that it is featured within a programme or a user-generated video, for instance, by an influencer, in return for payment or for similar consideration.<sup>154</sup> Programmes containing product placement shall:

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<sup>148</sup> Art. 9(1)(a) AVMSD.

<sup>149</sup> Art. 9(1)(g) *Ibid.*

<sup>150</sup> E. Grosemans, R. De Cock, L. Bradt, B. Zaman, 'More than loot boxes: the role of video game streams and gambling-like elements in the gaming-gambling connection among adolescents', *JGI* 2024, 1-32.

<sup>151</sup> B. Abarbanel, S.M. Gainsbury, D. King, N. Hing, P.H. Delfabbro, 'Gambling Games on Social Platforms: How Do Advertisements for Social Casino Games Target Young Adults?', *P&I* 2016, 184-209.

<sup>152</sup> Art. 9(1)(g) AVMSD.

<sup>153</sup> Art. 11 *Ibid.*

<sup>154</sup> Art. 1(1)(m) *Ibid.*

- (a) not affect the responsibility and editorial independence of the media service provider;
- (b) not directly encourage the purchase or rental of goods or services, in particular by making special promotional references;
- (c) not give undue prominence to the product in question;
- (d) be appropriately identified at the start and at the end of the programme, and when a programme resumes after an advertising break.<sup>155</sup>

VIDEO-SHARING PLATFORM RESPONSIBILITIES. Since the 2018 revision of the AVMSD, video-sharing platforms are required to take appropriate measures to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1)<sup>156</sup> (*supra*). For audiovisual commercial communications that are marketed, sold or arranged by the video-sharing platforms – and not by the platform users – the platforms themselves have to respect the requirements set out in Article 9(1) of the directive<sup>157</sup> (*supra*). The latter situation refers to advertisements shown before (pre-roll), during (mid-roll) or after (post-roll) a video as well to pop ups and banners displayed on the platform. For audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers, video-sharing platform providers should take appropriate measures (e.g. including and applying in their terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) or having a functionality for users to declare whether their videos contain audiovisual commercial communications) to comply with the requirements set out in Article 9(1), taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications.<sup>158</sup> Video-sharing platform providers shall also clearly inform users of the presence of audiovisual commercial communications, in case this was declared by platform users.<sup>159</sup> Furthermore, personal data of minors collected or otherwise generated by video-sharing platform providers in the context of applying age verification or parental control systems cannot be processed for commercial purposes, such as profiling and behaviourally targeted advertising.<sup>160</sup> This means that personal data of minors collected in this way cannot be used by VSPs to target them with advertisements for video games and in-game purchases.

#### **4. The General Data Protection Regulation (GDPR)<sup>161</sup>**

SCOPE. As already mentioned, behavioural advertising can also occur within the video game environment. A player's purchase or game-play history can be tracked and used by the provider of the video game in order to target this player with personalised offers for gambling(-like) elements within the game. Personalised advertising inherently involves the

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<sup>155</sup> Art. 11 *ibid*.

<sup>156</sup> Art. 28b(1) *Ibid*.

<sup>157</sup> Art. 28b(2) *Ibid*.

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid*.

<sup>160</sup> Art. 28b(3) *in fine Ibid*.

<sup>161</sup> This section is based on N. Feci and V. Verdoordt, "Nieuwe regels inzake reclame voor online gokken - Analyse van het KB van 25 oktober 2018", *DCCR* 2019, (31) 41-43.

processing of personal data<sup>162</sup>, which triggers the application of the GDPR.<sup>163</sup> The GDPR provides a wide array of obligations concerning the processing of personal data. The most important ones for this report are discussed below.<sup>164</sup>

**PRINCIPLES.** The GDPR is built on a number of principles relating to the processing of personal data: (1) lawfulness, fairness and transparency, (2) purpose limitation, (3) data minimisation, (4) accuracy, (5) storage limitation, (6) integrity and confidentiality and (7) accountability. Some of these principles are discussed more in detail below.

**FAIRNESS AND TRANSPARENCY.** Fairness requires data controllers - i.e. the actor who determines the purpose and means for processing<sup>165</sup> – to only handle personal data in ways that the individuals concerned would reasonably expect and to take account of their interests. What is actually processed by an entity must match with what the entity declares (e.g. through its consent forms and privacy policies) to be processing. A prerequisite for fairness is transparency. Individuals – *in casu* players of video games – must be provided with intelligible information regarding the risks, safeguards, their rights in relation to the processing of personal data<sup>166</sup>, why their data is being processed and who is processing it. The transparency obligations and specific information controllers have to communicate to individuals are further detailed in the Articles 12-14 of the GDPR.

**LAWFULNESS.** According to the GDPR, the data controller must have a legal basis to justify the processing of personal data. In this regard, Article 6(1) exhaustively lists the processing grounds which can potentially be relied upon by the controller.<sup>167</sup> The most suitable grounds in respect of the scope of this report are discussed next.

**INFORMED CONSENT.** In the context of behavioural advertising, the most appropriate legal basis to process personal data is consent.<sup>168</sup> Nevertheless, the request for consent often does not meet the strict threshold of consent – i.e. a freely given, specific, informed and unambiguous indication of the data subject's wishes.<sup>169</sup> Note that children merit enhanced protection when it comes to the processing of their personal data because they may be less aware of the risks

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<sup>162</sup> i.e. 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. (Art. 4(1) GDPR)

<sup>163</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council 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, OJ L 4 May 2016, 119, 1. ('GDPR')

<sup>164</sup> For a more comprehensive discussion of gambling(-like) elements within video games through the lens of the GDPR, see P. Declerck and N. Feci, Mapping and analysis of the current regulatory framework on gambling(-like) elements in video games, Deliverable 2.1.1. for the Gam(e)(a)ble project (FWO-SBO), 2022, Chapter 6.

<sup>165</sup> Art. 4(7) GDPR.

<sup>166</sup> Art. 12 – 22 Ibid.

<sup>167</sup> E. Gil González and P. de Hert, "Understanding the Legal Provisions That Allow Processing and Profiling of Personal Data – an Analysis of GDPR Provisions and Principles", *ERA Forum* 2019, 597.

<sup>168</sup> Art. 6(1)(a) GDPR; R. Fahy, "2. The framework" in M. Cappello (ed.), *New actors and risks in online advertising*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2022, 25.

<sup>169</sup> Art. 4(11) GDPR; S. Chiasson, Y. Abdelaziz and F. Chanchary, "Privacy Concerns Amidst OBA and the Need for Alternative Models", *IEEE Internet Computing* 2018, 52.

and consequences of processing as well as of their rights as data subjects.<sup>170</sup> To address the vulnerability of children, Article 8 of the GDPR puts in place specific rules for children's consent. Where an entity provides online services to a child relying on consent as the legal basis for the processing, consent must be given or authorised by a person with parental responsibility for the child, if the child is under the age of thirteen (in Belgium).

LEGITIMATE INTEREST. Another processing ground that could be invoked to try to justify behavioural advertising in a video game context is "legitimate interest".<sup>171</sup> In this case, providers will have to perform the balancing act prescribed by Article 6(1)(f) GDPR, between the interests or fundamental rights and freedoms of data subjects and the legitimate interest in question.<sup>172</sup> It will be difficult to tip the balance in favour of the advertiser, taking into account the purpose of this processing ground – namely, providing controllers with the necessary flexibility for situations where there are no unwanted consequences for data subjects, while at the same time providing data subjects with sufficient legal certainty and guarantees against abuse.<sup>173</sup> Advertising for gambling(-like) activities in the context of video games can have a negative impact on people's gambling behaviour and potentially lead to undesirable consequences in terms of financial and social status, as well as in terms of health status (e.g. more frequent gambling, squandering money and addiction).<sup>174</sup> Consequently, the 'legitimate interest' as a processing ground in the context of behavioural advertising for online gambling is unlikely to provide a solution. Moreover, the reasonable expectations of data subjects must also be taken into account when conducting the aforementioned balancing exercise. Due to a lack of transparency, data subjects are often not aware of the fact, nor the manner, of them being targeted.<sup>175</sup> Moreover, the European Data Protection Board (EDPB) has issued guidelines on the targeting of social media users in which it states that "legitimate interest" cannot be relied upon as a legal basis for social media targeting because such targeting involves monitoring individuals' behaviour across various websites and locations through tracking technologies.<sup>176</sup>

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<sup>170</sup> Rec. 38 GDPR.

<sup>171</sup> Art. 6(1)(f) GDPR; Rec. 47 *in fine* stipulates that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.

<sup>172</sup> Art. 19 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, 3, [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf).

<sup>173</sup> *Ibid.*, no. 12.

<sup>174</sup> N. Hing e.a., "Do Advertising and Promotions for Online Gambling Increase Gambling Consumption? An Exploratory Study", *International Gambling Studies* (2014), 394; D. Hanss e.a., "The Impact of Gambling Advertising: Problem Gamblers Report Stronger Impacts on Involvement, Knowledge, and Awareness than Recreational Gamblers", *Psychology of Addictive Behaviours* 2015, 483; P. Binde and U. Romild, "Self-Reported Negative Influence of Gambling Advertising in a Swedish Population-Based Sample", *Journal of Gambling Studies* 2019, 709.

<sup>175</sup> "A business involved in digital advertising must ask the following question: Is it reasonable to assume that a regular person who peruses the web expects that their behavior is being tracked and measured, consolidated across devices, and that the results of these operations are being traded between different companies that he or she has never heard of, and retained for further trading and consolidation over considerable periods of time?", see J. Ryan, "Why the GDPR "Legitimate Interest" Provision Will Not Save You", 2017, [https://pagefair.com/blog/2017/gdpr-legitimate-interest/#\\_ftn5](https://pagefair.com/blog/2017/gdpr-legitimate-interest/#_ftn5).

<sup>176</sup> EDPB, Guidelines 8/2020 on the targeting of social media users, 13 April 2021, 24.



DATA MINIMISATION. Considering the large amounts of personal data collected and shared for the purpose of behavioural advertising, the data minimisation principle also comes into question.<sup>177</sup> Data minimisation is another core principle underpinning the GDPR. The principle requires controllers to ensure that personal data are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. What data is deemed adequate, relevant and necessary depends on the specific purpose of processing.

PURPOSE LIMITATION. Finally, concerns can be raised in light of the sharing of personal data with other actors who use the data for their own purposes.<sup>178</sup> Such practices are at odds with the purpose limitation principle which requires personal data to be collected for specified, explicit and legitimate purposes and to not be further processed in a manner that is incompatible with those purposes.<sup>179</sup>

RIGHTS AND OBLIGATIONS. Besides the aforementioned processing principles, the GDPR also contains rights for the individuals whose personal data is being processed (“data subjects”) as well as obligations for the parties in charge of the processing (“the data controllers”).

Rights data subjects	Obligations controllers
<ul style="list-style-type: none"> <li>•Right to be informed (Arts. 12-14)</li> <li>•Right of access (Art. 15)</li> <li>•Right to rectification (Art. 16)</li> <li>•Right to erasure (Art. 17)</li> <li>•Right to restriction of processing (Art. 18)</li> <li>•Right to data portability (Art. 20)</li> <li>•Right to object (Art. 21)</li> <li>•Right to not be subject to a decision based solely on automated processing, including profiling (Art. 22)</li> </ul>	<ul style="list-style-type: none"> <li>•Implementing data protection by design and default (Art. 25)</li> <li>•Setting contractual terms to regulate their relationship with data processors (Art. 28)</li> <li>•Keeping records of processing activities (Art. 30)</li> <li>•Implementing basic security measures to the processing (Art. 32)</li> <li>•Establishing a procedure for managing personal data breaches and notifying the data protection authority and data subjects (Arts. 33-34)</li> <li>•Conducting a data protection impact assessment (Art. 35)</li> <li>•Appointing a DPO (Art. 37)</li> </ul>

### 5. The E-Privacy Directive

COOKIES. The E-Privacy Directive<sup>180</sup> is relevant when cookies are used for advertising purposes by videogame providers. They will need prior consent to place these cookies<sup>181</sup> on the terminal

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<sup>177</sup> Art. 5(1)(c) GDPR.  
<sup>178</sup> ICO, *Update Report into Adtech and Real Time Bidding*, <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906.pdf>.  
<sup>179</sup> Art. 5(1)(b) GDPR.  
<sup>180</sup> Recital 24-25 mentions cookies as devices used to enter the user’s terminal equipment (sometimes without their knowledge) to gain access to information, store information, or track the user’s activities.  
<sup>181</sup> Recital 24-25 mentions cookies as devices used to enter the user’s terminal equipment (sometimes without their knowledge) to gain access to information, store information, or track the user’s activities.

equipment (computer, phone).<sup>182</sup> In other words, if video game companies want to install cookies on the phones or computers of their players and use them to gain access to information in order to track players' activities or to improve advertising, they first need consent by the player.

LIMITED RELEVANCE. In general, the E-Privacy Directive also applies to electronic communications within video games and its provisions on confidentiality and security – which are important in the context of the child's right to privacy – apply in this context. They are however not further discussed in this report as the communications by players in the video game are different from the commercial communications related to advertising.

## IV. Industry self-regulation

### 1. ICC Code

THE ICC CODE. The International Chamber of Commerce has issued a code on advertising and marketing communications for its members,<sup>183</sup> including chambers of commerce all over the world.<sup>184</sup> The ICC Code has a dedicated Article 18 on children and teens, where it is *inter alia* stated that products illegal for children to purchase should not be advertised in media targeted to them, that children's inexperience or credulity should not be exploited, or that marketing communications should not have the effect of harming children mentally. The code further restates existing rules found in for example the EU data protection framework on the use of personal data in advertisements or the rules in the EU consumer protection framework on information and transparency obligations. In a dedicated chapter on direct marketing and digital marketing communications, it is stated for example that websites devoted to products subjected to age restrictions, such as gambling, should undertake measures to restrict access to such websites by children. Additionally, it stipulates that marketing communications directed at children in a particular age group should be appropriate and suitable for these children.

### 2. Pan-European Game Information (PEGI)

PEGI CODE OF CONDUCT. The PEGI-system is a European video game age rating system which provides age labels and content descriptors for video games. PEGI has a code of conduct which covers age labelling, advertising and marketing and related obligations for its signatories. The PEGI-system reflects the video game industry's commitment to responsibly inform the audience.<sup>185</sup> The code is contractually binding for every publisher using the system.

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<sup>182</sup> European Commission,

<sup>183</sup> ICC, "ICC Advertising and Marketing Communications Code (2018 Edition)", 2018, retrieved from <<https://iccwbo.org/wp-content/uploads/sites/3/2018/09/icc-advertising-and-marketing-communications-code-int.pdf>>.

<sup>184</sup> See <<https://iccwbo.org/world-chambers-federation/our-members/?location=belgium>>.

<sup>185</sup> See <<https://pegi.info/nl/node/48>>.

RELEVANT LABELS. Interesting within the scope of this research are the labels indicating the presence within video games of elements that encourage or teach gambling as well as in-game purchases:<sup>186</sup>

	<p>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.</p>
	<p>The game offers players the option to purchase digital goods or services with real-world currency. Such purchases include additional content (bonus levels, outfits, <b>surprise items</b>, music), but also upgrades (e.g. to disable ads), subscriptions to updates, virtual coins and other forms of in-game currency. This content descriptor is <b>sometimes accompanied by an additional notice if the in-game purchases include random items</b> (like loot boxes or card packs). Paid random items comprise all in-game offers where players do not know exactly what they are getting prior to the purchase. These items can be purchased directly with real money and/or exchanged for an in-game virtual currency. Depending on the game, these items may be purely cosmetic or they may have functional value.</p>

ADVERTISING. According to the PEGI Code of Conduct, the labels are also to be used in an advertising context: “Advertising materials shall follow the PEGI Labelling and Advertising Guidelines...”.<sup>187</sup> This means that the labels assigned to video games are not only intended for display on the game (packaging) itself, but also extend to advertising to ensure that consumers are provided with accurate and consistent information about the content of the video game. Of course, this presupposes that the content descriptors are clear, which is not necessarily true regarding gambling-like elements. As stated in our previous report, the gambling label does not appear to apply to loot boxes as they are not “normally carried out in casinos”. Additionally, the ‘includes random items’ descriptor is text-based and is not included into the in-game purchases logo, which may be insufficient to adequately inform parents and children about what type of random reward mechanism is present in the game.

### 3. EGBA Code

SCOPE. In 2020, EGBA – the European Gaming and Betting Association<sup>188</sup> – published the first pan-European Code of Conduct on responsible advertising for online gambling.<sup>189</sup> It concerns a self-regulatory code providing measures for responsible advertising for online gambling,

<sup>186</sup> See <<https://pegi.info/what-do-the-labels-mean>>.  
<sup>187</sup> Article 11.1 PEGI Code of Conduct.  
<sup>188</sup> The association is based in Brussels and represents the main online gaming and betting operators established, licensed and regulated in the European Union. See <https://www.egba.eu/>.  
<sup>189</sup> <https://egba.eu/uploads/2020/04/200625-EGBA-Code-of-Conduct-on-Responsible-Advertising-for-Online-Gambling.pdf>.

with a particular focus on minors and social media. The Code is developed in the context of the AVMSD, which encourages self- and co-regulation in the field of gambling advertising.<sup>190</sup> The Code applies to all EGBA members, but is also open for signature by any online gambling company licensed in the EU, the EEA and the United Kingdom. The Code is intended to be applicable in all EU, EEA countries and the UK. The Code covers all gambling marketing activities in all media platforms (including television, radio, social networks and other online platforms), regardless of the technology used. The Code does not prevail over legal requirements and if a local self-regulatory provision goes further than a provision in this Code, gambling operators must comply with the local self-regulatory provision.

DEFINITION GAMBLING. ‘Online gambling service’ is defined as

*“Any service which involves placing a stake of monetary value in a game of chance, including lotteries, casino games, poker games, virtual sports, eSports and any type of betting provided online, by electronic means or any other technology for facilitating communication and at the individual request of a recipient of services”.*

RELEVANT PROVISIONS. Interesting rules in the context of advertising for gambling elements within video games are: the prohibition to provide false or unrealistic information about the probability of gambling winnings or returns, the prohibition to target or specifically appeal to minors and the prohibition to contain pressuring or urgent messages such as “you have nothing to lose”, “your next win is around the corner”, or “hurry up and bet now”. A second set of rules deals with the protection of minors. Gambling marketing should not harm or exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of minors, nor should it be aimed at or specifically designed to appeal to minors – for instance by portraying fictional characters or real-life celebrities which are particularly appealing to minors. This raises questions regarding gambling operators or video game developers partnering with influencers who are popular with younger age groups. Furthermore, video games often make use of popular characters which serve as role models for children, and, which should consequently not be used in for gambling advertising purposes.<sup>191</sup> Besides rules on responsible gambling messages, there are also rules specifically dealing with social media. Online gambling operators are explicitly obliged to ensure that when they work with influencers, brand ambassadors, streamers, or podcasts, they comply with the requirements of the code irrespectively of whether the gambling operator is itself the creator and sender of advertising (e.g. the gambling operator needs to clearly label paid-marketing when produced in collaboration with influencers).

#### **4. Self-regulatory guidelines by the Belgian Association of Gaming Developers**

In 2016, the Belgian Association of Gaming Operators (BAGO, including e.g. Unibet, Ladbrokes or Napoleon Games) constructed a covenant including guidelines for gambling-related

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<sup>190</sup> Rec. 30 AVMSD 2018.

<sup>191</sup> European Parliament, Report on How Marketing and Advertising Affect Equality between Women and Men, 2008/2038(INI), 2008.

commercial communications (including advertising).<sup>192</sup> These guidelines include several interesting provisions for advertisements aimed at children:

- Commercial communications for gambling activities should never have minors as target audience;
- Commercial communications for gambling activities cannot entice minors to engage in gambling activities;
- Commercial communications for gambling activities cannot appear in the media exclusively aimed at minors;
  - o They cannot use marketing practices or images referring to characters specifically appealing to minors
- Commercial communications for gambling activities on social media websites cannot be aimed at minors;
- Commercial communications in digital form (e.g. in-app advertisements) cannot enable the opportunity to directly engage in a gambling activity through the advertisement;
- Commercial communications for gambling activities cannot show illegal forms of gambling.<sup>193</sup>

Considering the application of these guidelines to gambling-like elements illustrates the complex present situation. First, the involved operators are not video game companies. Nevertheless, should the interpretation by the Gaming Commission be accepted, paid loot boxes would constitute gambling and require a license to be offered in Belgium. This could lead video game companies to apply for a license if they want to keep loot boxes within their games and as such become licensed gambling operators. The guidelines such as those included in the Covenant then could become relevant if these video game companies decide to join the BAGO and commit to the guidelines.<sup>194</sup>

## **5. Streaming/video-sharing platforms and gambling advertising**

**TWITCH.** Twitch is an interactive livestreaming service for video content predominantly focusing on the broadcasting and viewing of video gaming. Twitch is one of the most successful online live streaming platforms in the world, with approximately 7.13 million active streamers in September 2023.<sup>195</sup> Twitch has grown rapidly within the last few years asserting its dominance

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<sup>192</sup> BAGO, *Convenant voor ethische en verantwoorde reclame voor en marketing van kansspelen (Covenant on ethical and responsible advertising and marketing of gambling (games of chance))*, 2016, retrieved from <[https://bago.be/wp-content/uploads/2020/08/Final\\_Convenant-Advertising-NL.pdf](https://bago.be/wp-content/uploads/2020/08/Final_Convenant-Advertising-NL.pdf)>.

<sup>193</sup> *Ibid.* at XVI, XVII, XX and XXII.

<sup>194</sup> For an overview of national self-regulatory codes on advertising, see Annex I.

<sup>195</sup> Statista, "Number of active streamers on Twitch worldwide from January 2018 to September 2023", <https://www.statista.com/statistics/746173/monthly-active-streamers-on-twitch/#:~:text=Active%20streamers%20on%20Twitch%20worldwide%202023&text=In%20September%202023%2C%20Twitch%20had,with%20gamers%20and%20gaming%20audiences..>

as one of the major forces in the games industry and becoming a multi-billion-dollar industry.<sup>196</sup>

POLICY UPDATE. Videos containing gambling – in particular slot streaming – are a very popular type of content on Twitch, which led to controversy throughout recent years.<sup>197</sup> Twitch has addressed this by prohibiting users to share links or affiliate codes to sites that contain slots, roulette, or dice games; e.g. sharing a referral code to a slots site or including a banner linking to online roulette games. Since October 2022, the streaming of gambling sites that include slots, roulette or dice games that are not licensed in the US or in another jurisdiction providing sufficient consumer protection are also no longer allowed. Linking to these websites in the chat is also prohibited. Websites focusing on sports betting, fantasy sports and poker remain unaffected.<sup>198</sup>

CONCERNS. Two remarks can be made regarding Twitch's policy update: (1) As it solely prohibits the streaming of a limited number of unlicensed gambling websites, plenty of advertising for licensed gambling websites can still be encountered on the platform; (2) the Twitch policy does not address the streaming of gambling(-like) elements within video games (e.g. loot box openings). In an answer to a commonly asked question – instead of including it directly into the policy provision – Twitch states that “promotion or sponsorship of skins gambling is prohibited under our policy.” Skin gambling refers to wagering virtual items known as ‘skins’ (i.e. cosmetic alterations to gameplay aspect, such as camouflage for weapons) on the outcome of Esports or other professional matches, or on other games of chance. Skin gambling is particularly relevant in the context of the video game *Counter-Strike: Global Offensive*.<sup>199</sup> Under the updated policy, streamers cannot promote skin gambling and cannot be sponsored by skin gambling websites, including those related to CS:GO. How far-reaching this policy update is, remains to be seen. For example, is a specific affiliation with an (often third-party) website necessary? In other words, can streamers still stream skin gambling activities when there is no sponsorship by the operating website? The answer seems yes, however, it depends on the scope of the concept ‘promotion’; should this also encompass the mere use of such skin gambling websites, then streaming skin gambling activities would arguably be prohibited. Additionally, while skin gambling is often related to loot boxes, there are also many games with loot boxes without associated skin gambling activities. The updated policy seems to overlook these loot boxes, and other gambling-like elements (e.g. social casino games) for that matter, even though there are also gambling-related concerns linked to these games.

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<sup>196</sup> O. Adamovich, “How Livestreaming Has Changed the Gaming Industry: Descrier News”, Descrier, 25 June 2019; J. Woodcock and M.R. Johnson, “Live Streamers on Twitch.tv as Social Media Influencers: Chances and Challenges for Strategic Communication”, *International journal of strategic communication* 2019, (321) 321.

<sup>197</sup> M. Casu and C.I. Belfiore, “The “Slotstreams” Phenomenon on Twitch.Tv: Can it Lead to Online Gambling?”, *Preprints* 2022; A. Hern, “Twitch to ban users from streaming unlicensed gambling content”, *The Guardian* 2022, <https://www.theguardian.com/games/2022/sep/21/twitch-to-ban-users-from-streaming-unlicensed-gambling-content>.

<sup>198</sup> Retrieved from <[https://safety.twitch.tv/s/article/Community-Guidelines?language=en\\_US](https://safety.twitch.tv/s/article/Community-Guidelines?language=en_US)>.

<sup>199</sup> See M. Stubbs (Forbes), 80% of ‘CS:GO’ Gamblers Started As Minors According to YouTuber Report, 2023, retrieved from <<https://www.forbes.com/sites/mikestubbs/2023/07/25/70-of-csgo-gamblers-started-as-minors-according-to-youtuber-report/>>.

OTHER VIDEO-SHARING PLATFORMS. YouTube, for example, also prohibits linking to an online gambling or sports betting site that is not approved by them.<sup>200</sup> Gambling advertising is allowed on YouTube under certain conditions. More in particular, promotion of online, real-money gambling – including games played with virtual currencies or items that have real-world value – and the promotion of sites that contain or link to content relating to online gambling (e.g. promotional products such as bonus codes or gambling/betting tutorials) are allowed if:

- the advertiser has received the proper Google Ads certification;
- only approved countries are targeted;
- there is a landing page with information about responsible gambling;
- minors are not targeted.<sup>201</sup>

Violations of policies on Google Ads may result in disapproval of ads or assets, requiring the policy breach to be fixed for eligibility. Multiple or severe violations could lead to the suspension of the account, cessation of ad displays, and potential permanent suspension of related accounts, with the possibility of automatic suspension for new accounts. Advertisers must adhere to all applicable laws and regulations, and repeated or serious violations may lead to the blocking of content and a potential inability to advertise with Google.

TikTok prohibits the promotion of gambling services.<sup>202</sup> Promoting services, such as casinos, poker, slot games, roulette, lotteries, betting tips, gambling-related software and apps is not allowed.<sup>203</sup>

## Conclusion

RELEVANCE OF THE REPORT. Research previously conducted within the Gam(e)(a)ble project already indicated that Flemish minors (aged 11-18) often encounter gambling advertising. Increased exposure to gambling ads, loot box openings, or gambling videos is associated with a more favourable attitude, higher intentions to engage in gambling, and increased participation in monetary gambling activities among teenagers.<sup>204</sup> Gambling can lead to people experiencing negative financial and social consequences, hence, advertising for such services raises moral concerns. This report provides an overview of the regulatory landscape pertaining to commercial communications for gambling(-like) elements within video games. Even though the list of the instruments discussed is not exhaustive, it paints a picture of the

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<sup>200</sup> Retrieved from <https://support.google.com/youtube/answer/9229611?hl=en#:~:text=Here%20are%20some%20examples%20of,prostitution%2C%20or%20erotic%20massage%20services>.

<sup>201</sup> Retrieved from <https://support.google.com/adspolicy/answer/6018017?hl=en>.

<sup>202</sup> “Gambling is betting money (including digital currencies such as bitcoin) or something of monetary value on an event with an uncertain outcome, to try and get a financial gain.”

<sup>203</sup> Retrieved from <https://www.tiktok.com/community-guidelines/en/regulated-commercial-activities/#1>.

<sup>204</sup> E. Grosemans, R. De Cock, L. Bradt, B. Zaman, ‘More than loot boxes: the role of video game streams and gambling-like elements in the gaming-gambling connection among adolescents’, JGI 2024, 1-32. For more information, see the longitudinal study conducted among Flemish teenagers within the Gam(e)(a)ble project, <https://www.gameable.info/studyresults>.



relevant rules and the fact that they are dispersed in several regulatory instruments (both binding and non-binding) and on several levels (international, EU, national, sub-national).

**CHILDREN'S RIGHTS.** The legal analysis started off by adopting a children's rights approach, the framework of which is provided by the UN Convention on the Rights of the Child. Advertising for gambling(-like) elements may have an impact on different children's rights and principles, for example the child's right to development, the best interests of the child, or the child's right to privacy.

**GAMBLING VS. GAMBLING-LIKE.** A first important observation is that distinct rules are in place depending on whether a particular activity qualifies as gambling under the applicable national law or whether it merely exhibits gambling-like characteristics without meeting the criteria of a legal definition ("gambling-like" elements).

**RULES ON GAMBLING ADVERTISING.** Due to a lack of EU competence in the field of gambling, there is no harmonisation of national gambling advertising laws. Different regulatory frameworks on gambling advertising exist in each Member State. Therefore, when dealing with gambling advertising, the national perspective remains very important. Even though there is no sector-specific law on gambling (advertising) in the EU, the EU is still able to exert some influence on national gambling (advertising) policies. Primary EU law grants Member States a wide margin to set their national gambling (advertising) policies 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 existence of different national definitions of gambling and gambling advertising leads to national differences (e.g. in-game elements such as loot boxes are treated as gambling only by some Member States and under different conditions). This is at odds with the cross-border nature of video games and can be burdensome for game developers who will have to take into account a lot of different rules.

**RULES ON ADVERTISING.** The mapping exercise central to this report has demonstrated that numerous other instruments dealing with advertising in general might be relevant, predominantly in the fields of consumer law, audiovisual media law and data protection law. From a practical point of view, it might be challenging for video game operators to piece together this regulatory puzzle.

**LEGAL UNCERTAINTY.** Overall, it can be concluded that the regulatory framework applicable to commercial communication in relation to gambling and gambling-like elements in video games raises quite some questions. The analysis central to this report has shown that it is often not straightforward whether in-game elements are covered under the material scope of the legal instruments concerned. Continuous developments in technology and online social environments have led to new ways of advertising, also in the video gaming ecosystem. Here one can think of, for instance, behavioural advertising within the video game or influencer/game stream advertising. Even though significant steps were taken by the EU legislator (e.g. GDPR, DSA), the regulatory framework is not keeping pace with the market reality. This has led to interpretation issues when applying existing rules to advertising for gambling(-like) elements within video games: Are loot boxes a game of chance in accordance



with national gambling laws? Are video games information society services in the sense of the eCommerce Directive? Are video game platforms online platforms in the sense of the DSA?

TRANSPARENCY AND PROTECTION OF MINORS. Throughout all the legal instruments mapped in this report, the common thread has been transparency. Consumers must be adequately informed on various aspects (e.g. the presence of a commercial nature, the identity and contact information of the advertiser, age restrictions, the risks associated with gambling, the odds of winning, etc.) to make informed decisions. Both gambling advertising rules as well as the more general regulatory framework on commercial communication provide an additional layer of protection to minors. Advertising for gambling services cannot target minors, nor be made appealing to them, for example by using influencers which are particularly appealing to minors. Outside of gambling law, the GDPR for instance also acknowledges that children merit specific protection with regard to the collection of their personal data for the purposes of marketing or creating personality or user profiles. Under the DSA, providers of online platforms shall not present advertisements on their interface based on profiling using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor. The AVMSD determines that audiovisual commercial communications shall not cause physical, mental or moral detriment to minors and shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

ADVERTISING LITERACY. Considering the political, social and moral aspect to gambling services, it is – and will remain – a challenge to get all Member States on the same page in order to achieve harmonisation in the field of gambling advertising. As gambling advertising and advertising for gambling-like elements is omnipresent, it is important to also focus on advertising literacy of citizens – children and adolescents in particular. This should empower them to recognise advertisements and to distinguish between editorial and commercial content in order to take a critical position towards the content of the commercial message.

## Annex I

Country	Self-regulatory organisation	Code for Gambling Advertising
Belgium	JEP	For lotteries, <a href="https://www.jep.be/sites/default/files/rule_recommandation/code_voor_ethische_reclame_fr.pdf">https://www.jep.be/sites/default/files/rule_recommandation/code_voor_ethische_reclame_fr.pdf</a>
Bulgaria	NCSR	<a href="https://www.nss-bg.org/kodeks">https://www.nss-bg.org/kodeks</a>
Czechia	CRPR	<a href="https://www.rpr.cz/cz/en.php">https://www.rpr.cz/cz/en.php</a> , Part 2, Section 9.
France	ARPP	<a href="https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/gambling-code-v2/">https://www.arpp.org/nous-consulter/regles/regles-de-deontologie/gambling-code-v2/</a>
Germany	DWR	<a href="https://www.werberat.de/sites/default/files/uploads/media/dw_code_of_conduct_gambling_2012_en.pdf">https://www.werberat.de/sites/default/files/uploads/media/dw_code_of_conduct_gambling_2012_en.pdf</a>
Hungary	ÖRT	<a href="http://www.ort.hu/kodex/ii-a-reklamozas-kulonosszabalyai/#21-cikkely">http://www.ort.hu/kodex/ii-a-reklamozas-kulonosszabalyai/#21-cikkely</a> , Art. 21.
Ireland	ASAI	<a href="http://www.asai.ie/wp-content/uploads/ASAI-CODE_2015_DEC15_Revision.pdf">http://www.asai.ie/wp-content/uploads/ASAI-CODE_2015_DEC15_Revision.pdf</a> , Section 10.
Netherlands	SRC	<a href="https://www.reclamecode.nl/nrc/reclamecode-voor-kansspelen-die-worden-aangeboden-door-vergunninghouders-ingevolge-de-wet-op-de-kansspelen-rvk-2015/">https://www.reclamecode.nl/nrc/reclamecode-voor-kansspelen-die-worden-aangeboden-door-vergunninghouders-ingevolge-de-wet-op-de-kansspelen-rvk-2015/</a>
Slovakia	SRPR	<a href="http://www.rpr.sk/en/ethical-principles">http://www.rpr.sk/en/ethical-principles</a> , Part 3 - Chapter 6 - Art. 46.
Spain	AUTOCONTROL	<a href="https://www.autocontrol.es/wp-content/uploads/2020/01/anexo-i-nueva-version-codigo-de-juego.pdf">https://www.autocontrol.es/wp-content/uploads/2020/01/anexo-i-nueva-version-codigo-de-juego.pdf</a>
Sweden	Ro.	SPER's Guidelines, <a href="http://igrg.org.uk/wp/wp-content/uploads/2015/12/Gambling-Industry-Code-for-Socially-Responsible-Advertising-Final-2nd-Edition-August-2015.pdf">http://igrg.org.uk/wp/wp-content/uploads/2015/12/Gambling-Industry-Code-for-Socially-Responsible-Advertising-Final-2nd-Edition-August-2015.pdf</a>
United Kingdom	ASA	<a href="https://www.asa.org.uk/type/non_broadcast/code_section/16.html">https://www.asa.org.uk/type/non_broadcast/code_section/16.html</a>
United Kingdom	Clearcast	<a href="https://www.asa.org.uk/type/broadcast/code_section/17.html">https://www.asa.org.uk/type/broadcast/code_section/17.html</a>