

**Virtual Coercion and the Vulnerable Consumer: 'Loot Boxes' as Aggressive
Commercial Practices**

ABSTRACT

Loot boxes have recently become a game mechanic of concern to policy-makers and regulators. The similarity between loot boxes and gambling is clear, and loot boxes and their regulation are commonly viewed through the lens of gambling. By contrast, very little attention has been given to tackling them as unfair, and in particular aggressive, commercial practices under consumer law. This article argues that by classifying the provision of loot boxes as a potentially aggressive commercial practice we will see that consumer law may protect gamers from some of the significant harms with which such products are associated.

1. INTRODUCTION

Video gaming (hereafter 'gaming') is a highly popular consumer pastime with the UK games industry alone having a market valuation of £7 billion in 2020.¹ Despite this importance, little attention has been paid to the role of consumer law in tackling the consumer detriment associated with gaming. That detriment comprises harm that may be physical, psychological or financial. It may arise through a consumer developing an addiction, being exposed to harmful content,² being misled about aspects of a game, or being subjected to coercive marketing techniques. This should be of significant concern to consumer law scholars.

There has long been concern about the adverse impact that gaming can have on the wellbeing of those playing (hereafter 'gamers') with most attention focusing on physical

¹ UKIE, *UK Games Industry Market Valuation 2020* available at <https://ukie.org.uk/news/uk-games-industry-valuation-2020> accessed 26 August 2021

² See Daithi Mac Sithigh, 'The Regulation of video Games: Past, Present and Future' (2010) 21(8) *Entertainment Law Review* 298. Where video games allow interaction between consumers, harmful content will be subject to regulation under the Online Harms Bill.

and mental health. One consequence of the Covid-19 Pandemic has been the rise in the number of hours that individuals spend gaming, thereby increasing the potential for harms to occur.³ However, most literature does not engage deeply with the consumer harms, particularly those of an economic nature, which may be caused to all gamers, no matter the types of games they play, the modalities of play, or how frequently or infrequently they play.

A common design feature of games which may be a particular source of consumer detriment is the 'loot box'.⁴ Loot boxes have been defined as: 'purchasable video game content with randomised rewards'.⁵ A typical example is found in the popular FIFA game series produced by Electronic Arts.⁶ In 'Ultimate Team' mode, the game allows loot boxes to be purchased which give the gamer the chance to win high-value players who will facilitate success in the game.⁷

Loot boxes form part of a broader trend of designers creating mechanics that allow monetisation beyond the initial purchase of the game. This shift towards a 'games-as-a-service' model ensures a continuing revenue stream for the publisher.⁸ This may have

³ C Arkenberg, 'Will gaming keep growing when lockdowns end?' *Deloitte Insights* 8 July 2020 <https://www2.deloitte.com/us/en/insights/industry/technology/video-game-industry-trends.html> accessed 1 November 2021.

⁴ The Committee of Advertising Practice (CAP) Guidance refers to these as 'Random-item purchases' but they will be referred to as loot boxes in this article as that is how they are most commonly known. See CAP *Guidance on advertising in-game purchases* (2021).

⁵ James Close and Joanne Lloyd *Lifting the Lid on Loot Boxes* (2021) 1 https://www.begambleaware.org/sites/default/files/202103/Gaming_and_Gambling_Report_Final.pdf accessed 1 November 2021.

⁶ Electronic Arts have recently made an alteration to ultimate team mode that lets players preview the contents of certain loot boxes before making a decision to purchase (see Wesley Yin-Poole, 'EA now lets you see what's in FIFA loot boxes before you buy them' (18th June 2021) available at <<https://www.eurogamer.net/articles/2021-06-18-ea-adds-ultimate-team-loot-boxes-that-let-you-see-all-items-before-you-buy-in-most-significant-shakeup-of-fifa-series-in-years>> accessed 26 August 2021). For further discussion of the role of loot boxes in FIFA see Wesley Yin-Poole, 'The big interview: EA, FIFA and loot boxes' (8th October 2021) <https://www.eurogamer.net/articles/2021-10-05-the-big-interview-ea-fifa-and-loot-boxes> accessed 21 October 2021.

⁷ An alternative form of loot boxes are 'skins' which are costumes that can be applied to a player's character to change their appearance. They are considered briefly below.

⁸ See Philipp Lohse 'Why Key Performance Indicators Might Fail – The IKEA Effect in Games as a Service' (2020) *ICEBI* 2020 21.

some consumer benefits, as the revenue stream will potentially enable the initial cost to be reduced, or even for games to be made free-to-play. With multiplayer gamers, the money made from loot boxes may be used to enable the servers that facilitate multiplayer gaming to be supported.⁹ However, they raise matters of significant social concern.

As explained below, the similarity between loot boxes and gambling is clear and loot boxes are commonly viewed through the lens of gambling. By contrast, very little attention has been given to tackling them as unfair, and in particular aggressive, commercial practices under consumer law.¹⁰ This article argues that by classifying the provision of loot boxes as a potentially aggressive commercial practice we will see that consumer law may protect gamers from some of the significant harms with which such products are associated.

After briefly outlining the relationship between loot boxes and gambling, the article then provides an overview of loot boxes and unfair commercial practices law. It then examines loot boxes as aggressive commercial practices. Next, the article outlines the benchmarks by which such practices are assessed before discussing how these benchmarks may provide particular protection to more vulnerable consumers from the aggressive practices associated with loot boxes. Finally, conclusions are drawn.

⁹ Despite these benefits there is evidence that loot boxes can be unpopular with many gamers. See Jason Schreier, *Blood, Sweat, and Pixels: The Triumphant, Turbulent Stories Behind How Video Games Are Made* (Harper, 2017) 120.

¹⁰ One article examines whether they might be classified as misleading omissions. See George Spence-Jones and Leon Y Xiao 'Loot Boxes – Video gaming industry's hidden treasure or a Pandora's Box that misleads consumers?' Gough Square Chambers. <https://goughsq.co.uk/wp-content/uploads/2020/11/Article-Loot-Boxes-November-2020.pdf> (accessed 1 November 2021). Another suggests that consumer protection might provide a solution but focuses again primarily on information remedies (Daniel L King and Paul H Delfabbro 'Video Game Monetization (e.g. loot boxes): a Blueprint for Practical Social Responsibility Measures' (2019) (17) *International Journal of Mental Health and Addiction* 166).

2. LOOT BOXES AND GAMBLING REGULATION

The similarity between loot boxes and gambling is clear.¹¹ In particular, this is because they promote compulsive behaviour through the utilisation of psychological techniques, thereby taking advantage of behavioural biases. These include the gamblers' fallacy, the near miss effect and the sunk cost fallacy and are examined in more detail below. Loot boxes resemble slot machines particularly closely because the outcome/prize is randomly determined and they do not require skills on the part of the player.¹² Many commentators have identified the extent to which those offering loot boxes utilise the same techniques as those providing gambling. In 2018, Zendle and Cairns identified an association between purchasing behaviour relating to loot boxes and scores relating to problem gambling.¹³ These associations have been confirmed by further studies, including those which control for age and gender.¹⁴ Close and Lloyd suggest that the results do not prove whether loot boxes *cause* problem gambling or whether the causes of problem gambling increase the purchasing of loot boxes. However, they recognise that the findings do suggest that 'the two behaviours are...psychologically akin.'¹⁵ In 2019 the Federal Trade Commission noted that they could be regarded as promoting 'compulsive or gambling-like behaviour'.¹⁶ A number of jurisdictions have intervened with this

¹¹ See A Drummond and JD Sauer 'Video Game Loot Boxes are Psychologically Akin to Gambling' (2018)(2) *Nature Human Behaviour* 530.

¹² 'Predatory Monetization Schemes in Video Games (e.g 'Loot Boxes') and Internet Gaming Disorder' (2018) 113 *Addiction* 1967-1969. There are different forms of prize, some of which make a contribution to gaming success and some of which do not.

¹³ David Zendle and Paul Cairns 'Video game loot boxes are linked to problem gambling: Results of a large scale survey' (2018) 13 (11) *PLoS ONE*: e0206767 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767> accessed 1 November 2021.

¹⁴ Close and Lloyd (n 5) 1.

¹⁵ *Ibid.*

¹⁶ Federal Trade Commission *Video Game Loot Box Workshop Staff Perspective* available at :https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-loot-box-workshop/loot_box_workshop_staff_perspective.pdf accessed 3 November 2021.

similarity in mind. For example, Belgium has classified loot boxes as gambling, with the result that licences must be obtained for their use.¹⁷

In the UK, however, the view of the Gambling Commission is that where in-game items obtained via loot boxes are confined for use within the game (and so cannot be 'cashed out') they are not licensable gambling activity under the Gambling Act 2015. In the UK, the Gambling Commission only has power to regulate 'gambling' as defined in s. 3 of the Gambling Act 2005 as 'gaming,' 'betting' and 'participating in a lottery.' In order to amount to gaming, the prize must be 'money or money's worth' acquired via a game of chance. The Commission concluded that while the line between video gaming and gambling was frequently blurred, in most circumstances loot boxes are confined for use within a game and cannot be 'cashed out'. As a result, they are viewed as not providing prizes of money or money's worth. The Commission has thereby concluded that while the products in question could potentially cause harm (particularly to children) it does not possess the legal powers to intervene to tackle them.¹⁸ The UK Government may decide to amend gambling legislation to amend this.¹⁹ However, this article contends that the existing law on unfair commercial practices is in some ways a more appropriate tool for tackling the harm from loot boxes. It is to this that we now turn.

3. LOOT BOXES AND UNFAIR COMMERCIAL PRACTICES

The paucity of attention that has been given to loot boxes under consumer law is unfortunate, as the legislation on unfair commercial practices seems well-suited to tackling the harms they encompass.²⁰ Unfair commercial practices law captures the

¹⁷ Gaming Commission, *Research Report on Loot Boxes* (April 2018) available at <https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf> (accessed 26th August 2021)

¹⁸ See Gambling Commission 'Loot boxes within video games' 24 November 2021 <https://www.gamblingcommission.gov.uk/news/article/loot-boxes-within-video-games> (last accessed 5 January 2022).

¹⁹ Department for Digital Culture Media and Sport (DCMS) *Loot Boxes in Video Games – Call for Evidence* <https://www.gov.uk/government/consultations/loot-boxes-in-video-games-call-for-evidence> accessed 1 November 2021.

²⁰ As noted in n.10 the exception are the articles by Spence-Jones and Xiao and King and Delfabbro.

nature of the harm caused to gamers, and provides enforcement tools to address this harm. Furthermore, where the focus is on the offering of loot boxes as an aggressive practice, traders may be less able to construct game mechanics that avoid the definition of gambling and so the supposed reach of the law. In addition, the law on aggressive practices is less likely to catch legitimate random-reward game mechanics that perform appropriate functions in gameplay.²¹

To understand the appropriateness of using unfair commercial practices law to combat the harms associated with loot boxes it is important first to explain the scope of The Unfair Commercial Practices Directive.²² The Directive is one the most significant pieces of European Consumer Law. Adopted in May 2005, it prohibits unfair practices which distort the economic behaviour of consumers so that they take transactional decisions that they would not otherwise have taken. The Directive was implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008 and this article focuses on those Regulations.²³

There is little doubt that the definition of 'commercial practice' covers loot boxes found in games. A commercial practice is defined as:

any act, omission, course of conduct representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion, sale or supply of a product, to or from a

²¹ Random generation of rewards is a game mechanic that appears in many games which do not demonstrate the characteristics of aggressive practices, for example in many role-playing games, but which could be caught by a poorly drafted definition which seeks to bring loot boxes within the purview of the Gambling Commission.

²² 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 ('Unfair Commercial Practices Directive').

²³ Following Brexit, the Consumer Protection from Unfair Trading Regulations 2008 are 'EU-derived domestic legislation' under the European Union (Withdrawal) Act 2018. Under section 6 of the Withdrawal Act, judgments of the CJEU may be used to interpret the Regulations.

consumer, whether occurring before, during or after a commercial transaction in relation to a product.²⁴

As Spence-Jones and Xiao argue, the commercial practice in question is 'the offering of loot boxes as digital content through the game.'²⁵ A consumer is (by virtue of regulation 2) 'any individual who in relation to a commercial practice is acting for purposes which are outside his business.' This is the standard definition of consumer in European Law and will certainly cover gamers when they consider purchasing loot boxes.

Before focusing on loot boxes as aggressive commercial practices, it is worth considering how they could be tackled under other provisions of the Regulations, as they identify several ways in which practices may be unfair. The Court of Justice of the European Union (CJEU) has identified a three step procedure to be followed which reflects the different ways in which a commercial practice may be unfair.²⁶ First, we should ask whether the conduct in question falls within one of the 31 practices in Annex one of the Directive (repeated in Schedule one of the CPUTRs).

Schedule One and Misleading Practices

Schedule one lists 31 commercial practices which are always unfair, regardless of the impact on the consumer. Some of these are misleading practices and might be relevant to loot boxes. For example, paragraph 7 prohibits a trader from:

falsely stating that a product will only be available for a very limited time, or that it 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.

²⁴ 'Product' is defined in Consumer Protection from Unfair Trading Regulations 2008 regulation 2 as including digital content.

²⁵ Spence-Jones and Xiao (n 10) 4. The CAP Guidance (n 4) makes clear throughout that this will be a commercial practice.

²⁶ See joined cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galeata BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-02949.

There might be occasions where this is used as a tactic to persuade consumers to purchase a loot box quickly. However, this will only be relevant where the statement that the product is available only for a limited time is 'false'; in the context of offering loot boxes it will more commonly be true.²⁷ Similarly, paragraph 27 prohibits 'including in an advertisement a direct exhortation to children to buy advertised products...' While such communications are more likely to be regarded as marketing communications than advertising, CAP Guidance specifically states that '[m]arketing communications directed at children should not include a direct exhortation to buy an advertised product'.²⁸

If the practice is not specifically prohibited, the second step is to consider whether a practice is unfair under one of three 'small general clauses'²⁹: as a misleading action; misleading omission or aggressive practice. Regulation 5(2) provides that a commercial practice will be a misleading action:

- (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct.

In addition, it must be demonstrated that the misleading action '(b)...causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.'

²⁷ For example, FIFA Ultimate Team Mode, discussed above includes both time-limited and limited-quantity packs.

²⁸ CAP *Children: Direct exhortation Advice online* (25 August 2015). <https://www.asa.org.uk/advice-online/children-direct-exhortation.html> accessed 1 November 2021. This raises the question of whether the product has been "advertised" which would require further investigation.

²⁹ See Mateja Durovic *European Law on Unfair Commercial Practices and Contract Law* (Bloomsbury 2016) for discussion. If the practice is not unfair on one of those bases it must be asked whether it is unfair under the General Clause. This article argues that loot boxes are likely to be unfair under the smaller general clauses and so does not investigate this final stage.

The practice does not have to contain false information and could also be a misleading practice if it is technically accurate but deceptive.³⁰ It must be untruthful or deceptive as to the matters in paragraph (4) which include both the nature and the main characteristics of the product. This provision will be relevant in some cases (for example where the game provides inaccurate odds about particular outcomes). Recently published Guidance points out that '[i]n-game purchasing and advertising happens within a unique context of gameplay, time pressure and (in some cases) chance, and therefore brings with it specific risks of misleading consumers.'³¹ However, it will not be applicable to the many of the concerns considered in this article where other provisions are more appropriately utilised.

An alternative is to proceed on the basis that there has been a misleading omission. Regulation 6(1) states that a commercial practice is misleading if: 'in its factual context, taking account of the matters in paragraph (2)' it omits or hides material information, provides such information 'in a manner which is unclear, unintelligible, ambiguous or untimely' or (except where it is already apparent) fails to identify its commercial intent. Again, the practice must cause or be likely to cause the average consumer to 'take a transactional decision he would not have taken otherwise.' The matters in paragraph 2 are:

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and

³⁰ Commercial practices are also misleading actions where the trader fails to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with if (i) the trader indicates in a commercial practice that he is bound by that code of conduct, and (ii) the commitment is firm and capable of being verified and is not aspirational.' Given the extent to which self-regulatory codes are adopted in the gaming industry this will be a possible avenue for enforcers to pursue.

³¹ CAP Guidance on advertising in-game purchases (n 4) 8.

(c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

'Material information' in this context means both the information 'which the average consumer needs, according to the context, to take an informed transactional decision' and 'any information requirement which applies in relation to a commercial communication as a result of a Community obligation.' Whether information is material will be determined on a case by case basis.³²

Spence-Jones and Xiao view it as 'clearly arguable that omitting to publish odds relating to items contained in video game loot boxes can be a misleading omission' and regard this as the simplest route for enforcers to follow.³³ This is a possible avenue, although the conclusion of the Court of Appeal in *PLT Anti-Marketing* that there is 'no obligation on a supplier to identify its particular mark-up' on products it supplies might imply that odds need not be disclosed.³⁴ King and Delfabbro argue that 'there seems to be a growing need for consumer protection measures for in-home purchasing systems.'³⁵ However, they again focus heavily on information remedies, such as the display of age restrictions on games and the providing of regular statements on spending activity. This reflects the approach taken in China, where game developers are required to disclose the odds of receiving items from loot boxes on the assumption that doing so will facilitate informed decision-making.³⁶ It has been suggested that the disclosure regime in China has not

³² Case C-428/11 *Purely Creative Ltd v Office of Fair Trading* [2012] para 55.

³³ Spence and Xiao (n 10) 8.

³⁴ *Secretary of State for Business, Innovation And Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76. One point of distinction may be that disclosing the odds of loot box success should not affect the business performance to the same extent as the disclosure of the existence of a free alternative to the service provider (or indeed, to the same extent that casino disclosing odds demonstrates the house edge and therefore the profit margin of the casino). The CAP Guidance does not mention odds as material information that needs to be disclosed.

³⁵ King and Delfabbro (n 10) 168.

³⁶ N Grayson 'Blizzard reveals overwatch loot box odds in China' 6 May 2017 <https://www.kotaku.com.au/2017/05/blizzard-reveals-overwatch-loot-box-odds-in-china/> accessed 1 November 2021.

been wholly successful.³⁷ In particular, while odds have been disclosed in the majority of cases, they have frequently not been provided in a prominent and transparent manner.³⁸

To fall foul of the provisions on misleading actions and omissions (and also, as will be seen later, aggressive practices) the practice must cause or be likely to cause the (average) consumer to take a transactional decision they would not have taken otherwise. 'Transactional decision' is defined as meaning:³⁹

any decision taken by a consumer concerning whether, how, and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumers decides to act or to refrain from acting.

Transactional decisions take a variety of forms. The most common of these will be the decision to make a purchase, and this will be the most relevant form in the context of loot boxes. But other examples could include the decision to click through a website following a commercial offer, to terminate a contract or switch to a new service provider.⁴⁰ This demonstrates that it is not enough for a commercial practice to be unfair; it must be unfair in such a way that it is liable to change an average consumer's behaviour in relation to the product at issue.

The Limitations of Information

It is clear that there will be situations where the marketing of loot boxes will involve a breach of schedule one, and others where there will be a misleading action or omission.

³⁷ See Leon Y. Xiao, Laura L. Henderson, Yuhan Yang & Philip W. S. Newall 'Gaming the system- suboptimal compliance with loot box probability disclosure regulations in China' (2021) *Behavioural Public Policy First View* 1.

³⁸ Ibid. The authors found that over 80% of games fail to make reasonably prominent disclosures.

³⁹ Reg 2(1).

⁴⁰ See European Commission Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices Brussels 25.5.2016 SWD(2016) 163 Final para 2.3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163> accessed 5 January 2022.

A common rationale for intervening in the relationship between traders and consumers is market failure, and regulation aimed at the correction of one form of market failure, information asymmetry, forms the basis of a significant amount of consumer protection law.⁴¹ Where traders provide information that is false, or present information in a deceptive manner, the provisions on misleading actions are likely to be relevant. Where consumers lack the 'material information' they need to make an informed transactional decision, those on misleading omissions will apply.

However, there are good reasons to view reliance on these provisions as insufficient. First, the provision of information has long been regarded as an inadequate tool for protecting consumers.⁴² Even where disclosure is prominent, it may be of information that is difficult for consumers to understand. It has been noted that loot box probabilities are more complex than gambling probabilities,⁴³ suggesting that the critiques of disclosure in the context of gambling may be repeated in the context of loot box probability disclosures.⁴⁴ Furthermore, there is ample evidence from behavioural sciences that consumers are prone to a host of cognitive biases, which cast significant doubt on the utility of expecting them to act rationally on the basis of information.⁴⁵ In relation to gambling, over-optimism bias is particularly relevant, with research

⁴¹ See e.g. G Hadfield, R Howse and MJ Trebilcock 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 JCP 131; I Ramsay *Rationales for Intervention in the Consumer Marketplace* (OFT, 1984); G Stigler 'The Economics of Information' (1961) 69(3) *Journal of Political Economy* 213; William C Whitford 'The Functions of Disclosure Regulation in Consumer Transactions' (1973) 2 *Wisconsin Law Review* 400.

⁴² See e.g. Oren Bar-Gill 'Seduction by Plastic' (2004) 98 *Northwestern University Law Review* 1373; Carl Schneider and Omri Ben-Shahar *More Than You Wanted to Know: the Failure of Mandated Disclosure* (Princeton University Press, 2016).

⁴³ Leon Y. Xiao and Philip W. S. Newall 'Probability disclosures are not enough: Reducing loot box reward complexity as a part of ethical video game design' *psyarxiv* 3

⁴⁴ See e.g. Kurt Eggert 'Truth in Gambling: Toward Consumer Protection in the Gambling Industry' (2004) 63(2) *Maryland Law Review* 217, 264-265.

⁴⁵ See Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32(3) *Journal of Law and Society* 349. For consideration of the utility of information disclosure in regulating gambling see Eggert *ibid.*

demonstrating that it may lead to disclosed odds being routinely ignored.⁴⁶ The existence of other biases, from the gamblers' fallacy to the near miss effect and the sunk cost fallacy also counsel against seeing disclosure as a panacea.

Second, to focus on information is to miss the essential character of the wrong. It is submitted that loot boxes are more typically unfair, not primarily because they are offered in circumstances of information asymmetry, but because they involve the manipulation of the gamer by the trader through practices that are aggressive.

Misleading conduct may form part of this, but the wrong goes beyond that. Furthermore, provisions on aggressive commercial practices will remain relevant even where there is no misleading action, and even if there is disclosure of 'material information' under the Regulations. As explained in detail below, the design decisions that surround loot boxes make this particularly likely in the context of gaming. In short, challenging the marketing of loot boxes as an aggressive commercial practice will better-reflect the character of the unfair practice.

4. LOOT BOXES AS AGGRESSIVE COMMERCIAL PRACTICES

Before the Regulations came into force, the UK lacked a horizontal consumer protection regime that prohibited traders from engaging in aggressive commercial practices. In establishing such a regime across the EU, the Union created 'a novel and hitherto unexplored concept in national and European consumer protection laws'.⁴⁷ The provisions on aggressive practices are found in regulation 7. Regulation 7(1) states that a commercial practice is aggressive if:

⁴⁶ Ellen J Langer found that gamblers have 'an expectancy of a personal success probability inappropriately higher than the objective probability would warrant.' ('The illusion of control' (1975) 32 *Journal of Personality and Social Psychology* 311) 313.

⁴⁷ H. Collins 'Harmonisation by Example: European Laws against Unfair Commercial Practices (2010) 73(1) MLR 8989. For a discussion of the provisions see P Cartwright 'Under Pressure: Regulating Aggressive Commercial Practices in the UK' [2011] Feb LMCLQ 123; Geraint Howells, Hans Micklitz and Thomas Wilhelmsson *European Fair Trading Law* (Ashgate 2006) chap 6.

in its factual context, taking account of all its features and circumstances-

- (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
- (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

The essence of an aggressive commercial practice is therefore the significant impairment of the (average) consumer's freedom of choice or conduct which is likely to induce a transactional decision (typically, to make a purchase). This must take place through harassment, coercion or undue influence. Harassment is not defined in the Legislation, but, in the view of one commentator: 'often relates to techniques or manners of communicating with the consumer that are viewed as anti-social.'⁴⁸ This is the least likely form of aggressive practice to be relevant to loot boxes and will not be considered further.⁴⁹ By contrast, both coercion and undue influence are highly relevant in this context and demand further examination.

Aggression, Immersion and Game Design

To understand why the offering of loot boxes can be viewed as an aggressive practice it is important to think about the design of games and, in particular, the methods that are used to 'immerse' the consumer.

A variety of design features can be used to make games so compelling that gamers become immersed in them. A helpful taxonomy is provided by King et al.⁵⁰ First, there are aesthetic features, such as the game's graphical and sound design. Second there are

⁴⁸ Howells (n 45) 173.

⁴⁹ It is possible that persistent exhortations to purchase in-game content could be seen as harassment (particularly where targeted at vulnerable consumers), but this is not a common design feature in loot boxes.

⁵⁰ Daniel King, Paul Delfabbro and Mark Griffiths 'Video Game Structural Characteristics: A New Psychological Taxonomy' (2010) 8 International Journal of Mental Health and Addiction 90

story features, such as the main narrative and any side narratives. Third are character features, such as the way a character develops over time. Finally there will be gameplay features, such as the way that the game is controlled, whether multiplayer modes of gameplay are possible and the tasks that the player has to perform with the character.⁵¹

The more attractive these design features are in aggregate, the more that a player is likely to become immersed into a game. Whilst immersion can sometimes be positive, in the context of loot boxes it has to potential to be highly damaging; this is largely because once immersed, a gamer may feel compelled to continue playing and make decisions that lead to detriment.⁵² There are different forms of immersion that may operate. One example has been labelled narrative immersion, which reflects a player becoming so immersed in the story of the game that they feel compelled to complete it game and so finish the tale.⁵³ Another is challenge-based immersion, where the player becomes preoccupied by the challenge of the game and is driven by the compulsion to 'win.'⁵⁴ Where Virtual Reality (VR) and Augmented Reality (AR) technologies are utilised, so-called 'system immersion', may also arise; this occurs where technology functions to place the individual in the game environment.⁵⁵ However, as VR and AR remain niche technologies, most games that utilise loot boxes do not exhibit system immersion as the primary immersive modality. The design of the game may therefore take the gamer through degrees of absorption: from engagement, through engrossment to, ultimately, total immersion.⁵⁶

⁵¹ Ibid.

⁵² UK HC Digital Culture Media and Sport Committee *Immersive and Addictive Technologies* 15th Report of Session 2017-19.

⁵³ See Niels Christian Nilsson, Rolf Nordahl and Stefania Serafin, 'Immersion Revisited: A Review of Existing Definitions of Immersion and their Relation to Different Theories of Presence' (2016) 12(2) *Human Technology* 108, 113.

⁵⁴ Ibid 114.

⁵⁵ Ibid 112.

⁵⁶ Emily Brown and Paul A Cairns 'A grounded investigation of game immersion' Extended abstracts of the 2004 Conference on Human Factors in Computing Systems, CHI 2004 Vienna, April 24-29, 2004. <https://www-users.cs.york.ac.uk/~pcairns/pubs/Immersion.pdf> accessed 1 November 2021.

Undue Influence and Coercion

The significant impairment of choice or conduct is at the heart of an aggressive commercial practice and, in the case of loot boxes, this might arise through undue influence or coercion.⁵⁷ Undue influence is defined in regulation 7(3)(b) as meaning:

exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.⁵⁸

By contrast, the Regulations do not define coercion; they merely state (somewhat unnecessarily) that the concept 'includes the use of physical force'.⁵⁹ The inclusion of physical force was never in doubt. More significant is the extent to which a trader can be found to have coerced a consumer in ways that do not include such force. The deployment of psychological pressure is far more common than the use of physical pressure in commercial contexts, and psychological pressure is particularly significant where technology is concerned.

It is vital here to try to identify what it is that makes the offering of loot boxes within a game an aggressive commercial practice, whether by undue influence or coercion. There are different types of loot box here to consider.

When a gamer is immersed in a story or gameplay, loot boxes may function in two main ways. First, they may increase the probability of a consumer's success in a game. These are so-called 'pay to win' loot boxes. Second, they may enable a consumer to avoid what

⁵⁷ In *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska S.A.* Case C-628/17(Orange Polska) the CJEU held that a practice may be aggressive where it is 'liable to make that consumer feel uncomfortable and thus to confuse his thinking in relation to the transactional decision.' (para 49). The combination of design decisions which encourage both immersion and purchase of loot boxes is particularly likely to confuse a gamer's transactional thinking.

⁵⁸ It is thus very different from undue influence in the law of contract (see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44.)

⁵⁹ Regulation 7(3)(a).

is called 'grinding'.⁶⁰ Grinding occurs where consumers continually engage in repetitive gameplay in order to enhance their characters' abilities or obtain particular items necessary for progression to the next area of the game. 'Pay-to-skip' loot boxes can help to overcome this.

Both pay to win and pay to skip loot boxes are potentially aggressive for the purposes of regulation 7. The pressure that the game's design creates on the part of the gamer results from a combination of factors. These include (but may not be limited to) the immersion in the game, the difficulty of the game and, where relevant, the multi-nature player of the game. When combined with the need to take a transactional decision quickly, it is more readily apparent why this is aggressive. But it is worth delving a little more deeply into the nature of that aggression.

First, the conduct might be viewed as involving undue influence. This case might be constructed as follows. Gamers may make a very significant investment (of money, time and effort) in the game. The trader is aware of this and, as already seen, may have used a variety of techniques to draw the gamer in and immerse them. The psychological pressure that results creates a significant position of power to the benefit of the trader. This power asymmetry can readily be exploited in a way that significantly limits the gamer's ability to make an informed decision. The gamer is likely to be deeply immersed at the point that they have to decide whether to make the relevant transactional decision (in the form of purchasing a loot box). The dynamics of the game will be highly relevant here. Part of the pressure placed upon the consumer arises from the difficulty of the game, and the trader may develop such that advancement is difficult, improbable (or impossible) without a further purchase.⁶¹ The time-limited nature of communications is

⁶⁰ For a discussion of grinding as a so-called 'dark pattern' see Jose P. Zagal, Staffan Björk and Chris Lewis, 'Dark Patterns in the Design of Games' (2013) *Foundations of Digital Games Conference, FDG 2013, May 14-17, Chania, Greece*, 4.1.1.

⁶¹ In the case of the game *Star Wars Battlefront II*, players felt that it was impossible to win without purchasing loot boxes. The consumer response to this was so overwhelmingly negative that the game was later updated (see Schreier (n 9), 120 and Yin-Poole, (n 6).

liable to increase this pressure further. As the CAP has observed, when in-game purchasing occurs within immersive gameplay 'there is a natural sense of urgency that may accompany decision-making that is uncommon in other forms of media.'⁶²

It is important to reflect further here on the relationship between aggressive practices and information. As noted above, it is sometimes argued that any harm from loot boxes can be tackled through the disclosure of information. However, this is not persuasive. If the consumer has been informed in advance (for example when purchasing the game) of the probability of winning a particular item, it is unlikely that they will be in a position to use that in an informed way at the point that they have to make their (later) transactional decision. Furthermore, even if the odds were provided at that later point where the consumer has to make the transactional decision (i.e in the game) it seems fanciful to conclude that the consumer is truly making an informed choice because of the pressure of the situation in which they find themselves.

The provision of information is clearly relevant to the assessment of whether a practice constitutes undue influence. Undue influence involves the significant limiting of the consumer's ability to make an *informed* decision. It cannot be argued that a practice inevitably involves undue influence simply on the basis that a consumer's choice was not fully informed. Indeed, the recent case of *Orange Polska*⁶³ appears relatively restrictive in this regard. That case raised the question of whether a practice involved undue influence (the language of the Polish provision was 'impermissible influence') when a courier insisted that a consumer sign a contract. The Court concluded that:

the mere fact of the courier asking the consumer to take his final transactional decision without having time to study, at his convenience, the documents

⁶² CAP Guidance on advertising in-game purchases (n 4). This Guidance states that marketers should avoid the use of mechanics that 'may place undue pressure onto players and prevent them from making an informed choice or mislead them as to the nature of the purchase' 9.

⁶³ *Orange Polska* (n 57).

delivered to him by that courier cannot constitute an aggressive commercial practice.⁶⁴

It is correct that a practice will not automatically be aggressive merely because consumers do not have the opportunity to peruse information at their leisure. However, there will be situations where factors combine to mean that the lack of time a consumer has to make an informed choice can be strong evidence of aggression. In *Wind Tre* the CJEU emphasised that the concept of an aggressive commercial practice' was defined by the fact that it impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product.⁶⁵ It concluded that 'it follows that for a service to be solicited the consumer must have made a free choice. That supposes, in particular, that the information provided by the trader to the consumer is clear and adequate'.⁶⁶

Lack of information will therefore be a factor to be considered in the assessment of whether there is undue influence. In *Orange Polska*, it was found that undue influence will exist where the commercial practice is 'liable to make that consumer feel uncomfortable and thus to confuse his thinking in relation to the transactional decision.'⁶⁷ While this is most likely to occur where trader and consumer are face to face, such discomfort and confusion might arise within the high pressure environment of gaming.

As noted above, the offering of loot boxes might be described either as involving undue influence or as involving coercion. Willett suggests that as a result of the definition of the former, the consumer's restriction of choice in undue influence 'must specifically be a

⁶⁴ Para 45.

⁶⁵ *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA* Case C-54/17 para 45

⁶⁶ *Ibid.*

⁶⁷ *Orange Polska* (n 57) para 49

restriction of choice that results from an information problem.⁶⁸ Although it is submitted that decision-making in relation to loot boxes will seldom be fully-informed, coercion will in some respects be a broader and more flexible concept. Despite lacking a clear legislative definition, 'coercion' might be viewed as better reflecting the nature of the wrongdoing than undue influence. For example, there is no need for a position of power for a finding of coercion (although the presence of one is likely); the assessment is centred more on the precise nature of the trader's behaviour. Coercion seems to involve compelling or inducing someone to act in a particular way by improper means. Like undue influence, it can only be assessed by taking account of all the circumstances. The pressure (which is created in large part by the trader and will certainly be known to them) is thus central to the coercive character of an invitation to purchase a loot box. In both forms of aggressive practice, there is a significant compromising of the gamer's autonomy. In the context of consumer decision-making, autonomy may be viewed as 'the absence of vulnerability or the capacity to act upon the market in the consumer's self-interest'.⁶⁹ The circumstances in which loot boxes are commonly offered are those which cast doubt on autonomous, self-interested decision-making. Looking back to the definition of aggressive commercial practice, the reference to the restriction of freedom of choice stands out. The consumer who does not have the opportunity to reflect adequately on decision making as a result of pressure generated by the trader lacks the requisite freedom of choice and may be said to have been coerced.⁷⁰

The argument that the offering of loot boxes may be an aggressive commercial practice, whether through undue influence or coercion, is strengthened by the wording of regulation 7(2). This provides that in determining whether a commercial practice uses harassment, coercion or undue influence, account shall be taken of a range of factors. Some are particularly relevant in the context of loot boxes. For example, the provisions

⁶⁸ C Willett 'Fairness and Consumer Decision-Making under the Unfair Commercial Practices Directive' (2010) 33 JCP 247, 260.

⁶⁹ Rylan Calo 'Digital Market Manipulation' (2014) *Geo Wash L Rev* 995, 1034.

⁷⁰ See Willett 'Fairness and Consumer Decision-Making' n.68.

refer to the 'timing, location, nature or persistence' of the practice. Timing may be especially apt in this context. Loot boxes are typically offered to consumers at particular points in a game, and it will be important to consider the dynamics of the individual game in assessing whether that offer is aggressive. It is recognised that some practices may not be aggressive when they take place at certain times, but aggressive at other times. This could relate to times of the day (such as a telephone call at night) or, as in this case, at key points within a commercial activity. The loot box will commonly be offered when a consumer is at a crucial point in a game and thus most susceptible to making a purchase. This may be when the game is grinding, the gamer is frustrated, and it seems that the only way to advance is to take the chance on a loot box. This pressure will be the greater the more immersed the gamer is. The coercive character of the practice may be further increased by manipulative messaging. *The OFT Principles* offer the example of a message telling players to 'feed [a game character] ice cream or [the character] will be unhappy.'⁷¹ Similarly, the Advertising Standards Authority held that direct exhortations to purchase paid content forming part of freemium online games were in breach of the Code of Advertising Practice, particularly where paid membership was presented to children as necessary to improve popularity and satisfy in game characters. In the *Mind Candy* adjudication,⁷² which was concerned with the game Moshi Monsters, invitations to join the paid premium version of the game were accompanied by statements that "The Super Moshis [a type of in game character] need YOU" and "Members are going to be super popular." Such statements, when accompanied by a "Join Now" command were likely to "put pressure on young players to purchase the subscription that would allow them to take part in this aspect of the game." The more time-critical the decision is, the more it is likely to be aggressive.

⁷¹ *The OFT's Principles for online and app-based games* (OFT 1519), principle 6.

⁷² Available at <<https://www.asa.org.uk/rulings/mind-candy-ltd-a15-305018.html#.Vd2AJ9NVhBd>> (last visited 6th January 2021). See also 55 Pixels Ltd t/a Bin Weevils available at <<https://www.asa.org.uk/rulings/55-pixels-ltd-a15-305045.html#.Vd2AKNNVhBd>> (last visited 6th January 2021)

Another factor that regulation 7 mentions is 'the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which he is aware, to influence the consumer's decision with regard to the product.' This provision was designed to tackle conduct where traders exploit misfortune that they know to have befallen the consumer and which impairs the consumer's judgement. One example might be a funeral director who persuades a recently bereaved client to purchase an expensive coffin by associating such expenditure with the consumer's devotion to the bereaved. However, the circumstances within a game where a loot box is offered for purchase should be taken into account. Compared with the funeral example, the offer of a loot box within a game may appear somewhat trivial; but this underplays the extent to which consumers become immersed in games and the extent to which they become deeply attached to characters. This point should not be pressed too far, but the connection that gamers can feel towards their characters (which are frequently viewed as extensions of themselves) should not be underestimated. As will be seen below, this is particularly pertinent where more vulnerable individuals are concerned.

As an aggressive commercial practice 'significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned.' It is important to consider what is meant by 'freedom of choice or conduct'. In one sense, of course, consumers are 'free' to make a choice when offered loot boxes. They can decide that the game is not so important to win after all. They can 'choose' to resist the temptation to take a chance, remaining mired in grinding loops and conclude that progressing to the next chapter of the games story or to a new challenge isn't worth it. However, there must be a strong argument that the deep frustration generated by being unable to progress in particular ensures that the freedom to exercise choice is substantially impaired.⁷³

⁷³ Zagal et al, (n 60), identify the combination of grinding and pay to skip mechanisms as a dark pattern, a game design feature 'whose purpose can be argued as questionable, against a player's best interests, and perhaps even unethical.'

A final point to reiterate is that the aggressive practice must cause or be likely to cause the (average) consumer to take a transactional decision they would not have taken otherwise. As noted above, 'transactional decision' means:⁷⁴

any decision taken by a consumer concerning whether, how, and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumers decides to act or to refrain from acting.

The transactional decision requirement appears to permit a trader to argue that while there was undue influence, coercion or harassment, and while this significantly impaired or was likely significantly to impair, the average consumer's freedom of choice or conduct, it was nevertheless unlikely cause him to take a transactional decision he would not have taken otherwise.⁷⁵ However, once it is established that the average consumer's freedom of choice or conduct is substantially impaired, it surely follows that the average consumer might act differently. The transactional decision test appears superfluous and should not prove a barrier to enforcement action in practice once the other elements are demonstrated.

5. THE BENCHMARK OF THE AVERAGE CONSUMER

Central to any assessment of a commercial practice as unfair (whether by being misleading or aggressive) is the concept of the 'average consumer'.⁷⁶ The Regulations identify three types of average consumer which provide benchmarks by which to judge

⁷⁴ Reg 2(1).

⁷⁵ See P Cartwright 'Under Pressure' (n 47).

⁷⁶ See e.g. P Cartwright 'The Consumer Image within EU Law' in C Twigg-Flesner (ed) *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2016); Bram B Duivenvoorde *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer, 2015); Marine Friant-Perrot 'The Vulnerable Consumer in the UCPD and Other Provisions of EU Law' in Willem van Boom, Amandine Garde and Orkun Akseli *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge, 2016).

commercial practices. Which benchmark applies depends upon the circumstances surrounding the practice.

A. Standard Average Consumers

Where the commercial practice in question 'reaches or is addressed to a consumer or consumers' the Regulations state that 'account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.' This 'standard average consumer' benchmark is the default position and will typically be applied where commercial practices are not targeted at particular groups of consumer.⁷⁷ It is the test that the Court of Justice developed in a series of cases culminating in *Gut Springenheide*.⁷⁸ According to *OFT v Purely Creative* it reflects 'the common sense proposition that the Unfair Commercial Practices Directive exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer.'⁷⁹ The wording follows Community case law in trademarks and implies that a relatively objective test should be applied as a benchmark.⁸⁰ The Commission's Guidance views the (standard) average consumer as 'a reasonably critical person, conscious and circumspect in his or her market behaviour.'⁸¹ Precisely how strict this test is debateable. Abbamonte argues that it assumes that consumers should behave 'like rational economic operators' in that they 'should inform themselves about the quality and price of products and make efficient choices.'⁸² Incardona and Poncibo share Abbamonte's interpretation,

⁷⁷ Although as will be seen below, the average vulnerable test will sometimes be applied when the practice is not targeted.

⁷⁸ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung* [1998] ECR I-04657.

⁷⁹ [2011] EWHC 106.

⁸⁰ See for example *Estee Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* Case C-220/98 [2000] ECR I-117.

⁸¹ Commission Staff Working Document Guidance on the Implementation/ Application of Directive 2005/29/EC on Unfair Commercial Practices COM (2016) 320 final para 2.5.

⁸² G Abbamonte 'The Unfair Commercial Practices Directive and its General Prohibition' in S Weatherill U Bernitz *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart, 2007) 11, 24.

but express regret that it departs from 'the unpredictable realities of individual human behaviour'.⁸³ By contrast, Weatherill suggests that the test is appropriately (and more) sophisticated and flexible in its vision of the consumer. He concludes that the standard average consumer 'is smart enough to (for example) process disclosed information, but he or she is no perfect rational actor.'⁸⁴ It is true that national courts appear disinclined to adopt the strict standard that Abbamonte posited. Those courts have some discretion when applying the test. Recital 18 to the Directive makes clear that the average consumer test 'is not a statistical test' and that national courts and authorities have to exercise their own judgement to determine what an average consumer would understand and how he or she would behave. Case law reveals that this discretion is frequently exercised in a relatively consumer-friendly manner.⁸⁵ Duivenvoorde compared the application of the benchmarks in Member States to the case law of the CJEU and concluded that: 'none of the Member States researched illustrate the emphasis of the CJEU's case law on the consumer's responsibility to beware of potentially unfair commercial practices.'⁸⁶

Of particular concern from the perspective of consumer protection is the offering of loot boxes to consumers who may be less well-informed, observant and circumspect than the average. The Regulations allow the interests of such consumers to be considered through the average targeted benchmark and the average vulnerable benchmark.

Average Targeted Consumers

The second type of 'average consumer' is identified in regulation 2(4). This provides that where the commercial practice is 'directed to a particular group of consumers' the

⁸³ I Incardona and C Poncibo 'The average consumer, the unfair commercial practices directive and the cognitive revolution' (2007) 30 *Journal of Consumer Policy* 21

⁸⁴ S Weatherill, 'Who is the "Average Consumer"?' in S Weatherill and U Bernitz (n 82) 123.

⁸⁵ See Duivenvoorde (n 76).

⁸⁶ *Ibid* 156. It should be noted that while most of the discussion focuses on the application of the test in the context of misleading commercial practices, it is equally applicable to aggressive practices.

average consumer is 'the average member of that group'. This is the 'average targeted' standard.⁸⁷ In some respects, this may be the most appropriate test to apply when considering how loot boxes should be assessed as a commercial practice. The purpose of the average targeted test is to ensure that where a trader directs a commercial practice towards a particular group, the practice is judged by the benchmark of the average person within that group. The commercial practice of most relevance is the offering of loot boxes, for example when a consumer is struggling to proceed.⁸⁸ However, it is important to consider this against the background of the initial sale and marketing of the game in which the loot box is found. In most cases there will be no question of an aggressive practice at that earlier stage and it may be that there is no misleading practice. However, CAP Guidance suggests that the presence of loot boxes within a game may be material to some consumers, particularly those with specific vulnerabilities; for this reason any advertising should make clear that a game includes forms of random-item purchasing, as well as providing information of the type of item, in a prominent manner.⁸⁹ Furthermore, the initial marketing remains relevant because it frames and contextualises the later commercial practice. *The OFT Principles* provide a useful, albeit non-exhaustive, list of factors that may be considered in determining whether a game is targeted at children. This includes: the inclusion of characters popular with or likely to appeal to children; cartoon-like graphics; bright colours; simplistic gameplay and/or language; that the game concerns an activity that is likely to appeal to or be popular with children; that the game is available to be downloaded, signed up to or purchased by anyone and is not age-restricted; and that the game is featured in a children's section of

⁸⁷ See P Cartwright (n 76).

⁸⁸ Note that a failure to provide information that a game requires purchase of loot boxes to succeed in advance of purchase may amount to a misleading action (see OFT (n 71) principle 1, which provides 'the costs associated with a game should be provided clearly, accurately and prominently up-front, before the consumer begins to play, download or sign up to it or agrees to make a purchase' including 'any subsequent costs that are unavoidable if the consumer wishes to continue playing the game.')

⁸⁹ CAP Guidance (n 4) 10.

an app store.⁹⁰ Where there is targeting, the practice in question will be assessed against the benchmark of the average member of that group.

Alternatively, a game may not be aimed at a particular group, but may be likely to be played by members of that group. This again forms important background to the argument that the subsequent offer of a loot box is aggressive. This is because that subsequent offer is likely to be aimed at, or to affect, a consumer who is a member of the relevant group.

Average Vulnerable Consumers

Traders may argue that their games (and the loot boxes which they contain) are not 'targeted' at particular groups of consumers. They are available to all (subject to age classifications) and will be played by a heterogeneous range of individuals. However, a practice or product need not be aimed at a particular group of consumers for the courts to take account of any vulnerabilities that consumers who engage with it may be likely to possess. The Regulations state that:

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

This 'average vulnerable' consumer benchmark was one of the more controversial aspects of the Directive. An objective test based on the assumption that consumers

⁹⁰ The OFT Principles (n71) 19-20. In the 55 Pixels Ltd t/a Bin Weevils adjudication, above n 72, the ASA considered that a game that involved players creating, customising and controlling characters ("bin weevils"), decorating their habitat and playing mini-games "would have particular appeal to, and was targeted at, young children."

could be expected to be reasonably well informed, reasonably observant and circumspect (which largely reflected the position in UK law) was unacceptable to some member states.⁹¹ German courts, for example judged commercial practices from the perspective of the gullible consumer, the 'flüchtigen und unkritischen durchschnittsverbraucher'. The final iteration of the average consumer test represented a trade-off which, notwithstanding its limitations, can help address the interests of consumers when it comes to loot boxes.

The average vulnerable benchmark only applies where there is a 'clearly identifiable group of consumers' who are particularly vulnerable to the practice or the underlying product because of specific causes, namely: mental or physical infirmity, age or credulity. In addition, the vulnerability must be something that the trader could reasonably be expected to foresee. It can apply both where no group is targeted (but the trader should have realised the vulnerability of a particular group) and where one group is targeted, but the trader should have appreciated the vulnerability of another group.⁹²

There are various ways of grouping consumers who may be particularly susceptible to the detriment arising from loot boxes and some fall outside those elements specified in the average vulnerable test.⁹³ However, the elements therein provide a helpful framework for analysis. The final part of this article draws out the main causes of vulnerability identified in unfair commercial practices law and considers the implications of applying these benchmarks to assess the offering of loot boxes. This is relevant both when loot boxes are targeted at particular groups of consumers, and when they are merely likely to be received by them.

⁹¹ Howells (n 45) 111.

⁹² The requirement that the practice is likely to materially distort the economic behaviour only of that (vulnerable) group is curious and must be interpreted purposively. It seems inconceivable that the drafters of the legislation intended the test to be unavailable if the trader can find a different vulnerable group who might also have been vulnerable to the practice or product.

⁹³ Socio-economic factors such as poverty are notably absent.

6. LOOT BOXES AND VULNERABLE CONSUMERS

Loot Boxes and Younger Consumers

Recital 18 to the Directive explains the rationale for the average targeted standard, stating that where a practice is aimed at a particular group of consumers 'such as children' it is 'desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.' Games will frequently be targeted at children and the loot boxes they contain similarly so.⁹⁴ Many games are, of course, not aimed at children. Some are demonstrably not, something which a trader may attempt consciously to demonstrate through labelling and age classification. However, as explained above, a commercial practice will be assessed from the benchmark of the average vulnerable consumer where there is a 'clearly identifiable group of consumers' who are particularly vulnerable to the practice or the underlying product because of specific causes, one of which is age. Products not aimed at younger consumers will frequently be foreseeably likely to be used by them. According to recent research by the Gambling Health Alliance, 83% of children and young people play video games when they are below the set Pan-European Game Information (PEGI) age classification.⁹⁵ It will therefore potentially be relevant to assess a commercial practice by the benchmark of the average child. To be aggressive, the practice must at least be 'likely significantly to impair the average consumer's [in this case average child's] freedom of choice or conduct in relation to the product concerned.' It must also cause or be likely to cause the average child to take a transactional decision they would not otherwise have taken.

⁹⁴ There is significant interest in this area. See e.g the Children's Commissioner Report *Gaming the System* (2019) <https://www.childrenscommissioner.gov.uk/report/gaming-the-system/> (accessed 1 November 2021) and the Royal Society of Public Health's *Skins in the Game* (2019) <https://www.rsph.org.uk/our-work/policy/gambling/skins-in-the-game.html> (accessed 1 November 2021). See also the OFT Principles (n 71) for how such targeting might be identified.

⁹⁵ Gambling Health Alliance *Loot Boxes in Video Games: Call for Evidence* <file:///C:/Users/llzpc/Downloads/FINAL-GHA-submission-Loot-Boxes-call-for-evidence.pdf> (accessed 1 November 2021) PEGI (Pan European Game Information) is a video game rating system for Europe which applies age recommendations and content descriptors.

There is a clear difficulty in using the term 'average child' as 'children' covers a range of ages. The court or other body deciding the matter will need to determine the appropriate benchmark on the basis (a) the age range of consumer targeted and/or (b) the age range of consumers likely to be affected by a product. It may be easier to assess the benchmark for the former than the latter, although it will not always be straightforward. Applying an age range seems an appropriate way of capturing the wrong, with particular attention being paid to those within that range whose age makes them particularly vulnerable to the practice or product.

A key issue to consider is how age makes consumers more vulnerable and thus how the (likely) age or age range of the consumer affects whether a practice can be regarded as aggressive. There are several elements to this and it is perhaps most helpful to think of 'younger' consumers, covering both children and adolescents.⁹⁶

First, it is well-established that children and adolescents are likely to perceive information differently from adults.⁹⁷ While this is particularly relevant to whether a practice should be regarded as misleading, it is also important to whether it is aggressive for the reasons considered above. One important factor is that children and adolescents are typically less experienced than older consumers. In relation to the definition of average consumer in the Regulations, they can be expected to be less well-informed or observant than adults, and so less able to make informed transactional decisions.

Second, children may be more liable to feel and succumb to pressure than adults. Many videogames are clearly aimed at adolescents (as well as likely to be played by them).

⁹⁶ Children is taken to mean those under 11 and adolescents those 11-15.

⁹⁷ This is one factor that is likely to be in issue in group litigation brought against TikTok on behalf of children for alleged breaches of the EU and UK GDPR (see *S v TikTok Inc.* [2020] EWHC 3589 (QB)). However, the decision of the Supreme Court in *Lloyd v Google* [2021] UKSC 50; [2021] 3 WLR 1268 presents significant challenges for the success of this case, particularly in relation to the structure of the representative action and the claimed award of damages under the GDPR for loss of control, so it may be that the question of information processing by young consumers does not reach the courts.

Adolescents may be especially susceptible to peer pressure.⁹⁸ They are also more likely than many other groups to suffer from low self-esteem.⁹⁹ These experiences and traits will be relevant in many contexts. However, they may be particularly pertinent where multiplayer and co-operative games are concerned. Younger consumers, and especially adolescents, may feel significant pressure to spend money in order not to let their team down, or to fit into the prevailing social structures of a game.¹⁰⁰ Research has identified that motivations for purchasing loot boxes are varied, but include social factors, such as 'gaining status and approval or as part of a group experience' as well as fear of missing out.¹⁰¹ While this pressure will apply to consumers of different ages it may be particularly strongly felt by adolescents. According to a survey for the Gambling Commission, 52% of young people said that they had heard of in game items and 44% of those said that they had paid money to open loot boxes in order to try to get such items.¹⁰² Consumers in that age range may be particularly susceptible to pressure. Batat concludes that 'inexperienced, unknowledgable and unconfident adolescents may lack self-belief to such a degree that they suppress their better judgement'.¹⁰³ In the language of the average consumer benchmark, they can be expected to be less circumspect than older consumers. The Royal College of Psychiatrists has emphasised the connection between information and pressure, arguing that 'children are less prepared to deal with the

⁹⁸ GR Bachman, D John and AR Rao 'Children's susceptibility to peer group influence: An exploratory investigation' in Leigh McAllister and Michael L Rothschild (eds) *Advances in Consumer Research* (Association for Consumer Research, 1993) 463.

⁹⁹ See ML Wright, H Dittmar and R Banerjee 'Consumer culture ideals and motives: Links with well-being in childhood and adolescence'. Paper presented at the British Psychological Society Social Psychology Section Annual Conference, Cambridge 6-8 September (Wiley, 2011) cited in A Nairn 'Children as Vulnerable Consumers' in Kathy Hamilton, Susan Dunnett and Maria Piacentini *Consumer Vulnerability: Conditions, contexts and characteristics* (Routledge, 2016) 79, 84.

¹⁰⁰ See Li et al **Error! Bookmark not defined..**

¹⁰¹ Close and Lloyd (n 5) 2 .

¹⁰² Gambling Commission Young People and Gambling 2019 summary.

<https://www.gamblingcommission.gov.uk/statistics-and-research/publication/young-people-and-gambling-2019> (accessed 2 November 2021).

¹⁰³ W Batat 'An Adolescent-Centric Approach to Consumer Vulnerability: New Implications for Public Policy' in Hamilton et al *Consumer Vulnerability* (n 99) 103.

potentially addictive nature of some modern computer games and less able to make informed decisions about spending'.¹⁰⁴

There is ample evidence that traders are aware of the attractiveness of loot boxes to children. A 2019 Federal Trade Commission workshop on loot boxes suggested that they involve 'predatory tactics to encourage addictive consumer spending, particularly in children.'¹⁰⁵ There are several ways in which this is done, as the *OFT Principles* attest. The Commission's Guidance on the UCPD similarly observes that 'Online games or applications that are likely to concern children or teenagers, as a vulnerable group, are usually not solely targeted at children' but recognises that 'they often use cartoons or other features children or teenagers are typically attracted by.'¹⁰⁶

A further concern arises from the tendency to use harmful techniques such as implying that characters (and by extension the gamers controlling those characters) will not be popular unless particular sartorial choices are made. The *OFT Principles* give the following example:

[a] game allows a player to choose his/her own character, which represents that player in the game. The player can dress up the character by selecting items of clothing from a menu. The game says that a character will not be popular if it does not have a green hat.¹⁰⁷

In some cases, the gamer will be offered the chance to buy such an item, but in others they will be offered the chance to win it (in the form of a loot box). Cosmetic items in

¹⁰⁴ This led the College to conclude that in-game spending by children should be prohibited. See Written Evidence of the Royal College of Psychiatrists to the DCMS Inquiry: Immersive and Addictive Technologies. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/immersive-and-addictive-technologies/written/96861.pdf> (accessed 3 November 2021).

¹⁰⁵ Federal Trade Commission (n 16).

¹⁰⁶ Commission (n 81) para 2.6.2.

¹⁰⁷ OFT Guidance (n 71) (Principle 6). The *Mind Candy* adjudication, above n72, similarly identified that the statement that "members are going to be super popular" (which refers to the popularity of the player rather than the character) can put pressure on the player, particularly where the player is a child.

loot boxes are commonly referred to as 'skins' and are considered below. They raise slightly different issues and involve slightly different pressures from loot boxes that relate to game play. But they are particular concern for younger consumers in the context of cooperative games.

Mental or Physical Infirmary

Although it is possible that games are targeted at those with a mental or physical infirmity, it is more likely that the average vulnerable benchmark will come into play. That test only applies where the consumer is vulnerable 'in a way which the trader could reasonably be expected to foresee'. The Commission Guidance points out that the foreseeability requirement 'becomes relevant each time one needs to establish whether a given trader could have reasonable expected this practice to appeal in particular to vulnerable groups.'¹⁰⁸ It is submitted that the probability of there being consumers whose vulnerability stems from mental or physical infirmity is sufficiently high that this should not be a difficult hurdle for the enforcer to overcome.

The relationship between gaming and health is complex and a detailed examination is beyond the scope of this article. However, there will be consumers whose physical and mental infirmity is inextricably connected with gaming, and who are particularly susceptible as a consequence. According to the 11th *Revision of the International Classification of Diseases*, 'gaming disorder' is a pattern of behaviour which is characterised by:

impaired control over gaming, increasing priority given to gaming over other activities to the extent that gaming takes precedence over other interests and daily activities, and continuation or escalation of gaming despite the occurrence of negative consequences.¹⁰⁹

¹⁰⁸ Commission (n 81) para 2.6.2.

¹⁰⁹ WHO 'Addictive Behaviours: Gaming Disorder' (<https://www.who.int/news-room/q-a-detail/addictive-behaviours-gaming-disorder>). Accessed 2 November 2021.

A diagnosis of gaming disorder requires the behaviour to be sufficiently serious to result in 'significant impairment in personal, family, social, educational, occupational or other important areas of functioning'. It should also have been evident for at least 12 months.¹¹⁰ Conditions linked with gaming disorders include anxiety, depression, obesity, sleeping disorders, and stress.¹¹¹

It is understandable (and appropriate) that a significant amount of attention has been paid to the effects of gaming on physical and mental health. As one commentator puts it: '[g]amers need to be educated on how to protect their thumbs, wrists, and elbows, their waistlines, their emotional state, their sleep, and their eyes.'¹¹² However, for the purposes of the law on aggressive commercial practices, the key point is that consumers with gaming disorder are particularly vulnerable to the activities of traders and likely to take transactional decisions that they would not otherwise have taken. An inherent part of gaming disorder which is particularly important in this context is a diminished ability to control impulses and therefore to make informed and voluntary choices. The similarities between gaming and gambling have already been emphasised. Compelling evidence has recently been advanced of the close relationship between problem gambling and loot boxes.¹¹³ Drummond stated that loot boxes are 'designed to exploit potent psychological mechanisms associated with the development and maintenance of gambling-like behaviours.'¹¹⁴ Most recently, Close and Lloyd describe them as having 'structural and psychological similarities with gambling'.¹¹⁵ The full extent to which loot

¹¹⁰ Ibid.

¹¹¹ See Israel Oluwasegun Ayenigbara 'Gaming Disorder and Effects of Gaming on Health: an Overview' *Journal of Addiction Medicine and Therapeutic Science*.

¹¹² Peter Grinspoon 'The Health Effects of Too Much Gaming' *Harvard Health Blog* (22 December 2020). Available at: <https://www.health.harvard.edu/blog/the-health-effects-of-too-much-gaming-2020122221645> Accessed 2nd November 2021.

¹¹³ See Digital Culture Media and Sport Committee Immersive and Addictive Technologies 15th Report of Session 2017-19.

¹¹⁴ Aaron Drummond and James Sauer, Written Evidence to the Immersive Technologies Inquiry <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/immersive-and-addictive-technologies/written/94835.pdf> (accessed 3 November 2021).

¹¹⁵ Close and Lloyd (n 5).

boxes are a gateway to problem gambling as opposed to problem gamblers being drawn to games with loot boxes is not clear. While problem gamblers are likely to be drawn to loot boxes, and traders should foresee that, it has been suggested that there is now enough evidence to reliably conclude that loot boxes cause problem gambling ¹¹⁶ At the very least 'relationships' between engagement with loot boxes and problem gambling have been confirmed in a large number of studies.¹¹⁷ In the words of Tristan Harns:¹¹⁸

There is a set of techniques that are used by the tech industry under the guise of creating entertainment that mask other problems like addiction. They are basically about hijacking the deeper instincts of the human mind.

The probability and foreseeability that loot boxes will be purchased by those with conditions such as gaming or gambling disorder and exploitation that such a relationship would involve suggests that the offering of such products may be aggressive and should be assessed by the average vulnerable benchmark.

Credulity

The final element of vulnerability to consider is credulity. A difficulty with applying the credulity element of the benchmark (paraphrased by the EU's Guidance as 'naivety') concerns identifying who might comprise a clearly identifiable group of consumers that is particularly vulnerable through credibility (independent of age or infirmity). However, if it were found that the problem gambling or gaming falls short of mental or physical infirmity, it might still be argued that problem gamblers form clearly identifiable group who are particularly susceptible to manipulative practices on the basis of high levels of credulity.

Whether we argue that those particularly susceptible to the offer of loot boxes are suffering from infirmity or are particularly credulous in a way that falls short of that, it is

¹¹⁶ DCMS (n 113).

¹¹⁷ Close and Lloyd (n 5).

¹¹⁸ T Harns, Oral evidence taken on 22 May 2018, HC (2017–19) 363.

important that conclusions are based upon evidence.¹¹⁹ There is a significant body of literature within behavioural science that recognises how consumers perceive information and make decisions. In some cases the exploitation of cognitive biases will be at the heart of the wrongs associated with the offering of loot boxes. Several examples of these biases have been discussed in the context of loot boxes.¹²⁰ One is the 'gambler's fallacy' where an individual believes that they are more likely to win following a long period of losses. Another is the 'Near Miss Effect' where narrowly failing to win incentivises a person to continue. A third cognitive bias that is well-known is the 'sunk cost fallacy' where people feel compelled to continue spending having incurred expenditure so as not to feel or appear wasteful. These biases will be found in many people and while there has been discussion of the role of law in 'debiasing', achieving this will be difficult.¹²¹ However, it will be possible to argue that problem gamers/gamblers, even if they cannot be said to possess a mental or physical infirmity, may form a clearly identifiable group who are particularly vulnerable to the techniques used to offer loot boxes. On this basis, those practices should be assessed by the standard of the average member of that group.

There might be other groups for whom the credulity test is applicable. Engagement with loot boxes is particularly linked with consumers who are male, young (which in relation to children and adolescents is considered above) and of lower educational achievement.¹²² It does not seem a stretch to argue that such consumers are likely to be more 'credulous' than those of average educational achievement. Given that this is foreseeable (it is found in the literature) this may place higher expectations on traders to ensure that their practices are not aggressive to such consumers.

Vulnerability, Loot Boxes and Skins

¹¹⁹ See e.g. C Sunstein 'Empirically Informed Regulation' (2011) 78 U Chi L Rev 1349.

¹²⁰ These are examined in Hannah Heilburth, *Should the UK Regulate Loot Boxes as Gambling?* (University of Nottingham Dissertation, 2021).

¹²¹ See C Jolls and C Sunstein 'Debiasing Through Law' (2006) 35 J Legal Stud 199.

¹²² Close and Lloyd (n 5) 28.

The focus above has been on loot boxes which contribute towards gameplay, either by helping the gamer to win or progress. An additional form of loot boxes are those which are cosmetic but highly valuable to gamers. The primary example is what are commonly referred to as 'skins'. Skins are costumes or similar adornments that can be applied to a player's character to change their appearance.¹²³ For example, Activision Blizzard's *Overwatch* includes the purchase of loot boxes which may include skins, emotes, victory poses, voice lines, sprays and highlight intros which do not affect the game, but which affect how the player presents themselves in the game.

These examples of loot boxes present some different challenges from those on which this article focuses. However, it should not be concluded that merely because they do not present the same pressures as those examined, they cannot be aggressive. In such cases, the aggressive character of the commercial practice may stem from traders leveraging the immersion of the players in the game's milieu and the social importance of the prizes on offer. This may be particularly prominent in multiplayer games, and especially attractive to younger consumers and those lacking in self-esteem. It is not possible fully to justice to these items in this piece and it is an area where further research would be valuable.

Individualised Targeting and Aggression

The assumption so far is that the trader's conduct should typically be judged by the average targeted or vulnerable standard because they will generally be aiming their practice at consumers who are likely to be vulnerable, or because they should realise that there is a group of consumers who are particularly likely to be vulnerable to that practice. There is, however, an additional and important element that deserves further

¹²³ For the importance of skins in gaming see Lingyuan Li, Guo Freeman and Donghee Yvette Wohn 'Power in Skin: The Interplay of Self-Presentation, Tactical Play, and Spending in Fortnite' (2020) *CHI PLAY '20: Proceedings of the Annual Symposium on Computer-Human Interaction in Play* 71.

investigation; that of individualised targeting.¹²⁴ It is beyond the scope of this article to tackle the subject in the detail it deserves, but it is important to identify it as an area that demands further examination.¹²⁵

Individualised targeting will take place when the trader is able to ascertain details of the behaviour of a consumer in game and amend their offer accordingly. It is particularly prevalent where online gaming (especially 'games as a service') is concerned, with consumers 'consenting' to the collection of their data as a condition of playing the game.¹²⁶

Where the trader is collecting data about a consumer and making offers on the basis of conclusions its algorithm draws about an individual consumer, there is a particularly strong argument that the trader is in a position power vis a vis the consumer, forming the basis for undue influence. As has been discussed, that position must be exploited 'in a way which significantly limits the consumer's ability to make an informed decision'. The full extent to which traders are targeting consumers at an individual level remains unclear. However, it is known that patents have been awarded for algorithms which allow for this, for example adjusting the price of virtual items for individual users.¹²⁷ This raises similar concerns to those raised by online behavioural advertising and personalised pricing. But it also reveals the extent to which consumers could be

¹²⁴ See Steven C Bennett 'Regulating Online Behavioural Advertising' (2011) 44 J Marshall L Rev 899.

¹²⁵ See e.g. Daniel L King, Paul H Delfabbro, Sally M Gainsbury, Michael Dreier, Nancy Greer and Joel Billieux 'Unfair play? Video games as exploitative monetized services: An examination of game patents from a consumer protection perspective' (2019) 101 Computers in Human Behaviour 131 available at: <https://www.sciencedirect.com/science/article/pii/S0747563219302602> (last accessed 3 November 2021). See also Rylan Calo 'Digital Market Manipulation' (2014) Geo Wash L Rev 995; P Hacker 'Manipulation by Algorithms: Exploring the Triangle of Unfair Practice, Data Protection and Privacy Law' (forthcoming European Law Journal).

¹²⁶ See King et al (n 125)

¹²⁷ See e.g. Tim Ernst 'System and Method for Proving in-game pricing relative to player statistics' (2013) US Patent and Trade Mark Office Patent no.US9138639B1). See also King et al (n 125).

manipulated, particularly when they feel under great pressure to succeed for some of the reasons discussed above. As King et al argue:

[a]s the game system gathers more data on how various types of players behave under certain conditions, it becomes better equipped to present in-game events and purchasing situations that will elicit the desired behavioural outcome.¹²⁸

In this way, the practice is not only unfair vis a vis the individual consumer using the product, but gathers data that could help to construct the ability to behave in a way that allows the manipulation of a broader range of consumers with similar characteristics and behaviours.

Further research is needed on the extent to which such microtargeting is being used, both in relation to loot boxes and in the context of other However it is clear already that the technology exists to allow for the manipulation of vulnerable consumers on the basis of their behaviour in-game.

7. CONCLUSIONS

The prevalence of loot boxes in video games and the consumer detriment that their use is liable to cause are matters of significant social concern. Although this article contends that loot boxes are aggressive in relation to a wide range of consumers, concern at the impact that their use has on more vulnerable consumers is particularly great. There is a compelling argument that in the context of many games the offering of loot boxes will amount to an aggressive commercial practice and should be prohibited as such. While it is possible (and arguably desirable) to achieve some protection by reforming legislation on gambling, the law on aggressive commercial practices is well-suited to tackle the wrong in question. This is particularly so because it gets to the heart of that wrong: the exploitation of consumers, and particularly those who may be vulnerable, through coercion or undue influence. It is accepted that there are difficulties with the application

¹²⁸ King et al (n 125).

of some of the concepts investigated in this article. For example, the definition of 'vulnerable consumer' is unduly convoluted and provides a disincentive for enforcement action. The absence of a definition of coercion also introduces unnecessary uncertainty. The UK's departure from the European Union presents an opportunity for rethinking how vulnerability should be understood in the context of consumer policy, and there is no shortage of literature examining alternative definitions of the concept.¹²⁹ However, even without these changes, the existing Legislation provides a mechanism by which consumers, and particularly the most vulnerable, might be protected from harms arising from loot boxes. In the absence of additional protections, enforcers should take advantage of this mechanism as a matter of some urgency.

¹²⁹ See e.g P Cartwright 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38(2) *Journal of Consumer Policy* 119; Norbert Reich 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill *The Images of the Consumer in EU Law* (Bloomsbury, 2016) 139; C Riefa and S Saintier *Vulnerable Consumers and the Law* (Routledge, 2021).