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ELECTRONIC COMMERCE IN THE GAMING INDUSTRY. THE APPLICABILITY OF CONSUMER PROTECTION FRAMEWORK AND LEGAL CHALLENGES.

Ph.D. Thesis

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ABSTRACT

The present research examined the existing regulatory and contractual approach toward player versus gaming platform legal relationships both on the stage of the game acquisition and in-game transactions. The author analyses applicable regulations on the European Union level as well as existing contractual arrangements in the game industry in order to determine whether, considering the specifics of the digital products and business models offered, the current status can ensure consumer protection and, at the same time, facilitate innovation and business growth. The research focuses on gaps in existing legal procedures regulating gaming platform access, virtual transactions, consumers' counter-performance under "free" subscription contracts as well as intellectual property rights of parties. Within the course of the present work, the author stresses the necessity of new legal models' application in the gaming industry and underlines the importance of amendments to the current European legislation with the focus on video games' commoditization in order to protect consumer rights, free movement of digital goods and to secure Digital Single Market Strategy of the European Union.

DECLARATION

I, Olena Demchenko, do hereby declare that this dissertation is my original work compiled from university library books and online educational platforms and that it has not been presented and will not be presented to any other learning institution for a similar or any other award.

I can confirm that my thesis was copy edited for conventions of language, spelling and grammar through the online tool “Grammarly”.

I can confirm that my thesis includes copies of provisions of valid contractual arrangements between consumers and gaming platforms. All relevant citations are used respectively.

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INTRODUCTION

Since 1961, when MIT student Steven Russel created the first-ever video game "Spacewar", which inspired the further appearance of such popular video games as "Asteroids" and "Pong",[1] the gaming industry has significantly developed. Nowadays almost every electronic device has access to the Internet and both online and offline video games.

Together with the technological development, the new possibilities and technical means for concluding the contract being available in the market, electronic commerce (hereinafter referred to as – the "e-commerce") in the gaming industry became more sophisticated and nowadays involves transactions with digital assets, intangible virtual items and smart contracts with involvement of the crypto-currency and virtual tokens. At the same time, most of the European e-commerce regulations are focused only on traditional online shopping, purchase of software or digital goods, such as music, videos, and electronic books.

Looking at the European digital market, it can be seen that, apart from standard forms of transactions with digital items, various alternative digital goods and services are available for the European consumer: info-products distributed via Instagram online platform (consultations, checklist, Instagram marathons, narrative advertisement, subscriptions etc.); online markets for virtual intangible items being available on the gaming platforms (so-called "skins", virtual animals, virtual building, avatars etc.); online platforms for crypto-currencies, non-fungible tokens, in-game currencies; blockchain-based collectable items sold on Distributed Ledger Technology (hereinafter referred to as - "DLT") platforms. The above-mentioned list is not exclusive as the market offer for digital products and services is limited only to human's fantasy and technological innovations.

Moreover, the modern digital market has a variety of authorized and non-authorized online marketplaces for digital items, or so-called "program codes", which, when applied to the third-party platform, can become a virtual item, a loot box or can increase in-game tokens balance to be used for the further in-game transactions. The above stresses the need for a separate regulation for online marketplaces and gatekeepers focusing not only on the physical goods' transactions but as well as on the digital content and digital services.

[1] Ramos A., López L. et al., 'The Legal Status of Video Games: Comparative Analysis in National Approaches', World Intellectual Property Organization, 2013, available at: http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf.

The existing European legal framework cannot be applied to the variety of digital goods and digital services available in the market in order to secure a sufficient level of consumer protection law and ensure a balance between parties. Due to the fact that European harmonized rules are created with the focus on offline services and considering the current situation on the digital market, such a limited approach cannot satisfy the consumers' needs and facilitates unfair treatment in the transactions with digital items.

In 2020 the size of the European gaming market reached 23.3 billion euros in turnover, showing a gradual increase to 3.1 times since 2015, with 80% of the market share belonging to online transactions (both personal computers and mobile application).[2] The rising revenue numbers indicate the growth of the gaming market in Europe and, therefore, attract the attention of business owners and consumers within the European Union (hereinafter referred to as - the "EU"). In 2021 in the European region the number of users in the gaming industry reached 715,8 million,[3] in the EU 50% of the population plays video games[4] with the highest involvement from Germany, France, Italy, and Spain.[5]

As can be seen from the above-mentioned data, transactions in the gaming industry can involve significant money flow from the player to the game developers and gaming platform. The revenue can be generated from the subscription contracts in free-to-play (software is free, but the company gets revenue from in-game micro-transactions)[6] and pay-to-play (where the player pays for software in order to access the game)[7] or from various hybrid or alternative products (i.e., "pay-to-earn").[8] For the purpose of the present research, the author will focus on two main gaming models available in the market - free and paid subscription contracts. Therefore, the present research will focus on monetization of the gameplay per see and the notion of "free"

[2] Interactive Software Federation of Europe, '2021 Key Facts about European game sector', 2021, available at: https://www.isfe.eu/data-key-facts/key-facts-about-europe-s-video-games-sector/.

[3] Statista, 'Number of video gamers worldwide in 2021 by region', available at: https://www.statista.com/statistics/293304/number-video-gamers/#:~:text=In%202021%2C%20there%20were%20almost,billion%20gamers%20across%20the%20globe.

[4] Interactive Software Federation of Europe, note 2.

[5] Statista, 'Digital video games revenue in selected European countries in 2021', available at: https://www.statista.com/forecasts/461229/digital-games-revenue-european-countries-digital-market-outlook.

[6] Davidovichi-Nora M., 'Paid and Free Digital Business Models. Innovations in the Video Game Industry', Institut Mines-Telecom/Telecom-ParisTech, Digiworld Economic Journal, no. 94, 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534022.

[7] Ibid.

[8] News Report, 'GAME ON Play to earn games: What are the they and how to get started', the Sun, 2022, available at: https://www.thesun.co.uk/tech/17534658/play-to-earn-games-money/.

and "paid", which can be applied as well to the hybrid models and gaming models with the inclusion of withdrawal. As will be shown within the framework of the current research, the European consumer protection framework focuses on the paid digital content supply or paid digital service provisions, that, when applied to the gaming industry, would exclude in-game transactions in the free-to-play video games, as the subscription contracts are de jure free as per Terms and Conditions accepted by the players.

From the EU-wide gaming revenue perspective, 64% are generated from in-game transactions[9] in free-to-play video games, thus, games that are positioned in the market as "free" with the main business model focused on ad hoc digital content supply. Thus, the consumer, indeed, can play for free, however, the game interface facilitated in-game transactions for (1) functional virtual items that can enhance faster game scenario development or give advantage to the player, (2) cosmetic virtual items that facilitate consumer's creativity and creation of the derivative works, (3) virtual items with the element of chance, or so-called loot boxes. On the other hand, only 25% of yearly revenue is generated from the full game download and 11% from the game subscription, thus, only 36% comes from pay-to-play video games.[10] The present research will show that the existing consumer protection and e-commerce legal framework can provide a sufficient level of player protection only for that 36%, which does not fulfil consumers expectation and create a significant misbalance between parties in the gaming industry.

The author acknowledges that according to the Common position of European national authorities, the game cannot be called "free" if it is not totally free for the consumer (thus, without build-in payment options).[11] Therefore, games, which allow direct and indirect payments (i.e., in exchange for crypto-currency or in-game tokens) de jure cannot be called in the European Union "free-to-play". However, for convenience in understanding and classification, in the present thesis, the author uses the term "free-to-play" towards video games with free subscription and build-in payments for intangible virtual items purchases.

[9] Interactive Software Federation of Europe, note 2.
[10] Ibid.
[11] European Commission, 'Common Position of the national consumer enforcement authorities on consumer protection in relation to "in-app purchases" for on-line games', 2013, available at: https://ec.europa.eu/info/sites/info/files/common-position_of_national_authorities_within_cpc_2013_en_0.pdf.

A. Research Focus

The present research will analyse the existing European regulatory framework in relation to electronic commerce, consumer protection and player protection, and their applicability to the business models widely acceptable in the gaming industry. The author will give an inside look at the possible ways to apply the existing legal norms to specific digital services focusing on the transactions with intangible virtual items on the gaming platforms, particularly on transactions with digital content, trade of so-called "program codes" on in-game platforms and external secondary marketplaces.

The author will determine gaps in the existing contractual and regulatory approaches to the player versus developer relationships by analysing contractual provisions of standard term contracts of popular video games available in the market on the subject of the applicable law, transparency of contractual terms and information provision. The gaps identification can serve for further research in the area of consumer protection in the gaming industry. Moreover, the present research will propose solutions for equalization of the rights and lawful interests of both parties in order to facilitate balanced legal relationships in the gaming industry and protect the rights of the players. Such a proposal can be used not only by the academicians focusing on the gaming industry and law of information technologies, as well as by various European policymakers, regulatory authorities and judicial bodies.

Moreover, within the course of the current research, the author will focus in detail on the difference in monetary value in free-to-play and pay-to-play video games and will analyse various business models, psychological manipulations and unfair consumer practices in relation to the digital content purchase on the gaming platforms. For example, certain gaming platforms request players to top up a virtual wallet in the gaming account with in-game tokens (purchased priorly for fiat money) and further in-game transactions are performed in exchange for such in-game tokens. Such an approach does not allow players to estimate the economic consequences of the particular transaction and, as will be explained further, can be considered as unfair commercial practice.

The author uses the term "real-life money" with a reference to the monetary value of free-to-play video games, which corresponds to actual monetary input or investment expected from a player in order to purchase or obtain usage right for the particular intangible item. Such a monetary interest can be represented in fiat money, crypto-currency, in-game tokens or any other

mean of exchange where at the beginning of the transaction chain fiat money are invested by a player.

As explained in the numbers above, free-to-play video games constitute approximately 2/3 of the annual gaming revenue. This can be explained by the fact the players are attracted to the possibility of playing without paying for the software. However, the income is generated by facilitating further purchases of virtual items with functional (for example, virtual weapons) and cosmetic (for example, so-called "skin")[12] virtual items. As a general rule, such transactions require an insignificant amount of money (thus, so-called "micro-transactions"),[13] which does not allow players to estimate the total cost of a video game. For example, when a player purchases subscription to the pay-to-play video game with no build-in payments possibility, the total cost of the contract would be determined by a cost of such a subscription. In free-to-play subscription contracts, the price of the contract is determined as "free" with no monetary estimation.

Notwithstanding the micro-transaction business model explained, not all in-game transactions in free-to-play video games bear insignificant character. For example, in the Entropia Universe video game, a virtual "Club Neverdie" was purchased for 635,000 U.S. dollars, in "Second Life" video game, a virtual city of Amsterdam was sold for 50,000 U.S. dollars;[14] in the Dota 2 video game, a player spent 38,000 U.S. dollars for "Ethereal Flames Pink War Dog" virtual item.[15] In 2010 the most expensive video game item ever – virtual planet Calypso – was sold for 6 million U.S. dollars in Entropia Universe video game, which stipulates Guinness World Record.[16]

The above shows that revenue-generating transactions in the gaming industry fall out of the standard models of the business regulated on the European level. Therefore, the gaps in legal regulations applicable to the gaming industry around the EU currently facilitate differences in

[12] Holden J., 'Trifling and Gambling with Virtual Money', 25 UCLA Entertainment Law Review, No 41, 2018, available at: https://ssrn.com/abstract=3035892.

[13] Davidovichi-Nora, note 6.

[14] News Report, 'Top 10 Most Expensive Virtual Items In Game Ever Sold', GadgetRoyal, 2018, available at: https://www.gadgetroyal.com/top-10-most-expensive-virtual-items-in-game-ever-sold.

[15] Ibid.

[16] Ibid; Guinness World Record, available at: https://www.guinnessworldrecords.com/world-records/92207-most-valuable-virtual-object.

the practical application, lack of legal certainty and do not fulfil customer expectations regarding the level of legal protection, including but not limited to expectations on customer guarantees regarding gratuitous content in video games.

As will be investigated further, such a lack of regulatory oversight and impossibility of legal enforcement allows gaming platforms to dictate contractual provisions to standard terms subscription contracts with consumers and unilaterally decide on the legal framework applicable. Particularly, as will be explained in the present research, due to the historical approach applied to the first software programs, up to the current date the gaming platforms apply intellectual property framework as a law analogy to the consumer versus trader relationships. The author will analyse specific terms of the various subscription contracts in the scope of the nature of business relationships between users and game developers and will provide alternative legal opinions towards the applicable framework.

B. Research Framework

In 2020 in the European Union, FIFA (by Electronic Arts), League of Legends (by Riot Games), Counter Strike (by Valve Corporation) and Overwatch (by Blizzard Entertainment) were named as the most popular video games.[17] The present research will analyse terms included in standard term subscription contracts or to the Terms of Service or End User Licence Agreement (hereinafter referred to as - the "EULA") of the above-mentioned games and will investigate consumer practices applied by the top revenue-generating gaming platforms in the EU.

The European regulatory framework on e-commerce, including but not limited to the consumer protection in e-commerce, consists of more than 90 different normative acts, explanatory notes from the European Commission as well as the prospective regulatory acts. However, the current research will focus, particularly, on the provisions included in:

(1) the Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of the Regions, A Digital Single Market Strategy for Europe (hereinafter referred to as - the "Digital Single Market Strategy"), lying down the principles on harmonization of the regulations in the

[17] Interactive Software Federation of Europe, note 2.

digital world and establishing general approach towards regulations development in the European Union on the cross-border digital contracts;

(2) the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (hereinafter referred to as - the "Consumer Rights Directive") focusing on the general provisions regarding consumer rights, traders' obligation in B2C contracts including contracts with digital elements;

(3) the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (hereinafter referred to as - the "New Deal for Consumers") focusing on the changes to the regulatory framework in relation to the cross-border digital service provision and digital service supply;

(4) the 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 (hereinafter referred to as - the "E-Commerce Directive") focusing on the mandatory contractual provisions and contractual obligations in B2C contracts concluded through electronic means;

(5) the Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods (hereinafter referred to as – "Digital Goods Directive"), focusing on the mandatory contractual provisions and contractual obligations in B2C contracts on digital goods provision;

(6) the Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter referred to as – "Digital Content Directive"), focusing on the mandatory contractual provisions and contractual obligations in B2C contracts on digital content supply or digital service provision;

(7) the Explanatory Memorandum, Proposal for a Regulation on the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC (hereinafter referred to as - the "Digital Services Act"), focusing on the

mandatory contractual provisions and contractual obligations in B2C contracts concluded on e-commerce online platforms acting as intermediaries as well as the provisions regarding illegal digital content;

(8) the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (hereinafter referred to as - the "Intermediation Services Regulation") focusing on the general provisions regulating intermediaries in B2C contracts, including but not limited to online platforms acting as intermediaries.

As will be investigated further in the present research, specific provisions of the regulations included in the European e-commerce and consumer protection framework cannot be applied to the player versus developer relationship in free-to-play video games due to the specific nature of the business models applied - audio-visual content, gratuitous software access, possibility to create own digital content (i.e., skins, avatars), in-game token transactions and availability of third-party digital content specific marketplaces. The author will analyse the above-mentioned acts, their scope and specific provisions that can be applied directly or as a legal analogy and will lay down the base for further research in this area for academicians and European policymakers.

C. Research Questions

The study is designed in order to analyse the existing consumer protection and electronic commerce framework in the scope of their applicability to the hybrid business models, alternative payment methods and online marketplaces for virtual items trade inter alia used in the gaming industry. For that the author will answer the following research questions:

1. Can the existing consumer protection and electronic commerce legal framework efficiently protect consumers from unfair treatment and ensure the balance between the parties considering the standard contract terms usage in the gaming industry?
    A. Which provisions can be applied to the gaming platform versus user legal relationships from the scope of the European consumer protection framework taking into account specifics of the electronic commerce activities in the gaming industry?

   B. What are the legal gaps in the existing legal framework on consumer protection and electronic commerce in relation to the gaming industry in the European Union?
2. Can the existing regulatory approach applied to the gaming industry ensure the balance between the rights and lawful interests of the parties and facilitate the equal level of consumer guarantees between traditional and innovative ways of business conclusion used in the gaming industry?
   A. What is the existing legal and regulatory approach used in the gaming industry?
   B. What are the gaps in the existing legal and regulatory approach used in the gaming industry from the perspective of consumer protection in the European Union?
   C. What is the most suitable legal and regulatory approach from the perspective of consumer protection in the gaming industry taking into account innovative models of electronic commerce used in the gaming industry?

As explained above, within the course of the present research the author will analyse European consumer protection and electronic commerce framework, doctrine and provisions of valid contract used by the popular gaming platforms and will answer the research questions proposed in the conclusion part of the present thesis.

D. Research Methodology

The author will use the qualitative content analysis and analytical legal research methodology as the main research methods in the current thesis in order to determine which provisions in the current European e-commerce and consumer protection framework can be applied to the (1) obtaining access to the video game (free-to-play and pay-to-play video games) as software and to the (2) in-game transactions on the virtual content purchase. As well as using qualitative content analysis and analytical legal research methods, the author will identify legal gaps in the particular European regulations and directives and will determine the way forward in order to secure European Digital Single Market Strategy and to provide equal treatment and consumer protection guarantees to the players in the European Union.

The author will separate legal notions used in the European regulatory framework (applicable to gaming industry), for example, notions of the “digital content”, “digital service”, “monetary

value", "online platform" and will use the descriptive methodology in order to determine characteristics of the legal terms used in order to define whether existing legal norms and definitions can be applied to the player versus developer relationships and, particularly, to the transactions in the virtual world.

Apart from the descriptive analysis, the author will use the method of historical analysis in order to investigate legal developments in determining notions and formation of concepts that are used in the European e-commerce and consumer protection framework in the scope of the digital market developments and involvement of innovative solutions in the European digital environment. The historical analysis can help understand the reasoning behind the current situation in contractual relationships. For example, as will be explained further, looking back at the emergence of the software market, the intellectual property approach was used as a legal analogy due to the lack of regulations. The same is applicable to the actual situation in the gaming market.

Moreover, the author will focus not only on the EU-wide harmonized framework but as well as the national legal norms of the different European member states (hereinafter referred to as – the "Member states") using the comparative research method. The present research will investigate the difference in legal regulations applications around the European Union and will underline the need for the harmonisation of approaches in regard to the particular digital content supply (i.e., loot boxes) in order to secure the Digital Single Market Strategy.

E. Research Structure

The present research will analyse particular legal notions applied the gaming transactions in various online platforms and secondary marketplaces, or so-called program code trade, and will examine legal challenges arising in the connection with the application of intellectual property rules, contract or property law to in-game transactions and will show possible ways to amend the rules regulating e-commerce, conformity of goods, particular consumer protection rules and gambling regulations in connection to commoditized free-to-play video games.

Chapter I will focus on the particular definitions used in the European electronic commerce and consumer protection framework and their applicability to the gaming industry. In the present chapter the author will analyse accepted notions on the European community (hereinafter referred to as - the "Community") level, such as electronic commerce, information society services, digital goods, digital services, goods with digital elements, and will explain how such

notions can be applied to the various types of business model available on the gaming market, for example, free-to-play, pay-to-play video games, games with the usage of augmented or virtual reality, online marketplaces for virtual items, shared collaboration platforms etc. The mentioned analysis can facilitate the determination of possible gaps in legal regulations and applicable legal framework to the in-game transactions and virtual items purchase in order to secure consumer and minor's protection.

Chapter II will explain the existing approach to the game developer versus player legal relationships with the usage of examples from popular video games. Particularly, the author will examine the nature of the factual legal relationships between parties and their correlation to the contractual provisions of the standard term contracts used widely in the industry. The present chapter will investigate whether the sole intellectual property law approach can satisfy legitimate interests of both parties and will examine alternative legal views present in the doctrine, for example, the "no legal intervention" approach, property law or contract law approach. Chapter II can provide legal guidance to the contractual provisions to be included in Terms of Service or End User Licence Agreements used by the gaming platforms in order to ensure the balance between rights, obligations and legitimate interests of both parties. Moreover, the author will examine legal acts and regulations on the Community level that can be applied to the gaming industry and in-game transactions per se and will analyse whether the existing framework can provide a sufficient level of consumer and minors protection that corresponds to the consumers' expectations and the pillars of the European Union.

Chapter III will focus on the specific legal challenges and legal gaps that take place in the gaming industry identified in the previous chapters. Particularly, the author will explain in detail the hybrid models and free subscription contracts used in the gaming industry, especially, in free-to-play video games and which contractual provisions are used by gaming platforms to override electronic-commerce and consumer protection regulations in the EU. The present chapter will focus on specific issues in the consumer protection framework, such as transparency requirements and conformity requirements, that are applicable in the digital environment and gaming industry itself. Additionally, the author will examine the legal issues connected with the loot boxes availability in video games and the effect it has on the applicability of the gambling regulations in the European Union and player protection framework. The author will

provide an overview of the legal gaps currently present in the legal relationships between players and gaming platforms and will show an alternative view on solutions to such non-compliances in order to ensure the balance between parties and player protection on the Community level.

F. Research Significance

Considering the significance of transactions in the video game industry on intangible items purchase, the author will underline the urgent need to adapt existing rules in order to protect consumer rights in the gaming industry and to secure the Digital Single Market policy of the EU. The present research can be used by the policymakers in order to amend the existing legal framework in the European Union on electronic commerce, consumer protection and players protection. In the same way, the present thesis can be used by practitioners in the industry as guidance for restoring the rights of players in a dispute resolution, mitigation or negotiation in relationships between consumers and game developers.

The present research can serve as a turning point for the amendment of age classification of the video games and the implementation of the game labelling system on the Community level. Moreover, the present research can be used by players in order to obtain information on the minimum scope of the rights, obligations and legitimate interests that has to be maintained by the game developers in standard term contracts in the gaming industry.

The main goal of the present thesis is to show an underestimation of the gaming industry, to determine legal gaps in e-commerce and consumer protection framework, and to facilitate further research and regulatory changes in order to secure European Digital Single Market strategy, to protect the rights of the consumers, players and minors, and to facilitate balanced legal relationships in the gaming industry. This will ensure healthy growth of the market, will attract more consumers and will provide a basis for innovation due to the legal certainty and practical enforceability of the legal regulations.

I. THE DEFINITIONS USED IN THE EUROPEAN ELECTRONIC COMMERCE AND CONSUMER PROTECTION FRAMEWORK AND THEIR APPLICABILITY TO THE GAMING INDUSTRY

The Treaty on the Functioning of the European Union (hereinafter referred to as - "TFEU") identifies the consumer protection issues under shared competence of the European Union and the Member states.[18] However, looking into the historical developments of the European consumer protection framework, it can be seen that the harmonization, particularly harmonization, over the definitions and, as the result, the scope of the consumer protection, was a primary issue in the consumer law of the European Union.[19]

Until resent, the consumer contracts, in which the digital goods and services were represented not on a tangible medium, were not regulated on the Community level in the European Union. The European policymakers were focused mainly on the offline sale of goods and offline service provisions. Therefore, in order to evaluate whether definitions that were historically developed in the European consumer protection and electronic commerce framework can satisfy modern reality needs, the historical background of the definitions used in the EU regulations should be examined.

[18] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, articles 4, 12, 114.

[19] Luczak A., 'Evolution of Consumer Protection Law in the Proposal for a Horizontal Directive on Consumer Rights and Rome I Regulation', Wroclaw Review of Law, Administration and Economics, 2011, available at: https://content.sciendo.com/downloadpdf/journals/wrlae/1/2/article-p121.xml; Case C-361/89, Criminal proceedings against Patrice Di Pinto, [1991] ECR I-01189; Case C-45/96, Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger [1998] ECR I-01199.

The roots of consumer protection in a modern society lie down in the first special program for consumer protection information policy adopted by the European Council in 1975.[20] This program served as a basis for the current directives and regulations including ones regulating consumer protection and electronic commerce nowadays,[21] even despite the fact that the above-mentioned program was focused mostly on offline relationships between the trader and the consumer.

The next step in the consumer protection regulations' development was concluded by the adoption of the following directives:

(1) the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;
(2) the European Parliament and the Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts;
(3) the European Parliament and the Council Directive 99/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,

which served as the basis for the further harmonization of the consumer protection law and the adoption of the Consumer Rights Directive.[22]

Currently over 90 EU directives regulate various consumer protection issues.[23] However, not all the provisions of the complex consumer protection regulatory framework in the European Union can address issues arising from the digital service provisions in virtual worlds. One of the examples can be consumer protection in contracts on gratuitous digital content, including, subscription or access to free-to-play video games.

Indeed, certain European directives and regulations went through multiple amendments and review procedures in order to adapt to modern realities. For example, Annex I to the Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts listed the following means of concluding contracts on distance:

[20] Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C-092, 25 April 1975.

[21] Valant J., 'Consumer protection in the EU. Policy overview', European Parliamentary Research Service, Members' Research Service, 2015, PE 565.904, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf.

[22] Eidenmuller H., Faust F. et al., 'The Common Frame of References for European Private Law: Policy Choices and Codification Problems', Oxford Journal of Legal Studies, Vol. 28, Issue 4, pp. 659-708, 2008, available at: http://www.ssrn.com/SSRN-id-1269270.pdf.

[23] Valant J., note 21.

(1) "Unaddressed printed matter;

(2) Addressed printed matter;

(3) Standard letter;

(4) Press advertising with order form;

(5) Catalogue;

(6) Telephone with human intervention;

(7) Telephone without human intervention (automatic calling machine, audiotext);

(8) Radio;

(9) Videophone (telephone with screen);

(10) Videotex (microcomputer and television screen) with keyboard or touch screen;

(11) Electronic mail;

(12) Facsimile machine (fax);

(13) *Television (teleshopping).*"[24]

The mentioned Annex raised further questions and resulted in differences in the application by the various Member states. In order to harmonize application and provide a higher level of legal certainty the Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations was adopted.[25] The directive stipulated exceptional cases for distance contracts and clarified the definition of the "electronic means", which in future served as a basis for the E-Commerce Directive.

Worth underlining, that in 1998 the participation in electronic video games, particularly games located in video-arcade premises where the customer was physically present was not considered as services provided at a distance.[26] The above shows that the approach taken in the European legal framework in 1998 was focusing on the simple consumer versus trader relation-

[24] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent OJ L 144, 4.6.1997, p. 19–27, Annex I.

[25] Directive 98/48/EC of the European Parliament and of the Council of of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, Annex V.

[26] Ibid.

ships without taking into account different possibilities in technological development. Unfortunately, this approach was not sufficient to grant a proper level of consumer protection and to be sustainable over time.

Nowadays, a simple-looking video game available on a machine placed in the shopping mall can involve complex legal relationships and various parties involved - i.e., video game developer, platform provider or aggregator, third-party service providers, shared collaboration platform etc. The complexity of legal relationships related to digital content and information technologies platforms created the push to the relevant definitions evolvement and followed the adoption of the E-Commerce Directive and Consumer Rights Directive.

E-Commerce Directive, particularly, in detail addressed issues arising from the contract conclusion through electronic means, use of intermediaries and various online platforms. E-Commerce Directive brought into the spotlight the notion of information society services, which was previously defined per the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.[27] The definition of information society services present in E-Commerce Directive covers services that are provided by electronic means, particularly by electronic equipment for the processing (including digital compression) and storage of data.[28]

Considering the above mentioned, the definitions, that were used historically in the European consumer protection framework, reflect the changes in the service provision and business models available over time, as well as shows strong interconnectivity between definitions used in the various consumer directives and regulations – definitions on “distance contract”, “electronic means”, “information society services” correlate between one another and are used to describe alternative means of concluding a contract in the digital environment.

[27] 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 178, 17.7.2000, par 17.

[28] Ibid.

With the fast technological development and availability of the new means of payment processing and contract conclusion, for example, online platforms, mobile applications, blockchain technology, augmented reality and physical goods with digital elements (i.e., smart home devices), the above-mentioned notions and concepts could not anymore satisfy consumer needs and grant sufficient level of the consumer protection.

Therefore, in order to cover various business models and in to eliminate the necessity in a constant regulatory update once a new technology is released to the market, the European Commission took a general approach regarding definitions in distance and off-premises contract in the following Consumer Rights Directive. Such a general approach allowed to leave room for flexibility in application to the new technological means in contract conclusion and addressing the usage of intermediaries. The new Consumer Rights Directive stated that the distance contract should cover all cases where a contract is concluded with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) and as well should include offerings provided by a third party used by the trader, such as online platforms.[29]

Consumer Rights Directive was considered as a step forward towards the harmonization of the consumer law in the European Union and addressing the issues arising from, currently considered as standard ones, such forms of business as online shopping and service provision at various online platforms.

Worth mentioning that the Consumer Rights Directive as well introduced the definitions of "online platforms" and "digital content". Even though the definition of "online platforms" is still out of the scope of the harmonization in the European Union, however, the notion of "digital content" mentioned in the Consumer Rights Directive was developed further within the framework of the Digital Single Market Strategy of the European Union.[30]

Unfortunately, the issues arising from the contracts on digital content supply or digital service provisions, particularly transactions with intangible virtual items (digital content, which is not

[29] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance OJ L 304, 22.11.2011, p. 64–88, par 20.

[30] Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM/2015/0192.

represented on tangible medium), were excluded from the scope of main European directives regulating trader versus consumer relationships, for example, Consumer Rights Directive [31] or Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (hereinafter referred to as - the "Geo-Blocking Regulation").[32]

Together with the further development of the cross-border online service provision, the European policymakers determined the need in the harmonization of the rules specifically for the digital goods supply and the digital service provisions in order to eliminate differences in the application of the mandatory consumer contract law rules,[33] expanding already existing definitions and detailing already existing consumer protection framework.

Such a harmonization resulted in the adoption of the Digital Goods Directive and the Digital Content Directive. The above-mentioned directives brought legal certainty into the digital contracts area, particularly above all, by providing clear definitions of "digital content", "digital goods", "digital services", which bears importance to the efficiency of consumer protection and legal rules applicability.

From the above-provided historical overview, it can be seen that the scalability of the digitalization, availability of the alternative payment methods and innovative approaches to the cross-border service provision resulted in the constant review of existing definitions. Moreover, such a review and amendment has moved towards generalization in order to include as many as possible variations of the e-commerce models and provide legal certainty to the users of such innovative technologies.

[31] Consumer Rights Directive, note 29.

[32] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, par 8.

[33] Commission stuff working document, on the Impacts of fully harmonised rules on contracts for the sales of goods supplementing the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels, 31.10.2017, SWD(2017) 354.

Notwithstanding the generalization and the constant review procedure, the existing e-commerce and consumer protection regulations of the EU cannot satisfy consumer expectations in the legal protections leaving room for various legal uncertainties. For example, the rights and obligation in gratuitous contracts on the digital content (except specific cases where digital content is transferred in exchange for personal data) or when alternative payment methods are used (i.e., crypto-currencies).

The Coronavirus pandemic in 2020 caused widespread of various electronic business models and brought up attention to the existing gaps in the legal regulation on digital content, including but not limited to the definitions of digital content and illegal digital content.[34] The scalability of online business triggered regulative work in the European Parliament in order to adopt a uniform harmonized Digital Service Act focused on the digital content offerings on various online platforms.[35]

The cross-border nature of the online gaming business, its impact on 50% of the European population, increase in gaming activity due to the pandemic[36] should trigger the review of the current approach to the gaming transactions and result in the creation of a harmonized framework of the consumer protection and e-commerce regulation focusing on the gaming platforms targeting European consumers.

In order to understand the scope of the amendments or harmonization required to the consumer protections under the current European legal framework and to discover gaps in the legal regulations connected to the trader's offerings in the modern digital world, the relevant definitions applicable to the electronic commerce framework in the EU should be investigated in detail.

The present chapter will focus on the definition used by the European policymakers regulating issues connected to electronic commerce and consumer rights protection in a digital environment. The author will investigate whether those definitions can be applied to transactions with virtual items in free-to-play video games. Particularly, this chapter will examine whether notions of "digital services", "digital content" and "digital goods" can be applied to the gaming

[34] Report on the Digital Services Act and fundamental rights issues posed, 2020/2022(INI), Committee on Civil Liberties, Justice and Home Affairs, available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0172_EN.html.

[35] Explanatory Memorandum, Proposal for a Regulation on the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15.12.2020, COM (2020) 825.

[36] Interactive Software Federation of Europe, note 2.

industry and, if so, in which particular cases. Moreover, the author will determine the types of platforms that can be defined as "online platforms" with a focus on the views and interpretation existing in the doctrine and will analyse whether in-game transactions can be qualified as "electronic commerce" or "information society services".

The present chapter will analyse the scope of existing European regulatory acts and their applicability to the gaming industry, particularly:

(1) Customer Rights Directive

(2) Digital Content Directive

(3) Digital Goods Directive

(4) Digital Service Act

The author will use examples from the existing video game EULAs in order to define the applicable legal norms and to determine the legal nature of developer versus user relationships in video games available in the EU market.

Considering the specific features and the scalability of the gaming industry in the EU, it is important to determine the place of the transactions with virtual items in the virtual world in the regulatory framework in order to protect consumers, to secure the rights of minors and to support the European Digital Single Market Strategy.

1. The Notions of the Electronic Commerce, Information Society Service and their Applicability to the Gaming Industry

In order to determine the scope and applicability of various legal norms included in the European e-commerce and consumer protection framework to the transactions in the gaming industry, first of all, general notions such as "e-commerce" and "information society services" should be analysed.

In the present part, the author will focus on the definitions of "e-commerce" and "information society services" accepted on the Community level in order to analyse whether video games per se (free-to-play and pay-to-play), as well as in-game transactions on intangible items purchase, can fall under the scope of those definitions and the relevant regulations consequently.

A. Electronic Commerce

E-commerce can be defined as electronic business activity[37], which is based on the exchange of tangible and intangible goods and services through electronic communication and can be expressed in various shapes – from online delivery of digital content to public procurement[38]. The notion of e-commerce changes over time in connection with technological development and the usage of both B2B and B2C transactions.[39]

First attempts to define e-commerce in the European Union (hereinafter referred to as the "Union") can be traced back to the 1996 Communication from the European Commission.[40] Initially, on the Union level as e-commerce was defined as goods supply via postal services.[41] Unfortunately, such a general definition was limiting the scope of the e-commerce regulations' application to specific delivery channels.

Later, in 1997, following the widespread of the e-commerce activity and the telecommunication services development, the European Initiative on Electronic Commerce was introduced on the Community level.[42] The European Initiative on Electronic Commerce further determined e-commerce as an electronic business activity that is based on the electronic processing and transmission of data, including text, sound and video, which includes diverse activities including electronic trading of goods and services, online delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design and engineering, online sourcing, public procurement, direct consumer marketing and

[37] Kalinauskaite, A., 'E-commerce and Privacy in the EU and the USA', LL.M. Paper, Ghent University, Master of Advanced Studies in European Law Ghent, 2012, available at: https://lib.ugent.be/fulltxt/RUG01/001/892/218/RUG01-001892218_2012_0001_AC.pdf; E-Commerce Directive, note 26.

[38] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM (97) 157 final, 1997, p. 8, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0157:FIN:EN:PDF, (last visited 23 October 2018).

[39] Kalinauskaite A., note 37.

[40] Lodder, A.R., Murray, A.D., 'The European Union and E-Commerce', EU Regulation of E-Commerce. A Commentary Elgar Commentaries series, 2017, available at: https://ssrn.com/abstract=2925882.

[41] Dublin European Council 13 and 14 December 1996, Presidency Conclusions, DOC/96/8, available at: https://ec.europa.eu/commission/presscorner/detail/en/DOC_96_8.

[42] A European Initiative on Electronic Commerce, COM (97) 157 final, 16.4.1997.

after-sales service.[43] As can be seen, the notion of e-commerce was widened to involve alternative delivery and payment channels.

Electronic commerce was defined through products and services, through traditional activities and new activities, through indirect (electronic ordering of tangible goods), as well as direct (online delivery of intangibles) digital activity.[44] Thus, back in 1997, the European Union took a wide approach defining electronic commerce and included all possible and available in the future e-commerce offers, including but not limited to collaborative gaming platforms, blockchain applications and pay-to-play video games.

Later on, the explanation of the e-commerce definition was changed to "*any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact*".[45] Thus the approach was changed to a general one, presumably in order not to limit any further technological developments in ways of contract conclusion or delivery channels. The above-provided definition focuses on the parties' interaction - contracts concluded on distance or through electronic means. However, taking into account already existing hybrid models, in which consumer versus trader interaction can be done both online and offline, for example, e-sport tournaments where tournament organizers, game developers and players are present in the same premises offline, however, the service performed in majority online, such a definition would require further clarification.

With the adoption of the E-Commerce Directive, the definition provided in the European Initiative on Electronic Commerce was narrowed down on the stage of implementation of actual legal norms. Thus, with the adoption of specific e-commerce rules and mandatory contractual requirements, the focus of the regulatory framework was shifted on the limited types of transactions, such as the online purchase of tangible goods, intermediary services. Notwithstanding the general approach to the e-commerce definition, the actual harmonized e-commerce framework provided various exclusions and exceptions, which resulted in a lack of legal certainty in relation to the transactions with intangible items or digital goods and services.

[43] Ibid.

[44] Ibid.

[45] Noll J., 'The European Community's Legislation on E-Commerce', University of Vienna, 2001, available at: https://ssrn.com/abstract=288942.

One of the main purposes of e-commerce per se is the facilitation of cross-border trade and cross-border service provisions.[46] E-commerce development reduces information asymmetries (when one party of a contractual relationships has more valuable information than the other party), search costs (the costs spent to find relevant products or customers), and transaction costs (the cost of market participation) for market participants.[47] However, on the other hand, digital economy and e-commerce can facilitate unfair consumer practices that are not possible in the offline world, for example, price discrimination (geo-blocking, selling and the same goods, providing the same services to different targeted groups at different prices), and dynamic pricing strategies (variability of the price depending on the demand characteristics or the supply situation).[48] Therefore, harmonized and balanced e-commerce framework is crucial to fair treatment in all digital industries targeting European consumers.

Unfortunately, at the current date, the e-commerce market in the Member states is unequal and diversified following, among others, the respective legal regulations.[49] Therefore, in order to secure equal treatment and consumer protection within e-commerce activity, specific legal norms should be adopted including but not limited to general and sector-specific mandatory contractual requirements and customer protection guarantees in order to secure fair treatment, legal certainty and balance between rights and lawful interests of all parties active at the market.

Back in 1999, the European Commission's Information Society Directorate General and the Internal Market Directorate General underlined that cross-border e-commerce requires a clear and predictable legal framework.[50] However, over time with the fast technological development, the existing e-commerce framework, together with various legal exceptions or "grey" zones in legal regulations, provided a background for unfair treatment.

In the fast-changing world of technologies, legal norms are not able to change so fast. Therefore, nowadays not all existing e-commerce rules can fit the conclusion of the contracts through code with automatic execution or to purchase intangible virtual items in exchange for virtual

[46] Ibid.

[47] Duch-Brown N., Martens B., 'The European Digital Single Market. Its Role in Economic Activity in the EU', JRC Technical Report, Institute for Prospective Technological Studies, Digital Economy Working Paper 2015/17, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98723.pdf.

[48] Ibid.

[49] Jedrzejczak-Gasanetta Barska J., Sinicakova M., 'Level of development of e-commerce in EU countries', Management 2019, Vol. 23, No. 1, available at: https://www.researchgate.net/publication/333874998_Level_of_development_of_e-commerce_in_EU_countries.

[50] Duch-Brown N., Martens B., note 47.

money. The lack of legal certainty in relation to various types of digital transactions, for example, transactions with intangible items, crypto-currencies, availability of various hybrid business models, such as augmented reality or shared collaboration platforms, smart home devices or e-sport competitions, created a need in legal analogy application and self-regulation. Unfortunately, such self-regulation and alternative legal framework are initiated by traders or industry monopolists that creates significant misbalance in relation to the rights of consumers and facilitates applicability of standard business models depriving consumers of bargaining power and possible legal enforcement.

Currently, the e-commerce regulatory framework in the EU disregards specifics of audio-visual products and e-commerce transactions related thereto. As will be explained in the following chapters, the current lack of e-commerce regulations in the gaming industry per se results in the application of intellectual property framework as a legal analogy to the consumer contracts without actual intellectual property rights certification, which triggers consumers abuse and deficiency in mechanisms of consumer's protection and legal enforcement against such abuse.

Based on the initiatives created to secure the Digital Single Market Strategy of the European Union, review the audio-visual media framework to adapt to realities of the 21st century, analysis of the role of online platforms in the market, reinforcement of trust and security in digital services are considered as main pillars and main areas of focus of the Digital Single Market Strategy.[51] Therefore, the harmonisation of relevant e-commerce norms applicable to the gaming industry is a crucial part of the European Digital Single Market Strategy.

An efficient e-commerce framework should provide both legal certainty and room for flexibility in order to align with possible development in the market and take into account the digitalization of e-commerce transactions. The present research will provide a base for the further regulatory development in e-commerce regulation in the gaming industry and will determine possible legal analogy applications in order to secure the rights of the consumer and players on the Community level.

[51] Lodder, A.R., Murray, A.D., note 40; Press Release, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen', 6 May 2015, Brussels, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4919.

B. Information Society Services

The definitions of information society services and e-commerce are closely connected and explained one through another - information society services are considered as the main subject of the e-commerce activity.[52] The notion of information society services was explained in connection to e-commerce first in 1999 with the new initiative "Europe - An information society for all" proposed by the European Commission.[53] As per the above-mentioned initiative, information society was represented in "*the liberalisation of telecommunications, establishment of a clear legal framework for e-commerce and support for the industry*".[54] Thus, the information society is considered a society that is living hand-by-hand with technologies and uses innovative technologies in everyday life for regular contract conclusion and service provision.

Currently, the information society services are defined as services provided on distance (without the actual presence of the representatives of the parties in the same place if the contact is direct, or even with actual presence in the same place of the consumer and supplier, if the contract is made through intermediary platform)[55] through electronic means (with the usage of any application, software, Internet of Things)[56] for remuneration (not only directly, but also indirectly with the income a seller receives from advertisement[57] or shared personal data)[58] and at the request of the recipient.[59] Thus, the definition of the information society services is covering as well as hybrid business models where the communication between parties, service provision or contract conclusion can happen both online and offline.

From the gaming industry perspective:

(1) the user has to log in to create an account, avatar, thus demanding a service,

(2) the video game is a software, thus, fits the condition of electronic means,

[52] Lodder, A.R., 'European Union E-Commerce Directive - Article by Article Comments', Guide to European Union Law on E-Commerce, Vol. 4. Update from 2016 of the 2001 version, published in EU Regulation of E-Commerce. A Commentary Elgar Commentaries series, 2017, available at: https://ssrn.com/abstract=1009945.

[53] Europe - An information society for all - Communication on a Commission initiative for the special European Council of Lisbon, 23 and 24 March 2000, COM/99/0687 final.

[54] Ibid.

[55] Lodder, A.R. note 52.

[56] Ibid.

[57] Case C-291/13, Sotiris Papasavvas v Fileleftheros Dimosia Etaireia Ltd and Others, CJEU, 11 September 2014.

[58] Lodder, A.R. note 52.

[59] Directive 98/48/EC, note 25.

(3) the services are given on distance without the actual presence of parties, only their avatars, (even though during e-sport tournaments both representatives of a supplier and the user are present, however on such e-sport tournament the activity is conducted through gaming software, which can be considered as an intermediate platform),

(4) the service is provided for remuneration (in pay-to-play video games the remuneration is immediate as the user is paying in order to have access to the software, in free-to-play video games the access is free, however virtual items are for payment, as explained above), which is paid by electronic transfer of fiat money or crypto-currencies, exchanged for money in advance.

Worth underlining that the notion of "remuneration" per se in the European regulatory framework is a vague point and a reason of different interpretations in various Member states. As defined in the explanation provided above to the definition of the information society services, both direct and indirect cross-performance is accepted, which covers all payment models, including alternative payment models such as crypto-currencies, in-game tokens as well as personal data provision in exchange for digital service. However, unfortunately, examining further specific e-commerce regulations, the notion of remuneration is significantly impaired.

While the information society services definition provides flexibility in the "remuneration" notion, including in the scope direct forms of commoditized business as well as indirect commoditization of digital services, accessing the gaming industry, it can seem that after receiving access to the audio-visual software (on a tangible medium or through online streaming) the relationships with the consumer and supplier are limited to the "Terms of Service" or "End User License Agreement", and every other transaction inside the video game is not regulated by e-commerce rules.

In pay-to-play video games, where the consumer is paying for the software or the access to the software and is acknowledged on the total price of such video game (no build-in payments possible as per the gaming interface), the direct remuneration model can be observed. Even though, the majority of pay-to-play video games follow a direct remuneration or direct commoditization model, when the contract price is determined prior to the contract conclusion, following already established e-commerce rules, however, as will be explained in the further chapters, certain existing e-commerce regulations cannot be fully applicable to free-to-play

video games where the gratuitous contract is covering build-in payments and, thus, the trader receives indirect remuneration for the information society services' provision.

Considering mentioned above, both in-game transactions in free-to-play video games between the consumer (the player) and gaming company (or gaming platform) with a subject of intangible item exchanged for the monetary interest and assessing a game per se (free-to-play and pay-to-play) can be considered as information society service and fall under the scope of the E-Commerce Directive and Consumer Rights Directive. However, as will be explained further, the specific provisions of the E-Commerce Directive and Consumer Rights Directive and related regulatory framework can be applied only to the direct remuneration models with exception of one indirect model – personal data provision as a counter-performance expected from the consumer.

Such a legal gap resulted in unfair treatment in consumer contracts and facilitated usage of the gratuitous contracts with indirect payment models, particularly, in the gaming industry. As will be explained in further chapters with the "real-life" examples from the popular video games, the following indirect payment models are used by the gaming platforms (not exclusive list):

(1) player has an assigned virtual wallet where a player can purchase virtual in-game tokens, which are later used for further in-game transactions with virtual items (for example, like Linden Dollars in "Second Life" video game),[60] or
(2) player can purchase and trade virtual items in exchange for crypto-currency, including but not limited to blockchain-based crypto-currencies and non-fungible tokens (for example, like in "Axie Infinity" video game).[61]

Considering the fact, that indirect payment models generate 64% of the European revenue in the gaming industry,[62] there is an urgent need to provide a comprehensive harmonized regulatory framework on e-commerce and consumer protection taking into account business models focused on indirect payments. Such a harmonized regulatory framework should, first of all, include transparency and information provision requirements, as indirect payments can facili-

[60] Second Life Community, Information on Linden Dollars, available at: https://community.secondlife.com/knowledgebase/deutsche-knowledge-base/linden-dollar-kaufen-und-verkaufen-r1301/#:~:text=Die%20W%C3%A4hrung%20in%20Second%20Life,Zahlungsart%20registrieren.
[61] Information on Axie Infinity, available at: https://axieinfinity.com/.
[62] Interactive Software Federation of Europe, note 2.

tate misjudgement amount consumers and, particularly, minors or young adults, due to the impossibility to evaluate economic consequences of the indirect transaction and the total cost of the gameplay. Moreover, such a disproportionate legal regulation focusing on a direct revenue model can deprive consumers of seeking legal remedies.

Even though the above-explained definition of information society services is significantly broad, however, the limitation of the scope of services that are included under such definitions raised different concerns while applied to hybrid business models and innovative solutions on the European market. For example, in Asociación Profesional Elite Taxi versus Uber Systems Spain the preliminary ruling was requested in order to determine whether services provided by Uber can be considered as transportation services, as information society services or a combination of the above.[63] The described case triggered a wider discussion on the legal regulation of online platforms and intermediary services, as will be described further, and showed that the clear scope of adopted definitions in a crucial part of the scope of the applicability for the European legal norms.

Asociación Profesional Elite Taxi versus Uber Systems Spain case explained that in the modern realities the symbiosis of offline and online (information society services) can exist and, therefore, respective legal norms should be taken into account.[64] Similar to the Uber case, the issue of "composite services"[65] was raised in the Airbnb case, following the symbiosis of the real estate brokerage services and information society services.[66]

Hybrid business models, similar to those explained above, becoming more widespread as digitalization is coming to everyday life together with smart home devices, artificial intelligence and self-driven cars. The explained notion of composite information society services can be

[63] Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain, SL, Judgment of the Court (Grand Chamber) of 20 December 2017.

[64] Geradin D., 'Principles for Regulating Uber and Other Intermediation Platforms in the EU', TILEC Discussion Paper No. 2017-037, Tilburg Law School Research Paper, No. 18, 2017, available at: https://ssrn.com/abstract=3055023.

[65] Busch Ch., 'The Sharing Economy at the CJEU: Does Airbnb Pass the 'Uber Test'? – Some Observations on the Pending Case C-390/18 – Airbnb Ireland', 7 Journal of European Consumer and Market Law, 2018, available at: https://ssrn.com/abstract=3231505.

[66] Case C-390/18, Criminal proceedings against X, Judgment of the Court (Grand Chamber) of 19 December 2019.

applied in the gaming industry as well, particularly to augmented reality games,[67] for example, games like PokemonGo,[68] where the player accesses virtual reality items, however, travelling through the offline world and, in specific cases, interacting with property rights of physical owners.[69]

In the modern information society where the variety of services, remuneration models and innovative technologies is only limited by the frames of technology and fantasy of a trader, the relevant legal norms should be narrow enough to provide legal certainty to existing products and, at the same time, broad enough to cover alternative innovative solutions. Therefore, there is a need in an EU-wide specialized regulatory framework focusing on composite information society services and indirect remuneration models in order to eliminate unfair treatment, application of the legal analogy and to secure rights of consumers and European Digital Single Market Strategy.

C. Intermediate Conclusions

E-commerce activity and information society services cover various scopes of online businesses including but not limited to gaming platforms, online marketplaces for virtual items, blockchain and shared collaboration platforms etc. Innovative business models can include not only online services, but offline elements (for example, video games integrated with virtual reality or augmented reality games), which makes the applicability of existing legal frames difficult and in some cases impossible.

Even though the general e-commerce rules on mandatory contractual provisions and consumer protection already exist on the community level, however, not all those norms can be applicable to the gaming industry taking into account hybrid business models and indirect remuneration under gratuitous contract (as will be explained in details in Chapter III of the present thesis), on the other hand, sector-specific norms are absent, which causes legal uncertainly, unequal

[67] Li T., 'Pokémon Go and the Law: Privacy, Intellectual Property, and Other Legal Concerns', Yale Law School - Information Society Project, Boston University - Boston University School of Law, 2016, available at : https://ssrn.com/abstract=3022356.

[68] Information on Pokemon Go, available at: https://pokemongolive.com/en/.

[69] News Report, 'Pokemon Go 'trespass' legal action settled in US', BBC, 2018, available at: https://www.bbc.com/news/technology-46426930#:~:text=Home%20owners%20who%20sued%20when,creatures%20placed%20in%20private%20gardens.

treatment and impossibility for consumers to seek legal remedy in cases related to digital content transactions.

Considering the above-mentioned, the present research will focus on alternative e-commerce models available in the gaming industry nowadays such as indirect payment models in commoditized free-to-play video games, collaborative gaming platforms, in-game items purchase on gaming platforms and online marketplaces for virtual items etc. Particularly, the author will investigate whether existing legal norms on consumer protection, mandatory contractual provisions can be applied to gaming transactions (in-game purchases and access to the video games), gratuitous contracts and hybrid business models.

2. The Notion of Digital Goods, Digital Content and Digital Services in the European Law

The definition of digital content was already present in the European regulatory framework starting from the adoption of the Consumer Rights Directive; however, it evolved during the time and was amended with the Digital Content Directive, which also established new regulatory framework focusing on e-commerce and consumer protection in the digital environment and introduced such notions as digital services and digital goods into the European consumer protection framework.

The present part will examine in detail the notion of “digital content”, “digital goods” and “digital services” in the prism of the European legislation focusing on the new approaches brought together with the Digital Content Directive and Digital Goods Directive, and on the views represented in the doctrine. The author will analyse the above-mentioned definitions through the prism of applicability to the realities existing in the gaming industry and will relate such notions to the applicable e-commerce and consumer protection framework to the hybrid business models and indirect payment methods used in the gaming industry.

A. Digital Content

The notion of digital content itself was first discussed at doctrine in the beginning of the 2000s[70] and afterwards incorporated in the Consumer Rights Directive adopted in 2011.[71] Even though a significant part of day-to-day transactions is concluded in a digital form, however, up until recently, the European policymakers were not paying due attention to the regulatory framework regarding such and, particularly, to defining notions used in the scope of the consumer protection during the online business conduct focusing on the digital transaction only as a solution for the contract conclusion for offline goods and services.

The digital content as a universal notion initially was defined as "*data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer*".[72] The Consumer Rights Directive introduced explanation of digital content as "*data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means*".[73]

Indeed, digital content is digital data that can be represented in a tangible medium or exist in an intangible form. Digital content generally can be defined as a computer code (set of 1 and 0), which, if to apply such a code to specific software, would represent an intangible product or a service. In the perspective of the gaming industry, virtual items, including but not limited to functional and cosmetic virtual items, as well as in-game tokens, are considered as a computer code, which, after being purchased within the gaming platform or on the external marketplace, when applied to particular gaming platform becomes a virtual item requested by a player.

[70] Bradgate R., 'Consumer Rights in Digital Products', A research report prepared for the UK Department for Business, Innovation and Skills, BIS, University of Sheffield, 2010, p.2; Narciso M., 'Consumer Expectations in Digital Content Contracts – An Empirical Study', Tilburg Private Law Working Paper Series No. 01/2017, 2017, available at: https://ssrn.com/abstract=2954491; Helberger N., Guibault L., at al., 'Digital Consumers and the Law – Towards a Cohesive European Framework', Wolters Kluwer, Information Law Series, 2013, Volume 28; OECD Policy Guidance for Digital Content, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, 2008, available at: https://www.oecd.org/sti/ieconomy/40895797.pdf.

[71] Consumer Rights Directive, note 29.

[72] Bradgate R., note 70; Narciso M., note 70.

[73] Consumer Rights Directive, note 29.

The Digital Content Directive and Digital Goods Directive follow up on the definition prescribed in the Consumer Rights Directive and explain digital content as "*data which is produced and supplied in digital form*".[74] Particularly, the policymaker gives examples of operating systems, applications, software as ones that fall under the digital content definition.[75] Considering the above mentioned, the Digital Content Directive and Digital Goods Directive do not step away from the definition provided in the Consumer Rights Directive, however, they provide better explanation on the data that can be considered as digital content and grants consumer protection in the contract on digital content.

Considering the characteristics of products available in the gaming industry (intangible items purchase, in-game transactions, access to the video game per se), it can be seen, that a video game is a complex audio-visual product with the inclusion of separate transactions on virtual items incorporated in such a game. Due to the broad nature of the definition of digital content, the video games themselves, as well as a separate transaction on virtual items purchase, can be considered as transactions with digital content, as both are computer codes or data represented in a digital form.

Digital content is a crucial part of both digital services and digital goods, therefore, in order to determine the scope of applicability of the customer protection framework during the digital service provision or digital goods supply, it is important to define the notion of digital content first. Everything in a digital environment can be explained as a computer code, including transactions on online purchase of offline goods, thus, digital content is a broad definition and further explanation on the applicable regulatory framework with a focus on digital content was required.

European regulations define digital content as a general notion covering all digital data. Such a generic approach, if to be taken on its own solely, can cause legal uncertainty regarding the scope of the rights that can be applied by the consumer participating in the digital economy online – as will be shown further, the definitions of digital content, digital goods and digital

[74] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA relevance.), PE/27/2019/REV/1, 2019, article 2; Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136, 22.5.2019, p. 1–27, article 2.

[75] Digital Goods Directive, note 74.

services are cross-referencing one another. Therefore, in order to ensure consumer rights protection and compliance with e-commerce regulations, there is a need for clear determination on the Community level whether the notion of digital content can be used on its own or as a part of a traditional differentiation between goods and services.[76]

At the current stage with wide fragmentation of the European consumer protection and e-commerce regulatory framework referring to the business and payment models available at the time of adoption, there is a lack of clarity on the applicable law and scope of the consumer protection guarantees related to the particular online, offline or composite product or service. This can lead to fragmentation in enforcement and in legislation in particular Member states causing unfair treatment of consumers and discriminatory approach in the industry based on consumers' domicile.

B. Digital Services

Even though the concept of digital content was introduced into the European customer protection framework together with the Consumer Rights Directive, however, the notion of digital services was explained only in 2019 with the adoption of the Digital Content Directive and Digital Goods Directive.

Following the provisions of both the Digital Content Directive and Digital Goods Directive, digital service is defined as:

(1) "a *service that allows the consumer to create, process, store or access data in digital form; or*

(2) *a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service*"[77].

Analysing the above-provided definitions of digital content and digital services, it can be hard to distinguish the digital content supply and the digital service due to the overlap of the definitions. For example, in the streaming service contract, cloud storage contract, contract on supply of virtual goods in the shared platform, the subject of the contract will be defined as a service

[76] Narciso M., note 70.
[77] Digital Gods Directive, note 74; Digital Content Directive, note 74.

that allows data processing in the digital form. Thus, taking into account the definitions provided in the Digital Content Directive, it is almost impossible to distinguish whether the digital service or digital content supply is the subject of a contract.[78]

At the same time, the Digital Content Directive treats both notions equally providing the same level of customer protection guarantees regarding the supply, modifications and conformity.[79] For example, as per article 6 of the Digital Content Directive, "*the trader shall supply to the consumer digital content or a digital service that meets the requirements set out in Articles 7, 8 and 9, where applicable, without prejudice to Article 10*".[80]

Taking into account available video game offerings, where consumers, or players, can create their own avatars, skins, design or create virtual object (therefore, create data), can trade, exchange virtual items on internal and external platforms (therefore, share data), can destroy virtual items, bet on monster races and participate in virtual tournaments (therefore, interact with data in different possible ways), it can be concluded that in-game transactions in the video games can be classified as digital services or digital content supply.

At the same time, acquiring access to the particular video game as a sole product should be as well classified as a digital service, as the customer is using services focused on providing access to data in a digital form (a computer code/software provided by a trader/developer). Thus, both free-to-play and pay-to-play video games, including but not limited to in-game transactions and software access, are classified as digital service or digital content supply equally following the definition provided in the Digital Content Directive.

Notwithstanding the above-mentioned broad definition of the digital service and digital content, the Digital Content Directive provides limited coverage for the mandatory e-commerce regulations and consumer guarantees as it excludes from the scope of application gratuitous content.[81] Therefore, Digital Content Directive will not be applicable to free-to-play video games, if to take a video game as a sole software product regulated by one subscription contract, however, will be applicable to the pay-to-play business model.

[78] Carvalho M. Martim J. and F., 'Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771', Revista de Direito e Tecnologia, Vol. 2, No. 2, 257-270, 2020, available at: https://ssrn.com/abstract=3717078.

[79] Ibid.

[80] Digital Content Directive, note 74.

[81] Ibid.

On the other hand, the consumer can spend only up to 20 EUR as a subscription fee or platform access for pay-to-play video game evaluating full economic consequences of such a contract, while in free-to-play video games consumers are attracted by gratuitous access, however, the game scenario can require further acquisition of in-game virtual items in order to obtain advantage compared to other players or pass to another level. Each of such in-game transactions can be equal to the price of the pay-to-play contract. Moreover, as will be explained in further chapters, game developers often use various methods to facilitate price obfuscation, for example, payment for transactions in the in-game currency that is previously purchased for fiat money and deprive consumers of the possibility to evaluate economic consequences of game participation. Such a discriminatory approach towards gratuitous contract established in the Digital Service Directive leaves over 64% of consumers[82] unprotected from trader's misconduct and unfair consumer practices.

The only exception is provided to gratuitous contracts with a personal data provision as counter-performance.[83] Considering the ambiguity of standard term EULAs and taking into account age restriction and age classification present in the gaming industry, it can be observed that the game developers in majority use the in-game transactions business model in free-to-play video games, thus, the personal data collected is used by the trader with the purpose of fulfilling the legal obligations. Therefore, such free-to-play video games and gratuitous EULAs will remain out of the scope of the Digital Content Directive and respective consumer protection regulatory requirements.[84] The issue of gratuitous digital content supply and digital service provision will be explained further in chapter III of the present thesis.

It can be seen that the asses to pay-to-play video games (where the consumer or player is purchasing the assess to the digital content or gaming platform),[85] as well as in-game transactions, should be covered under the scope of the consumer protection in digital content supply or digital service provision contracts in order to secure fair treatment in the gaming industry. However, the existing consumer protection framework on the Community level exclude gratuitous

[82] Interactive Software Federation of Europe, note 2.
[83] Digital Content Directive, note 74.
[84] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of consumers, in particular minors, in respect of the use of video games, COM/2008/0207 final.
[85] Davidovichi-Nora, note 6.

contracts from the application scope, which facilitates discrimination in the industry and does not satisfy customer expectations regarding the level of legal protection and consumer guarantees.[86]

Taking into account the fact that the business model of free-to-play video games is focused on the revenue coming from in-game transactions and attracting consumers by providing gratuitous asses to the gaming software,[87] the presence of paid digital content in a video game should be classified as the digital content supply and digital service for remuneration and respective mandatory contractual provisions of the Digital Content Directive should be applied. Indeed, there is a possibility that a player will not opt-in for paid digital content and will use the service for free, however, this does not change the legal protection status and consumer guarantees, as even in such a hybrid model contractual transparency regarding possible payments should be maintained.

Therefore, in the author's opinion, the European consumer protection network should not provide the difference in treatment regarding paid and gratuitous digital service and digital content provision, as the revenue might be obtained from various alternative methods, including but not limited to "payment" with personal data, time spent for being subject to the advertisement, crypto-currency etc. The consumer protection and e-commerce framework in the EU, should not focus only on direct fiat money payment as contractual remuneration, however, to adapt to modern realities, alternative revenue models, technological and payment solutions.

The current situation in the market shows that due to the lack of regulation in relation to the gratuitous digital service provision or gratuitous digital content supply, the player versus developer relationships are regulated solely by the End User Licence Agreement (as a legal analogy) with the focus on intellectual property rights of the developers and without taking into account the nature of the relationships. The existing contractual approach and the legal framework applied in the industry will be investigated in chapter II of the present research.

Shortly after the Digital Content Directive and Digital Goods Directive adoption, the European Parliament together with the European Commission commenced the preparatory work for the development of the Digital Service Act, focusing on the fundamental rights connected to the

[86] Narciso M., note 70.
[87] Davidovichi-Nora, note 6.

usage of digital content, the right of online anonymity, the definition of illegal digital content and the scope of consumer protection on online platforms as a subject of digital service provision.[88] The development of the Digital Service Act per se shows that the existing e-commerce framework is unable to cover all variety of services that are available for consumers on various online platforms. Thus, the establishment of the comprehensive European consumer protection and e-commerce framework is on the initial stage and the present research can serve as the guidance for future regulation in the gaming industry on the Union level.

The Digital Service Act opens the new scope of the digital service definition, particularly, the definition of the service provision in the European Union, taking into account the possibility of cross-border service provision in the digital environment.

Considering the provisions of the Digital Service Act, service provision in the European Union should be considered as "*enabling legal or natural persons in one or more Member States to use the services of the provider of information society services which has a substantial connection to the Union; such a substantial connection is deemed to exist where the provider has an establishment in the Union; in the absence of such an establishment, the assessment of a substantial connection is based on specific factual criteria, such as: a significant number of users in one or more Member States; or the targeting of activities towards one or more Member States*".[89] The above-mentioned definition shows the cross-border nature of various online platforms (including online platforms for video games, shared collaboration platforms or online marketplaces for virtual items) and the possibility to have digital content as a subject of service provision per se (with no physical delivery) should not influence the level of consumer protection in the European Union.

The definition provided in the Digital Service Act is an important step for cross-border service provision in the EU, especially for the traders and online platforms residing outside of the territory of the European Union, however, providing services to the European consumers. As will be investigated in chapter II and III of the present research, various game developers tend to choose jurisdictions with the lower level of consumer guarantees compared to the EU ones, such as Russia, Costa Rica or the United States, as the country of establishment, and to use self-regulatory approach towards developer versus player relationships prescribing rights and

[88] Digital Services Act, note 34.
[89] Ibid.

obligations unilaterally in the contracts. The adoption of the Digital Service Act is a step towards eliminating discrimination in cross-border service provision and in order to deprive traders registered overseas of non-compliance with the EU-wide regulatory framework while providing services to the European consumers.

As explained above, in the gaming industry the trader supplies digital content or digital service, when the trader makes digital content available for "*accessing or downloading to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose*".[90] Considering mentioned definition, a gaming company supplies digital content, when makes a particular digital content or virtual item on an online platform or video game accessible by the player (after registration, after payment etc.). Similar to the situation explained in the part 1 B) of the present research, such a general definition of digital service can cover the majority of the digital products at the market, however, the lack of legal regulations on gratuitous digital services enables contractual regulation by the parties, which for mass participation products such as video games means the application of the legal analogy through standard term contracts with provisions dictated by the traders.

Taking into account the above-explained definitions and the scope of applicability of the European consumer protection and e-commerce framework in the digital environment, the current legal norms cannot grant a proper level of consumer protection in the video game industry leaving in-game transactions (which might reach up to the significant amount, as explained previously in Introduction part) out of the scope of the Community's attention.

Even though the Digital Content Directive takes a step forward by ensuring the effective protection of consumer rights in respect to online platforms, considering such platforms as traders in the situations where the platforms act for the purpose related to their own business; in respect to extending the notion of price to payments that are performed using a digital representation of value as well as vouchers and coupons; and in respect to the counter-performance in personal data;[91] however, the above-mentioned provisions cannot address all types of digital services offered in the modern society, including but not limited to video games and virtual items transactions in a virtual world.

[90] Digital Content Directive, note 74.
[91] Carvalho M. Martim J. and F., note 78; Digital Content Directive, note 74.

On the other hand, the Digital Service Act provides important rules for the online platforms targeting European consumers taking into account the scalability of the business. The development of a Digital Service Act is with no doubt a positive step towards the legal certainty and consumer protection framework expansion to the various options of digital service provision available for the consumers, including the gaming industry. Even though the Digital Service Act itself does not refer to gaming platforms but the provisions of the Digital Service Act can be taken into account as a base for the future regulatory framework for gaming platforms providing services to the European players.

C. Digital Goods

The notion of goods with a digital element, or digital content, that is supplied on a tangible medium, was established in the Consumer Rights Directive.[92] Together with the digital market developments, the above-provided definition had to overcome particular changes in order to correspond the modern reality. After the Consumer Rights Directive implementation, the notions of "digital goods" or "goods with digital element" were further explained in the Digital Content Directive and the Digital Goods Directive, as:

"*Any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions".*[93]

The definition incorporated in the Digital Goods Directive expanded the scope of the previously existed definition provided in the Consumer Rights Directive extending the scope of the legal guarantees to contracts with digital content as an integral part of such a tangible medium (digital good), contrary to the previous approach focusing solely on contracts with a tangible representation of a specific digital content (for example, digital content represented on CD, USB flash drive), but as well for contracts with digital content as an integral part of such a tangible medium (digital good).

Analysing the provisions of the Consumer Rights Directive, the same digital content could exist both on a tangible medium and in the digital environment, and in both cases, the scope of the consumer protection framework would be different as directive implements distinction in mandatory contractual provisions based on the methods of supply. For example, audio-visual

[92] Consumer Rights Directive, note 29.
[93] Digital Content Directive, note 74; Digital Goods Directive, note 74.

content (i.e., movie, music) could be downloaded by the consumer (intangible medium) or supplied on a tangible medium (i.e., CD, DVD). – in both cases, the scope of the consumer protection would be variable, even though there is no difference in the digital content per se.

Such a legal collision resulted in the difference in the application of particular consumer rights and obligations regarding the digital goods and triggered the adoption of specific regulations addressing issues with digital content and digital goods on a different level in order to grant equal treatment to the consumers around the EU. This led to the differentiation between notions of digital goods and goods with digital element in Digital Good Directive.

Therefore, the Consumer Rights Directive can be applied only to contracts where the subject of a contract is a tangible medium (CD, DVD, flash drive etc.) which is a carrier of digital content, therefore, goods with digital elements. On the other hand, the Digital Goods Directive is applied to contracts on the sale of goods, or services provision, where such a good or service requires digital content to function[94] (for example, smartwatches, audio assistants as Amazon Alexa), thus, digital goods. At the same time, the Digital Content Directive is applied to all kinds of paid contracts on the digital content supply,[95] including digital content supplied in a tangible medium as a carrier (contracts on goods with digital element) and digital content as an integral part of a digital good.

Considering the nature of the free-to-play and pay-to-play video games, it can be seen that the video games represented on a tangible medium would be considered as goods with a digital element, video games available solely online would be explained as digital content, video games that require integrated tangible items would be defined as digital service with digital goods. This again would result in a legal collision, when the same digital product, let's say video game X, would be classified differently if supplied on various media. Thus, the consumers, while purchasing the same digital content, or game X, would have different consumer guarantees in relation to contract transparency and price transparency depending on the medium of representation of game X – whether it was purchased as a USB key, whether it will require a virtual reality set or if it is a free subscription to the online platform.

The difference between such notions as "digital goods", "goods with the digital element", "digital service" and "digital content", as well as the applicability of different provisions of the

[94] Digital Goods Directive, note 74.
[95] Digital Content Directive, note 74.

European consumer protection and e-commerce framework, is not so transparent per se if to address the complexity of a consumer versus trader relationships in specific types of contracts. For example, in multi-party contracts on smart devices, the difference between notions and the scope of mandatory requirements is not so distinguishable.[96] When a consumer purchases a smart TV with pre-installed applications for Netflix, YouTube and Amazon, then such a contract can fall under both digital goods and digital content or digital service supply provisions.[97]

A similar situation can arise in the gaming industry, for example, when a consumer purchases a virtual reality set designed for a specific video game, in such a case virtual reality set would be defined as digital good and a video game per se as a digital service or digital content supply. However, the clear lines of difference between such notions would be eliminated when a game (digital service provided by a trader A) would not be able to have its functionality without a virtual reality set (digital good provided by a trader B) and vice versa.

Such a lack of legal certainty regarding the applicable framework and impossibility to define the nature of legal relationships in the complex contracts or hybrid business models can trigger differences in the application of e-commerce rules and consumer guarantees, create self-regulatory framework stipulated solely in standard terms contracts, deprive consumers of the possible contract enforcement due to the lack of clarity regarding traders' liability and result to violation of consumer rights

D. Intermediate Conclusions

Based on the analysis explained above, it can be seen that the European e-commerce and consumer protection framework does not provide clear differentiation between various notions in relation to digital products. Moreover, specific consumer protection rules and mandatory contractual provisions prescribed under the harmonized framework in the EU facilitate a discriminatory approach in the gaming industry as a different set of consumer guarantees is offered for gratuitous contracts, indirect payment models and in respect to the digital content representation.

Both video games as sole product and virtual items available in free-to-play video games fall under the definition of "digital content" and transactions with such virtual items as well as

[96] Sein K., 'Goods With Digital Elements' and the Interplay With Directive 2019/771 on the Sale of Goods', University of Tartu - Institute of Law, 2020, available at: https://ssrn.com/abstract=3600137.

[97] Ibid.

access to the video game should fall under the "digital service" definition according to the Digital Content Directive. However, due to the hybrid model (availability of both free and paid digital content) and indirect payments (transactions with the involvement of in-game tokens and crypto-currencies), the specific transactions with virtual items are regulated under gratuitous contracts and intellectual property framework, as will be explained in detail in Chapter II.

Due to the variety of supply methods of the same digital products, the video game can be explained both as "good with the digital element" (pay-to-play video games represented on tangible medium), "digital good" (tangible items incorporated into pay-to-play or free-to-play video games) or "digital service" (free-to-play and pay-to-play video games) depending on its representation (tangible or intangible medium). Such a cross-reference in regulations, absence of clear differentiation in applicable mandatory provisions and availability of hybrid or alternative delivery methods under the same contract, enables the creation of the legal gaps in the gaming industry and facilitates misbalance between the parties.

Currently popular in the EU video games include the following characteristics:

(1) availability of most free-to-play video games online, not on tangible items,
(2) representation on a distributed ledger platforms (Blockchain),
(3) functionality with incorporated tangible medium (virtual reality),
(4) presence of multi-party relationships on shared collaboration platforms,
(5) usage of price obfuscation mechanisms (prior in-game tokens purchase),
(6) possibility to trade virtual items (or, basically, program codes, which can become a digital weapon, for example, after being applied to a particular online platform – video game) not only inside the game but also on external platforms,
(7) involvement of the consumer in digital content creation (video games allow users to create and design their own skins, avatars and virtual items),
(8) availability of peer-to-peer gaming and virtual items exchange,
(9) usage of augmented reality technology,
(10) creation and trade of random content in exchange for money, which can involve a game of chance etc.,

which can lead to the conclusion that the existing definitions and, thus, the scope of legal regulations, cannot cover all features of video games available currently and to be developed in the future.

The lack of legal clarity and difference in treatment facilitates a self-regulatory approach based on the law analogy and, as explained further, creates unfair treatment towards European consumers. Thus, the issues connected to the digital content created or traded on particular gaming platforms by users, needs to be addressed particularly on the European level in order to secure European Digital Single Market Strategy[98] and to eliminate discrimination and confusions during the cross-border gaming activity.

In order to provide a high degree of legal certainty and to eliminate unequal treatment of digital content represented on tangible medium and intangible digital content, the definitions provided in the Consumer Rights Directive, Digital Goods Directive and Digital Content Directive and provisions on services included in the scope of the above-mentioned directives should be amended with the clear guidelines for distinction. The notions used in the digital service provision or digital products supply should provide flexibility to new technological solutions, payment models and delivery channels and, at the same time, facilitate legal certainty regarding consumer protection and e-commerce requirements.

3. Definition of Electronic Commerce Online Platforms and its Applicability to the Gaming Industry

The present part will focus on the online platform's definition used in the doctrine and in the European regulatory proposals applicable to the digital environment. The author will investigate whether the current situation can satisfy consumers expectations and provide the appropriate level of consumer protection guarantees in the gaming industry and, particularly, in e-commerce transactions with virtual items in free-to-play video games.

E-commerce transactions are operated through electronic communication (direct and via intermediaries) with the usage of online platforms or specific software. Even though there are numerous regulations applicable to the consumer versus trader relationships in the digital world, however, the definition of online platforms is absent in the European e-commerce and consumer protection legal framework. Notwithstanding the above, some authors stress that it is

[98] Digital Content Directive, note 74.

necessary to adopt one, which will cover marketplace online platforms, online shopping malls, online intermediaries, search engines and comparison tools.[99]

Indeed, mentioning e-commerce, the conservative approach (and, as will be shown further, the European Parliament and the Commission as well) would be to refer to the online shopping of tangible goods. However, with the fast technological development and availability of various types of online platforms in the market (including but not limited to blockchain platforms, shared collaboration gaming platforms, virtual items marketplaces), the harmonization of definition applicable to online platforms would be necessary in order to protect rights and legitimate interests of such platforms' users.

The European Commission stresses that the common European regulation on the online platform is a must for the further development and functioning of the Digital Single Market strategy.[100] Indeed, taking into account the cross-border nature of the Internet and respectively digital service provision, the presence of 27 different regulations on the European online market would significantly influence the start-up economy and would slow down economic development in the digital era.[101]

The difference in local legislation on online platforms can generate confusion for consumers and business owners due to the international nature of online business.[102] Moreover, the cross-border element requires not only a common harmonized legal network but also specific provisions addressing online platforms in relation to already existing regulations covering competition rules, mandatory contractual provisions and consumer protection.

[99] Policy recommendations on the role of online platforms in the e-commerce sector, Ecommerce Europe, 2016, available at: https://www.ecommerce-europe.eu/app/uploads/2016/04/Ecommerce-Europe-Online-platforms-Position-Paper-April-2016.pdf.

[100] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM/2016/0288.

[101] Ibid.

[102] Ibid.

Nowadays the polarity in the legal treatment around the EU leads to the unequal distribution of services in the digital environment. For example, the specific legal provisions on the distributed ledger technology online platforms are currently available in Malta,[103] Estonia,[104] Germany[105] and Cyprus,[106] which significantly increased the number of innovative start-ups in the country (only in Estonia numbers increased from 103 in 2017 to 1431 licence companies as per the data provided by the Financial Intelligence Unit).[107] The above shows that legal certainty facilitates business development and brings an inflow of investment into the country's economy. Considering the above, in the cross-border digital economy, it is important to have a legal certainty regarding the rights and obligations of contracting parties in online platforms as well as the definition of such online platforms.

The Organization for Economic Cooperation and Development defines online platforms as digital services facilitating interaction between two or more independent sets of users through the service via the Internet, collecting and exchanging data and serving for the benefit of such users and the platform itself.[108] Such a definition is broad; however, it does not cover all possible types of online platforms. For example, service platforms cannot be considered online platforms, as they do not provide interaction between groups of users. Such a definition explains an online platform as a service itself, not a platform for services, which can lead to the conclusion that only online intermediation services are being determined as online platforms.

[103] Act to regulate the field of Initial Virtual Financial Asset Offerings and Virtual Financial Assets and to make provision for matters ancillary or incidental thereto or connected therewith, Chapter 590, Laws of Malta, 2018, available at: https://legislation.mt/eli/cap/590/eng/pdf.

[104] A Survey of Service Providers of Virtual Currency, Financial Intelligence Unit, 2020, available at: https://www.politsei.ee/files/Rahapesu/ENG/estonian-fiu-survey-of-service-providers-of-virtual-currency-30-10-2020.pdf?c0acfba2ff.

[105] Guidance notice – guidelines concerning the statutory definition of crypto custody business (section 1 (1a) sentence 2 no. 6 of the German Banking Act (Kreditwesengesetz – KWG), BaFin, 02.03.2020, available at: https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Merkblatt/mb_200302_kryptoverwahrgeschaeft_en.html?nn=13732444.

[106] Circular No. C417, Prudential treatment of crypto assets and enhancement of risk management procedures associated with crypto assets, Cyprus Securities and Exchange Commission, 25 November 2020, available at: https://www.cysec.gov.cy/CMSPages/GetFile.aspx?guid=2937dc45-aa64-43fc-af9f-07ca5ff02730.

[107] Overview of the activities of the Estonian Financial Intelligence Unit in 2019, FIU, 2020, available at: https://www.fiu.ee/en/annual-reports-estonian-fiu/annual-reports#item-1.

[108] OECD, An Introduction to Online Platforms and Their Role in the Digital Transformation, OECD Publishing, Paris, 2019, available at: https://doi.org/10.1787/53e5f593-en.

According to the Communication on Online platforms from the European Commission, online platforms are characterized as a form of participation or conducting business based on collecting, processing, and editing large amounts of data, which operated in multisided markets but with varying degrees of control over the direct interactions between groups of users, benefits from the 'network effects' and relies on the information and communications technologies.[109] The mentioned 'network effect' can be explained when the utility of every consumer of the product or service increases with the number of consumers of such product or service.[110] The above-mentioned definition offered by the European Commission can be applied to the online intermediation service platforms, however, e-commerce service platforms are still excluded from the scope as such platforms are targeting regularly one group of users – users of particular services.

Considering the above-explained, online gaming platforms cannot be considered by the proposed EU regulatory framework as "online platforms" as they offer service to one group of users only (players). Therefore, such a definition of the online platform is too narrow in order to cover all possible existing online platforms, including but not limited to the gaming platforms. Besides, excluding all service online platforms from its scope can lead to legal uncertainty while applying various European regulations on e-commerce and digital service.

European Commission conducted a study collecting feedback on the definition of "online platforms", which showed that such definition should not be broad enough to include all internet activities, not too narrow to exclude businesses to be regulated and not to overlap existing definitions in other European acts, for example, towards operation systems or internet service providers.[111] It can be seen, that the adoption a common European definition for online platforms can be a very complex task and is supposed to be interpreted in the context of a particular area of law to be regulated or the purpose of the regulation. Therefore, the definition of online

[109] Digital Single Market Strategy, note 100.

[110] Preta A., 'Platform Competition in Online Digital Market', International Institute of Communications, 2018, available at: https://ssrn.com/abstract=3272839; Dittrich P.-J., Online platforms and how to regulate them: An EU overview', Jacques Delors Institut – Berlin, NO.22714, 2018, available at: https://www.delorsinstitut.de/2015/wp-content/uploads/2018/06/20180614_OnlinePlatformsandHowtoRegulateThem-Dittrich-June2018-4-1.pdf.

[111] Gawer A., 'Study on Online Platforms: Contrasting perceptions of European stakeholders: A qualitative analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms', A study prepared for the European Commission DG Communications Networks, Content & Technology, 2016, available at: https://ec.europa.eu/digital-single-market/en/news/study-online-platforms-contrasting-perceptions-european-stakeholders-qualitative-analysis.

platforms can be accessed only after defining the purpose of such definition – for example, consumer protection law, corporate law regulation, contractual law regulation etc.

It can be seen that the policymakers focus mostly on the intermediate service platforms, however, the separate definition is already available in the European legislation for intermediation service platforms as well as the specialized regulatory framework.

According to the Regulation of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (hereinafter referred to as – the "Intermediation Services Regulation"), online intermediation services are defined as information society services, which allow traders or private individuals acting in a commercial or professional capacity to offer goods or services to consumers, in order to facilitate the initiation of the direct transactions between those parties, irrespective of the place where those transactions are ultimately concluded, and which are provided to traders or private individuals acting in a commercial or professional capacity on the basis of contractual relationships between the provider of online intermediation services and traders or private individuals acting in a commercial or professional capacity and offering goods or services to consumers.[112]

As explained above, the gaming platforms, which can be offered by the gaming companies themselves (service online platforms), do not fall under the scope of the above-mentioned definition, however, in some cases, intangible virtual items can be purchased on the external platform or online marketplaces for virtual items. In such a case, an external gaming platform offers an intermediation service connecting gaming companies and players, and thus, can fall under the scope of the mentioned definition.

For example, online intermediaries for collaborative gaming, such as CRAYTA, provide online platforms for several gaming companies and operate such platforms.[113] According to the EULA available on CRAYTA collaborative platform, it is stated that the player "*acknowledge that this EULA for the Platform is an agreement between you and Unit 2 Games only and not Epic Games, Inc. Without prejudice to the foregoing, you are required to have a separate license*

[112] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, PE/56/2019/REV/1, OJ L 186, 11.7.2019, article 2.

[113] Information on CRAYTA platform, available at: https://crayta.com.

with Epic Games, Inc. and you agree to comply with the End User License Agreement of Epic Games, Inc. as may be updated from time to time and made…"[114] Therefore, it is possible that online platforms for video games are operated not by the video game developer itself, but also by third parties, and in order to access the video game the consumer has to enter an agreement both with the operating company and with the gaming company. In this case, such platforms will fall under the scope of the online intermediate service definition.

However, if the online platform does not connect different groups of users, but only offers intangible virtual items purchase (program codes for particular games) to the consumers (therefore, being a service online platform), for example, like Markee Dragon or G2G online platforms that are de facto online marketplaces for virtual products or program codes, which are representing virtual items when applied to an external gaming platform,[115] such platform cannot be considered either as an online platform, neither as online intermediation services platform, based on the above-examined provisions.

Considering mentioned above, the definition of electronic commerce online platforms should be adopted on the Community level in order to secure legal certainty and to facilitate consumer protection for all information society services being available, including transactions with the purchase of intangible virtual items online. Such a definition should cover both intermediate and service online platforms, which operate for profit (conduct business activity). There is no need to separate the intermediate service online platforms from service platforms in the consumer rights protection perspective and regulation on e-commerce as the functionality of both of those platforms are the same – both online platforms offer to consumers information society services.

The issues arising from the regulatory gap in the European normative act triggered numerous case-laws in the European Court of Justice, for example:

[114] CRAYTA EULA, available at: https://crayta.com/eula/.

[115] Information on Markee Dragon, available at: https://store.markeedragon.com; Information on G2G platform, available at: https://www.g2g.com.

(1) Google France and Google versus Vuitton or L'Oréal SA and Others versus eBay International AG, where the liability of online platform regarding users' verification and trademark protection were investigated by the court;[116]

(2) Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) versus Netlog NV, where the approach regarding filtering system and digital information processing applicable on online platforms was examined by the court;[117]

(3) UPC Telekabel Wien GmbH versus Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH, where the legal capacity of the national courts in actions against online platforms was analysed by the court;[118]

(4) Eva Glawischnig-Piesczek versus Facebook Ireland Limited, where the court had to decide upon the territorial scope of liability and obligations of cross-border online platforms.[119]

From the above-mentioned case law, it can be seen that there is a difference in legal enforcement and difference in treatment of various functionalities of the online platforms. Thus, there is an urgent need to provide legal certainty to the multi-party relationships, where online platforms are involved in the service provisions (intermediary service providers) and where cross-border service online platforms are participating in e-commerce activity on the Community level.

With the development of the cross-border digital economy, especially during the Coronavirus pandemic, the need for the determination and regulation of online platforms became again on the table. The European Parliament and the Council proposed a new Digital Service Act.

[116] Joined cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), Judgment of the Court (Grand Chamber) of 23 March 2010; L'Oréal SA and Others v eBay International AG and Others, Case C-324/09, Judgment of the Court (Grand Chamber) of 12 July 2011.

[117] Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, Judgment of the Court (Third Chamber), 16 February 2012.

[118] Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH, Judgment of the Court (Fourth Chamber), 27 March 2014.

[119] Case C-18/18, Eva Glawischnig-Piesczek v Facebook Ireland Limited, Judgment of the Court (Third Chamber) of 3 October 2019.

The Digital Service Act establishes specific e-commerce mandatory requirements for online platforms and defines online platform as "*a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this regulation*."[120]

The new online platform's definition focuses solely on the technical features of online platforms such as hosting, cashing and mere conduit services.[121] Particularly Digital Service Act stresses that such functionality of online platforms as storing, processing and transmitting information is necessary for digital service provision, not delivery or payment channels.

Such an approach is, on one hand, sufficiently general in order to cover both service provision platform and intermediary service providers, and, on the other hand, narrow enough to enable the possibility of legal efficiency of such norms. The definition of online platforms proposed in the Digital Service Act would be able to cover various types of available gaming platforms, including blockchain-based gaming platforms, online marketplaces for intangible items (computer codes) and shared collaboration platforms.

Additionally, the cross-border nature of online platforms is properly addressed by the European policymakers in the Digital Service Act – all online platform that are offering services of storing, processing and transmitting information with a substantial connection to the European Union (country of establishment is in the EU, a significant amount of the platform users are from the EU or targeting of activities conducted in the EU is present) would be obliged to follow the provisions of the Digital Service Act.[122] Thus, gaming platforms registered outside the EU, however, targeting a significant amount of players in the European Union would be obliged to comply with the Digital Service Act requirements.

The Digital Service Act is no doubt an important step in facilitating consumer rights protection in the cross-border digital economy including but not limited to ensuring e-commerce rules applicability in the gaming industry. Due to the cross-border nature of gaming business, examples of the choice of law and country of establishment of the popular video games in the EU,

[120] Digital Services Act, note 34.
[121] Ibid.
[122] Ibid.

the provisions of Digital Service Act can be taken as an example for further specialized regulatory framework covering gaming industry in order to secure consumer protection, transparency and the balance between rights and lawful interests of the players and game developers.

The mandatory requirement for foreign online platforms to be subject to the EU consumer protection and e-commerce framework while targeting EU consumers can enable fair treatment and secure balance between parties in the gaming industry, however, only if legal collisions explained in the present thesis are eliminated on the Community level.

4. Legal Acts Applicable to the Developer versus User Relationships

The European e-commerce and consumer protection legal framework focuses primarily on the online purchase of physical items or so-called online shopping. However, with fast technological development and variety of digital and physical goods available online, taking into account alternative ways of contract conclusion (for example, smart contract), marketing strategy (for example, augmented reality advertisement), online platforms (for example, shared collaboration service platforms) available, such an approach cannot satisfy consumers expectation regarding legal guarantees while benefiting from cross-border e-commerce activity.

The present part will focus on legal acts and provisions of particular European acts applicable to the gaming company versus consumer relationships. The author will provide a high-level overview of the applicability of existing regulatory acts in e-commerce and consumer protection on the community level. Particularly, the scope and applicability of the following core legal regulations will be analysed:

(1) Consumer Rights Directive;

(2) E-Commerce Directive;

(3) Digital Goods Directive;

(4) Digital Content Directive;

(5) Digital Service Act.

The present part will examine core European acts regulating consumer protection, e-commerce and consumer contracts in the European Union in order to understand whether the nature of legal relationships between the developers and the players in pay-to-play and free-to-play video

games can fall under the scope of particular provisions and whether the player can demand from the gaming company specific set of mandatory contractual obligations.

The author will focus particularly on the status of in-game transactions with participation of fiat money, in-game tokens and crypto-currency. The author will analyse the scope of the application of different European acts in the area of consumer rights protection and e-commerce to new ways of concluding contracts, peer-to-peer virtual items exchange availability, shared collaboration platforms and online marketplaces for digital content. Such analysis would provide a possible way forward towards improving the European e-commerce and consumer protection framework in order to create a protective mechanism that the player purchasing intangible items in virtual worlds can count on. Moreover, the below analysis results from the above discussion on the definitions used in the European e-commerce and consumer protection framework and their applicability to the gaming industry.

In order to understand the applicability of the European consumer protection and e-commerce framework to the particular types of gaming transactions, the scope of the European directives needs to be analysed.

Considering the provisions of the Consumer Rights Directive, the directive is focused on the establishment of standard rules for the distance and off-premises contracts concluded between consumers and traders, notwithstanding the public or private status of such traders, following the organized distance sales or service provision scheme.[123] Therefore, the scope of the Consumer Rights Directive is widespread to all e-commerce contracts with certain exceptions that are directly stated in the directive (for example, gambling, healthcare, package travel, financial services are excluded from the scope of the Consumer Rights Directive) or in the national laws of the Member states (for example, the Member states can stipulate financial threshold for consumer contracts that would fall under the Consumer Rights Directive requirements).[124]

According to the Consumer Rights Directive, digital content represented on a tangible medium is defined as a digital good and fall under the provisions of sale and service contract, however, contracts for digital content supply, where such digital content is not represented on a tangible medium, cannot fall under the scope of many provisions of the Consumer Rights Directive

[123] Consumer Rights Directive, note 29.
[124] Ibid.

considering the consumer protection in service and sale contracts (for example, in such contracts the consumer is not granted with the right to withdrawal from the contract).[125]

Therefore, analysing definitions provided in the Consumer Rights Directive, it can be seen that the directive is focused on online sale of physical goods the contracts with the subject of digital content that is not supplied on a tangible medium are put under the separate category as exclusion from the standard off-premise contract.[126] Additionally, certain consumer guarantees prescribed in the Consumer Rights Directive can be applied only to digital content represented on a tangible medium (for example, delivery requirements) and from certain guarantees contracts on digital content supply are at all excluded (for example, withdrawal rights).[127]

Even though the Consumer Rights Directive is focused on contracts where the subject of a contract is a tangible medium (CD, DVD, flash drive etc.) which is a carrier of digital content, however, contracts on digital content not represented on tangible medium also fall under the scope of the mentioned directive with particular limitations on rights granted.

Thus, under the Consumer Rights Directive, in free-to-play video games, the consumer can enjoy only certain set of rights, which are limited compared to the regular sales or service contract, where the subject of a contract is a tangible item. For example, according to the Consumer Rights Directive, the gaming company has to follow provisions on information requirements,[128] as well as provisions on the arrangement of payments.[129] However, again transparency requirements and information provisions regarding the gratuitous contracts are not clearly specified, which will be explained in detail in chapter III of the present research.

Considering the above-mentioned, the provisions of the Consumer Rights Directive can be related to the gaming industry, as contracts on digital content supply are falling under the scope of its application. However, the main focus of the Consumer Rights Directive is directed to-

[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] European Commission, DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council an d repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2014, available at: https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf.
[129] Ibid.

wards electronic contracts on the online purchase of physical goods or digital content represented on the tangible medium. Thus, the directive can be applied fully to the pay-to-play video games, when the digital content or video game is purchased by the player and supplied on a tangible medium such as CD, USB or key drive.

At the same time, the scope of the Consumer Rights Directive includes only contracts between a consumer and a trader,[130] thus, the contracts on digital content broadcast without the explicit conclusion of the contract[131] (for example, access to the website itself) would not fall under the provisions of the Consumer Rights Directive. In free-to-play video games, the player has to accept EULA or "Terms of Service" provisions in order to access the website and, as will be described in chapter II of the present research, such documents can be considered as mixed consumer and license contracts. Therefore, relationships between users and the gaming company in free-to-play video games should fall under the scope of the Consumer Rights Directive.

Even though the Consumer Rights Directive is as well applicable to free-to-play video games, however, certain mandatory contractual requirements can be applied only partially. The issues arising with free-to-play video games, particularly transparency requirements, conformity of digital content and provisions of gratuitous contracts will be investigated in detail in chapter III of the present thesis.

The E-Commerce Directive, on the other hand, is applicable to the contracts in the area of the information society service provision, particularly facilitating cross-border trade and freedom of movement of information society services.[132] The E-Commerce Directive covers electronic business activity with the exception of taxation, gambling, legal representation etc.[133] Considering the findings presented in the present chapter, video games are considered as information society services, thus, falling under the scope of the E-Commerce Directive.

Both the Consumer Rights Directive and E-Commerce Directive establish information requirements for consumer contracts concluded through electronic means that are not contradicting but complimenting one another.[134] Additionally, all below-discussed directives and regulations

[130] Ibid.
[131] Ibid.
[132] E-Commerce Directive, note 26.
[133] Ibid.
[134] Consumer Rights Directive, note 29; E-Commerce Directive, note 26.

are applicable all together in a non-self-excluding manner but adding extra value to the provisions stated in each directive forming together European consumer protection and e-commerce framework.

The Digital Goods Directive regulates issues arising from contracts on the sale of goods, or service provision, where such goods or services require digital content in order to be functioning[135] (for example, it can be applied to gaming consoles, which are created to play video games). The Digital Goods Directive established certain rules and mandatory requirements for contracts with tangible movable items only, which fall under the digital good definition (tangible medium for digital content) or definition of goods with the digital element (good that is requiring digital content to function).[136] Therefore, the Digital Goods Directive to be applied to pay-to-play video games that are represented on a tangible medium, however, to the hybrid products, such as a physical access key that provides authorization for online video game, or virtual reality set required for augmented reality video game both Digital Goods Directive and Digital Content Directive will be applicable.

On the other hand, the Digital Content Directive is focused on the digital content and digital service supply notwithstanding the representation of such digital content or digital service.[137] Therefore, both free-to-play and pay-to-play video games should fall under the provisions of the Digital Content Directive without prejudice to the tangibility of the gaming product.

Digital Content Directive applies to the supply of digital content and digital services, including digital content supplied on a tangible medium, as well as to the tangible medium per se, in cases when the tangible medium serves only as a carrier of the certain digital content.[138] While the Digital Goods Directive is applicable to contracts for the sale of goods, including but not limited to goods with digital elements.[139]

Moreover, considering the provisions of the Digital Content Directive, it can be seen that all contracts on the digital content supply are falling under its scope of application even if the payment for such supply is represented not only by fiat money but also by data.[140] However,

[135] Digital Goods Directive, note 74.
[136] Ibid.
[137] Digital Content Directive, note 74
[138] Digital Goods Directive, note 74.
[139] Ibid
[140] Digital Content Directive, note 74.

according to the same Digital Content Directive, when the software offered by the trader under a free and open-source license and the consumer does not pay a price for such software (when data is collected only for the reasons of security and operability of software),[141] the Digital Content Directive provisions should not be applied. Therefore, gaming companies can claim that free-to-play video games do not require any payment from the player, therefore, provisions of the Digital Content Directive should not be applied. However, in the author's opinion, such an approach cannot be considered legally justified and the issue of the gratuitous content will be explained in detail in chapter III of the present thesis.

The Consumer Right Directive also does not grant a high level of legal certainty considering regulations towards contracts on digital content and leaves the possibility to interpret some of its provisions. For example, the notion of payment is not explicitly defined as a necessary characteristic in online digital content supply contracts (opposite to service and sales contracts). This puts also free subscription contracts on online digital content (not represented on tangible medium) under the scope of the Consumer Rights Directive (opposite to free trial for digital contents represented on tangible medium).[142] Thus, contracts on a free download of an application from a Google Play or Apple store fall under the scope of the Consumer Rights Directive,[143] in the same way also a free subscription to free-to-play video games online also fall under the scope of the Consumer Rights Directive.

Considering the above mentioned, it can be seen that towards totally free subscription contracts to free-to-play video games Consumer Rights Directive will still be applicable, even while the provisions of the Digital Content Directive exclude gratuitous contracts from its scope and leave room for interpretation in regard to legitimate data usage in free-to-play video games.

Worth mentioning that multiple items of digital content (different virtual items) can be offered under one contract when such offer is connected by a single connection to the trader's online platform.[144] In this case, the supply of individual digital content under the subscription contract does not constitute a new contract under the Consumer Rights Directive, but if such digital content is not covered by the subscription, it will.[145]

[141] Ibid.
[142] DG Justice Guidance Document, note 128.
[143] Ibid.
[144] Ibid.
[145] Ibid.

As will be investigated in chapter III, the inclusion of the paid content under free subscription contract should be considered as out of scope relationships that are not covered by the main gratuitous contract and, therefore, the provisions of the Digital Content Directive and further e-commerce and consumer protection regulatory framework should become applicable respectively. Moreover, according to the Digital Content Directive, even in the case of a single connection contract between the same trader and the same consumer, the Digital Content Directive should be applied to the part of the contract where the elements of a digital content supply are present.[146]

Thus, both Consumer Rights Directive and Digital Content Directive should be applied to all in-game transactions, where the virtual intangible item is exchanged for the "real-life" money, crypto-currency, or in-game token, which was purchased for the fiat money. However, as will be shown further in chapter II, game developers disregard consumer rights protection guarantees and European e-commerce rules and follow a self-regulatory approach under the intellectual property protection framework.

Notwithstanding such self-regulation, the single subscription contracts, EULAs, "Terms of service" contracts between players and the gaming company are considered as contracts on digital content provision and fall under the scope of the Consumer Rights Directive and the Digital Content Directive. Unfortunately, due to the foreign place of establishment, lack of transparency in contractual provisions and disregard of the EU regulations, standard term contracts with game developers and gaming platforms complicate the possible enforcement.

Analysing the provisions of both the Digital Content Directive and Consumer Rights Directive, it can be seen that the contracts with digital content as a subject (not represented on tangible item) are not considered as sale or service contract according to the Consumer Rights Directive, however, as explained in the present chapter, free-to-play video games fall under the definition of "digital services" and "digital content supply" defined in the European consumer protection and e-commerce framework.

A difference in approaches taken by the Consumer Rights Directive and Digital Content Directive towards the same type of contracts can be explained by the technological development and new ways of service provisions for digital content supply being available on the market.

[146] Digital Content Directive, note 74.

However, this as well can cause legal uncertainly towards contracts on digital content supply on online platforms and, in particular, consumer protection framework applicable to in-game purchases. The consumer rights protection mechanisms to be applied to in-game transactions will be investigated in detail further in the present thesis.

Worth mentioning that the Digital Content Directive is applied to the consumer versus trader contracts, however, as per provisions of the directive, online platform providers are as well considered as traders from the consumer protection perspective.[147] Therefore, gaming platforms, not necessary service platforms, would be considered as traders as per Digital Content Directive and would need to follow certain mandatory contractual requirements established thereby.

Such an innovative approach towards online platforms was laying down a base for the Digital Service Act and new e-commerce and consumer protection framework focusing on the liability of intermediary online platforms and online marketplaces that do not necessarily act as traders in standard sense and such platforms do not offer services directly to the consumers.

The Digital Service Act is a step towards solving the problem of non-enforcement of foreign mass cross-border contracts by providing specific thresholds to online platforms and international traders targeting European consumers. The scope of the Digital Service Act covers legal relationships between consumers and online platforms, notwithstanding the fact whether such an online platform is a direct service platform and whether the entity owning a platform is established outside of the European Union.[148] Digital Service Act mainly focuses on the online marketplaces, including but not limited to online marketplaces for digital content, large scale cross-border online platforms engaging certain amount of consumers on the Union level.[149]

Taking into account scalability and the nature of the gaming industry in the European Union, the Digital Service Act is applicable to online marketplaces for intangible virtual items, shared collaboration platforms, decentralized applications and commoditized free-to-play video games. The approach taken by the Digital Service Act is open to new technological developments and is not limited to the certain type of online platforms, but focuses on the technical

[147] Digital Goods Directive, note 74.
[148] Digital Services Act, note 34.
[149] Ibid.

features such as hosting, cashing and mere conduit services provided to consumers, third-party traders or groups of such consumers and traders.[150]

Notwithstanding the innovation in the regulatory framework, Digital Service Act leaves smaller sized gaming platforms out of its scope, however, the principles established can be used for further specialized framework regulating gaming industry in order to avoid differentiation in treatment for cross-border virtual worlds and secure consumer rights protection for foreign gaming platforms targeting the EU consumers.

5. Intermediate Conclusions to the Definitions Used in the European Electronic Commerce Framework and their Applicability to the Gaming Industry

The present chapter examined in detail the existing definitions applicable to e-commerce and consumer protection regulatory framework on the Community level and their applicability to the transactions in the gaming industry. Particularly, the author examined provisions of the E-Commerce Directive, Digital Content Directive, Digital Goods Directive, Consumer Rights Directive, Intermediation Services Regulation and the Digital Service Act on the subject of applicability of existing definitions to the business models available in the gaming industry.

The present chapter assessed definitions of “e-commerce”, “information society services”, “online platforms”, “digital content”, “digital goods” and “digital services” in the scope of the existing business models in the gaming industry, particularly, the intangible item purchase, availability of various service gaming platforms, online marketplaces, hybrid products, blockchain and augmented reality usage (free-to-play video games, collaborative gaming platforms, third-parties intermediation service platforms etc.).

It can be concluded that the existing e-commerce and consumer protection framework focuses on distribution channels (subscription contract, gratuitous access or one-time digital item purchase, online marketplace, service platform) and the representation (tangible medium, intangible medium or a combination of both) of the particular digital content and can be hardly applicable to various hybrid models. Video game per se can be explained both as “digital good”, “digital service” or “digital content”. The regulatory framework does not provide clear differentiation between the above-mentioned notions and introduce various exclusions on the stage

[150] Ibid.

of practical implementation, which facilitates difference in interpretation and, therefore, self-regulation through law analogy and contractual means.

Due to the various exclusions, in order to determine e-commerce and consumer protection rules applicable to the specific video game or in-game transaction, first of all, the nature of such a game needs to be assessed:

(1) Video game that is represented solely as a digital software available online and which does not require goods with digital elements to participate in a game will be falling under the scope of the relevant provisions regarding digital content supply or digital services (the issues arising from gratuitous contracts will be investigated further in Chapter III of the present thesis);

(2) Video game that is represented on a tangible medium, which acts as a carrier of such a video game will be explained as a good with the digital element (pay-to-play video games on a CD, USB-flash, with a physical access key);

(3) Video game that is represented as a digital software on the online platform, but which requires physical good for game participation (for example, virtual reality set) and such a good is purchased together with the game, can be as well explained as digital good;

(4) Video game that is represented as a digital software on the online platform, but which requires physical good for game participation, however, such a good is purchased separately from a game and based on a separate agreement with a third party, should be defined as a digital service.

If the business modes stand out from the above-stated classification, there is a lack of legal certainty regarding applicable harmonized regulations on the Community level. The EU regulatory framework is not adapted to hybrid digital products, alternative payment models and indirect payment mechanisms, which facilitates manipulations, price obfuscation and unfair treatment in the gaming industry. The majority of game developers use various methods, to disguise the actual price of game participation under gratuitous contracts. Even though the clarifications regarding paid content being available under gratuitous subscription contract is present on the Community level, game developers use in-game tokens purchase system or

crypto-currencies transaction in order to avoid direct fiat money payments and eliminate the possibility for consumers to evaluate the economic consequences of such a contract.

Moreover, various gaming platforms are established oversees in compliance with various e-commerce and consumer protection standard that are not compatible with the EU ones. Or the platform itself can be hosted by a private individual or third-party service provider, which would change the approach towards mandatory contractual rules and liability of parties. Video game as sole product or in-game transactions on the intangible virtual items exchange are represented on gaming online platforms, which can be acting as service online platforms (free-to-play video games itself or online marketplaces for virtual items purchase) or as intermediation service online platforms (online platforms for collaborative gaming).

Historically, in the European legislation, there was no common view on online platforms' definition and, the definition of intermediation service platforms available in the Intermediation Services Regulation excludes from its scope service platforms and, consequently the majority of gaming platforms. However, as explained above, notwithstanding ownership, online platforms are considered as acting as traders in a business capacity.

The Digital Service Act proposal, indeed, introduced a new approach towards the definition and regulation of online platforms focusing on the digital features as hosting and data processing service of online platforms, which would cover both service platforms and intermediation platforms including various types of gaming platforms. Even though the Digital Service Act provides an innovative approach and tackles overseas establishment for cross-border service provision, it focuses on the high scale gatekeepers and excludes smaller service platforms. Therefore, Digital Service Act per se cannot fill the legal gaps in consumer protection in the gaming industry but can serve as an example for further gaming-related specialized regulations on the Community level.

The European consumer protection and e-commerce framework is composed of numerous directives and regulations, which are complementing one another. The fast technological development of new ways of concluding contracts and conducting business in the digital environment provides room for interpretation and in certain cases triggers a need in the applicability of the legal analogy due to the impossibility to apply specific legal norms to certain types of modern legal relationships.

Understanding the scope of the above-mentioned notions existing in the regulatory framework on the EU level is crucial for the determination of the applicability of the relevant norms to the gaming industry, and are useful for further research in order to understand the mechanisms regulating consumer rights protection, unfair terms, information requirements, data protection and conformity of goods, liability in the gaming industry, particularly regulations applicable to the in-game transactions, virtual items exchange and online marketplaces for virtual items.

The present part investigated the scope of applicability of the main harmonized legal norms established on the Community level in order to regulate online platform versus user relationships on the digital content supply and digital service provision in the European Union. The author analysed whether already existing European directives and regulations can be applied to the gaming industry taking into account various innovative technologies used in the developer versus user relationships.

Considering the above mentioned, the scope of the main European acts on the consumer protection and e-commerce towards issues arising with digital content supply in the gaming industry can be classified as follows:

Subject of a contract	*Regulatory act to be applied*	*Example*
Digital content represented on a tangible medium, where such medium loses its functionality without digital content	Digital Goods Directive Digital Content Directive Consumer Rights Directive	Smart watch, audio assistant (i.e., Amazon Alexa)
Digital content represented on a tangible medium, where such medium loses its functionality without digital content. However, where digital content can exist separately from digital good	Digital Goods Directive Digital Content Directive Consumer Rights Directive Digital Service Act (based on the online platform characteristics and scalability)	Augmented reality video games requiring specific virtual reality set

Digital content represented on a tangible medium where such medium is acting as a carrier	Consumer Rights Directive Digital Content Directive Digital Service Act (as above, additionally, in case when access to video game only supplied in USB key)	Pay-to-play video games on CD, DVD, USB flash drive
Digital Content not represented on a tangible medium, where such content is totally free and no build-in payments available	Consumer Rights Directive Digital Content Directive Digital Service Act (as above)	Free-to-play video games, gaming application, where the content is totally free for the users
Digital Content not represented on a tangible medium, where subscription for such content is free and, but build-in payments are available	Consumer Rights Directive Digital Content Directive (only to in-game transactions partially, or transactions requiring personal data transfer as counter-performance) Digital Service Act (as above)	Majority of free-to-play video games
Digital Content not represented on a tangible medium, where the consumer pays with personal data for such content	Consumer Rights Directive Digital Content Directive (with exceptions as stated above) Digital Service Act (as above)	Free-to-play video games, gaming application, where the content is free and gaming company earns revenue on advertisements
Digital Content not represented on a tangible medium, where	Consumer Rights Directive	Majority of free-to-play video games

the consumer pays with fiat money, crypto-currencies, exchanged for fiat money in advance, or in-game tokens exchanged for crypto-currency or fiat money in advance.	Digital Content Directive (with exceptions as stated above) Digital Service Act (as above)	

Considering the above-discussed, it can be concluded, that the existing legal framework could be applied partially to the gaming industry and in-game transactions. It covers in the majority of pay-to-play video games, however, certain gaps related to the free-to-play gaming model, particularly, regarding the gratuitous contracts, the monetary value of the intangible virtual items, indirect payment models, commoditized in-game transactions under free-subscription contract, crypto-currencies engagement, are present in the existing European e-commerce and consumer protection framework. This leaves European players without proper legal protection, facilitates unfair treatment, and creates a misbalance between parties in the gaming industry. The issues related to the direct application of European e-commerce and consumer protection rules will be discussed in further chapters.

II. LEGAL APPROACH TO THE DEVELOPER VERSUS USER RELATIONSHIPS

Nowadays virtual world relationships are integrated into a "real-life" in a way, that in certain situations it is hard to distinguish whether particular rights and obligations take place in a virtual world or a "real-life" world. The present chapter will examine the nature of legal relationships between parties as well as will analyse the actual examples of contractual norms stipulated in EULAs of popular video games in the EU.

A virtual world is an online community taking place in a three-dimensional simulated physical space.[151] The participants of a virtual world use it to socialize, take part in adventures, network,

[151] Fairfield J., 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds', McGill Law Journal, Vol. 53, 2008, Washington & Lee Legal Studies Paper No. 2007-20, available at https://ssrn.com/abstract=1002997.

play, or even work.[152] Virtual worlds are used not only for entertainment, but as well as for military training, medical treatment, and e-commerce.[153]

Free-to-play virtual world games, or massive multiplayer online games, share characteristics with traditional computer software games: the virtual environment is represented graphically on a computer monitor, however, unlike traditional single-player free-to-play or pay-to-play video games, virtual worlds allow users to customize their avatar's appearance and participate in social interaction.[154]

The border between virtual and "real-life" worlds, rights and obligations in relation to such virtual worlds is not clearly defined in modern society. In the virtual world, users create a new electronic identity that is used and promoted in "real-life", at the same time, economic activity in the virtual world affects the "real-life" economy, for example, in play-to-pay video games player can "withdraw" virtual money from the gaming platform.[155]

Digital activity interacts with reality in various ways, resulting in economic, personal, even administrative and criminal consequences. For example, there are different business models used in the virtual worlds – customers invest "real-life" money into gaming platforms in order to obtain intangible virtual items, or convert virtual world currency, tokens into "real-life" money to earn for living.[156] This creates opportunities not only for gaming platforms to obtain revenue from the consumers, but also vice versa – for consumers to use gaming platforms as digital marketplaces and digital work or business environments for networking, trade and service provision. Jon Jacobs, as an example, sold virtual property obtained on the gaming platform for more than half of a million U.S. dollars as a result of a peer-to-peer transaction on the gaming platform.[157] Moreover, some countries, apply a property regime for digital assets and

[152] Ibid.
[153] Ibid.
[154] Reuveni E., 'On Virtual Worlds: Copyright and Contract at the Dawn of the Virtual Age', Indiana Law Journal, Vol. 82, No. 261, 2007, available at: https://ssrn.com/abstract=1113334.
[155] Fairfield J., note 151.
[156] Ibid.
[157] Chiang O., 'Meet The Man Who Just Made A Half Million From The Sale Of Virtual Property', Forbes, 2010, available at: https://www.forbes.com/sites/oliverchiang/2010/11/13/meet-the-man-who-just-made-a-cool-half-million-from-the-sale-of-virtual-property/#5a2e766c21cd.

crimes connected to deprivation of digital property are investigated in the "real-life". For example, in Korea and China, certain action committed in the virtual worlds on the gaming platforms can be classified as cybercrimes and investigated it in a "real-life".[158]

Notwithstanding the variety of technological solutions for the gaming platforms available in the market, for example, Blockchain-based video games like CryptoKitties,[159] massively multiplayer 3D online games like AceOnline,[160] augmented reality games like PokemonGo,[161] from the legal perspective all video games are regulated based on the legal analogy and contractual self-regulation regime - provisions stated in the End User Licence Agreement drafter by the game developer or gaming platform. In order to participate in a game all players need to agree to the terms stated in such a EULA following the "take it or leave it" approach with no bargain power to change any of the terms and conditions. Due to the fact that the EULA imposes rules on the virtual community with millions of participants, it bears characteristics of a mass standard terms contract.[162]

Such standard term EULAs establish rules applicable not only to "real-life", thus, the regulation on legal rights and obligations of the parties – trader and the consumer, but as well as rights and obligations applicable to the virtual worlds only. Moreover, as licencing agreement per se, the standard term EULA should regulate software licensing rights and obligations, however, looking into the EULA examples of popular video games, such contracts regulate as well social behaviour between parties, consumer rights and property rights of the parties.[163]

For example, Blizzard entertainment EULA ("World of Warcraft" video game) states following:

"*Blizzard may suspend or terminate your license to use the Platform, or parts, components and/or single features thereof, if you violate, or assist others in violating, the license limitations set forth below. You agree that you will not, in whole or in part or under any circumstances, do the following:*

[158] Ward M., 'Does Virtual Crime Need Real Justice?', BBC News, 2003, available at: http://news.bbc.co.uk/2/hi/technology/3138456.stm; Knight W., 'Gamer Wins Back Virtual Booty in Court Battle', New Scientist, 2003, available at: http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle.html.

[159] Information on CryptoKitties, available at: https://www.cryptokitties.co/.

[160] Information on ACE, available at: https://ace.subagames.com/

[161] Information on PokemonGo, available at: https://pokemongolive.com/en/

[162] Fairfield J., note 151.

[163] Ibid.

… Disruption / Harassment: Engage in any conduct disrupting or diminishing the game experience for other players, or disrupt operation of Blizzard's Platform in any way, including:

Disrupting or assisting in (i) the disruption of any computer used to support the Platform or any Game environment; or (ii) any other player's Game experience…

Harassment, "griefing," abusive behaviour or chat, conduct intended to unreasonably undermine or disrupt the Game experiences of others, deliberate inactivity or disconnecting, and/or any other activity which violates Blizzard's Code of Conduct or In-Game Policies."[164]

Thus, EULA, which is by its nature an intellectual property rights contract,[165] regulates social behaviour and social interactions in video games. Moreover, in some cases, EULAs regulate developer versus user relationships in the scope of anti-money laundering regulations. For example, the same Blizzard Entertainment EULA states:

"*You may choose to add Blizzard Balance in different currencies that are applicable to your country of residence, in order to redeem Blizzard Balance for certain goods and/or services offered on the Platform. To have a Blizzard Balance of more than a certain value, you must have attached an authenticator to your Blizzard Account*".[166]

The above-provided EULA provisions show that a developer in such a case is intending to eliminate the risk of money laundering using in-game transactions by requesting consumers to complete relevant identification and authentication procedure.

Standard EULA or "Terms of Service" agreement has mixed nature involving characteristics of different types of contracts - EULA can include instruments transferring property, license on intellectual property rights and characteristics of a purchase or service provision agreements, therefore, during the practical legal application different views on the law applicable are possible.[167] In the majority of the cases, the virtual-world EULAs intend to create pseudo-property,

[164] Blizard Entertainment EULA, available at: https://www.blizzard.com/en-gb/legal/08b946df-660a-40e4-a072-1fbde65173b1/blizzard-end-user-license-agreement.

[165] Fairfield J., 'Virtual Property', Boston University Law Review, Vol. 85, 2005, Indiana Legal Studies Research Paper No. 35, available at: https://ssrn.com/abstract=807966; Gong J. Z., 'Defining and Addressing Virtual Property in International Treaties', Boston University J. SCI. & TECH. L., Vol. 17, 2015, available at: https://www.bu.edu/jostl/files/2015/02/Gong_Web_171.pdf; Stein S.J., 'The Legal Nature of Video Games – Adapting Copyright Law to Multimedia', Press Start, Vol 2, No 1, 2015, available at: https://press-start.gla.ac.uk/index.php/press-start/article/view/25/11.

[166] Blizzard Entertainment EULA, note 164.

[167] Mulligan Ch., 'Licenses and the Property/Contract Interface', Indiana Law Journal, Forthcoming; Brooklyn Law School, Legal Studies Paper No. 544, 2017, available at: https://ssrn.com/abstract=2987325.

pseudo-tort, and even pseudo-constitutional and pseudo-criminal systems out of standard term contracts regulating not only intellectual property rights but as well as social behaviour and property rights.[168]

Taking into account the lack of clear legal and regulatory framework, self-regulatory approach established in the industry and the fact that access to video games is granted through accepting standard term contract – EULA,[169] the nature of such legal relationships needs to be analysed in order to determine legal framework applicable (i.e., intellectual property, consumer protection, property law, anti-money laundering regulations etc.).

The present chapter will examine legal approach to the gaming company versus consumer relationships including but not limited to the doctrine view and the legal regulations applicable to the EULA as well as post-contractual relationships, such as in-game transactions. The author will focus on the different views existing in doctrine regarding the character of the legal relationships between the developer (gaming company, collaborative gaming platform or online marketplace for virtual items) and the player.

Based on the interconnectivity of the virtual world and the "real-life" world, as explained above, it is important to analyse all views with respect to the actual provisions of existing EULAs taking into account the hybrid business model of revenue provision including but not limited to revenue from in-game transactions in free-to-play video games.

The present part will examine legal regulations applicable to the gaming company versus consumer relationships and will analyse different approaches existing both in doctrine and in the regulatory framework of the European Union towards applicable law doctrine and regulations applied to specific issues. The virtual world EULAs are covering complex developer versus user relationships and are subject to the following main legal views towards the regulations approach:

(1) Intellectual property law approach;

(2) No legal intervention approach;

(3) Property law approach;

[168] Fairfield J., note 151; Fairfield J., note 165; Gong J.Z., note 165; Stein S.J., note 165.
[169] Fairfield J., note 151.

(4) Contract law approach.

The author will explain in detail whether intellectual property rights law, contract law or property law should be applied to the developer versus user relationships, will explain legal consequences following each of the approaches, and will discuss the possible solutions regarding the nature of such relationships in order to protect interests of both businesses and consumers and to secure Digital Single Market Strategy.

1. Current Regulation or Intellectual Property Law Approach

Nowadays virtual property rights and in-game transactions are managed within the framework of intellectual property rights protection.[170] Video game providers bind their users with "Terms of Service" or "End User License Agreement", which regulates not only the behaviour of the user in the game, but in many cases, as well grants transfer of intellectual property rights for items created by the user in the virtual environment and all property rights outside of the game for virtual objects purchased in the game by the user.[171]

Provisions of EULAs on the property rights and intellectual property rights of video game developers or gaming platforms raise questions and trigger court cases and legal issues. Following the case investigated in the U.S., the physical workplace "Black Snow Interactive" was established in Mexico, where employees were paid to play the Dark Age of Camelot video game in order to obtain digital items on the gaming platform and further re-sell such virtual assets and their virtual characters acquired through gaming platform on eBay.[172] The video game developers claimed intellectual property rights' infringements and the violation of the licensing agreement.[173] The Black Snow Interactive, on the other hand, stated that the EULA represented unfair business practice and unfair consumer contract.[174] The above-discussed case shows that there is no agreement in the industry regarding the legal status and classification of EULAs regulating rights and obligations between parties.

[170] Fairfield J., note 165; Gong J.Z., note 165; Stein S.J., note 165.

[171] Volanis, N., 'Legal and policy issues of virtual property', Katholieke Universiteit Leuven, Int. J. Web Based Communities, Vol. 3, No. 3, 2007, available at: https://www.law.kuleuven.be/citip/en/archive/copy_of_publications/91206-volanis2f90.pdf.

[172] Reuveni E., note 154; Dibbell J., 'Black Snow Interactive and the World's First Virtual Sweat Shop', available at: http://www.juliandibbell.com/texts/blacksnow.html.

[173] Ibid.

[174] Ibid.

Virtual items, including virtual in-game currency, which were created by the game developers, are usually contractually considered as intellectual property by the gaming company. For example, according to EULA of the Rocket League video game company, the trader grants:

"…the nonexclusive, non-transferable, non-sublicensable, limited and revocable right and license to use Virtual Currency and Virtual Goods obtained by you for your personal non-commercial gameplay exclusively within the Software. Except as otherwise prohibited by applicable law, Virtual Currency and Virtual Goods obtained by you are licensed to you, and you hereby acknowledge that no title or ownership in or to Virtual Currency and Virtual Goods is being transferred or assigned hereunder. This Agreement should not be construed as a sale of any rights in Virtual Currency and Virtual Goods."[175]

The gaming company grants no property rights to virtual goods created, purchased or obtained on the gaming platform by the user. Moreover, on conditions usually prescribed in the EULA, the developers can on their own consideration delete purchased property or delete the access of the player to the gaming platform per se depriving of any virtual items usage.[176] In cases when the player spends over 6 million U.S. dollars for a virtual item (example discussed above in regards to Entropia Universe video game), there are no contractual or legal guarantees that such a player will not be facing the risk of being deleted from the game, the risk of non-delivery of the item and the risk of the destruction of such an item due to an event in the game or sole decision of the developer. If applied to the rules in relation to the online marketplace for the offline goods, or even digital goods, such a situation would be considered as a violation of consumer rights and e-commerce regulations, however, in digital content supply or digital service provision contracts, especially under gratuitous subscription contract, the consumer has a minimum level of consumer guarantees.

In the Eve Online video game, a virtual space battle, caused by the delay of the payment in "real-life" money by one player for the virtual item needed to protect his spaceship, resulted in an estimated loss of 300,000 U.S. dollars in virtual items for different consumers.[177] Thus, the

[175] RocketLeague EULA, available at: https://www.rocketleague.com/eula.

[176] News Report, 'China's first 'virtual property' insurance launched', China Daily, 2011, available at: https://kotaku.com/5818906/china-launches-virtual-property-insurance.

[177] News Report, 'Eve Online virtual war 'costs $300,000' in damage', BBC News, 2014, available at: https://www.bbc.com/news/technology-25944837.

in-game actions can require players not only to input fiat money or monetary value items optionally, but such a monetary investment can be required as a mandatory one in order to protect already obtained virtual items, to proceed further in a video game, or to obtain an advantage over other players.

The present part will examine valid provisions of actual EULAs of the popular video games available at the market and will explain the nature of the self-regulatory framework applied contractually. The author will analyse whether the intellectual property law approach can represent the actual nature of the developer versus user relationships and can protect the rights and lawful interests of the parties. The present part will focus as well on user-created content and the provision of the derivative works available in popular video games.

A. Intellectual Property on Virtual Items

Historically, the intellectual property law approach to regulate software access was used by software developers as a legal analogy due to the lack of regulatory framework applicable to the newly created concept in the digital world.[178] The first licence contract for the software was used under the General Public Licence concept by the Free Software Foundation in the 1980s establishing four freedoms of software developers, particularly, freedom to run the software program, to modify it, to study it and to distribute it.[179] With the Open Source Initiative Creative Commons and Free Software Movement proposed licencing agreements as alternatives for protecting the rights and interests of software developers while providing gratuitous software to the public.[180]

With the technological and regulatory development, software licences achieved the possibility to obtain intellectual property rights certification for the end sole product and various regulatory acts were adopted on the Community level to secure the weak position of software developer on intellectual property rights market for open and free software, particularly, to protect from unauthorized copying and distribution. Thus, such a self-regulatory approach became redundant, however, software developers continue using legal analogy and cover relationships in

[178] Elkin-Koren N., 'Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks', Governance, Regulations and Powers of Internet, E. Brousseau, M. Marzouki & C. Meadel eds., Cambridge University Press, 2009, available at: https://ssrn.com/abstract=1321164.
[179] Ibid.
[180] Ibid.

the gaming industry under the same intellectual property law framework due to the lack of specific regulation on in-game virtual items transactions and virtual items purchase.

In the well-known Atari Inc. versus Amusement World Inc. historical case, the U.S. court held that certain visual components of the work could not fall under the copyright protection framework.[181] Indeed, in 1981 the video game elements were more engineering work than creative work. However, almost 30 years later in the United States versus Clark case, the court ruled similarly.[182] Therefore, the historically used approach to rely on intellectual property framework in modern realities was doubled in the court opening a further discussion for the appropriate regulation.

Moreover, intellectual property rights do not take a source in all physical objects created, in the same way, they do not source from all digital items created. The element of creativity in relation to the in-game virtual items was examined by the court in the United States versus Clark case. In the present case, the defendant "stole" in-game tokens (intangible virtual items) from EA Games Company.[183] During the trial, the issue of the monetary value of in-game tokens and intellectual property for particular virtual items was examined by the court. As a general rule, in order to prove fraud, the developer has to prove that the revenue was lost by the gaming company as a result of the defendant's action, however, in FIFA's (video game discussed in the present case) EULA the gaming company stated itself that virtual items have no monetary value.[184] Therefore, the gaming company claimed that revenue was lost as a result of a player's actions, when he acquired the intangible virtual items without paying the remuneration cost, however, the binding "Terms of Service" agreement, concluded between the player and the gaming company, directly stated that such intangible virtual items have no monetary value in the respect to the trader versus consumer relationships.

[181] Atari, Inc. v. Amusement World, Inc. Civ. No. Y-81-803, November 27, 1981, available at: https://caselext.com/case/atari-inc-v-amusement-world-inc#.VAdFllWSxv4.

[182] United States v. Clark, o. 4:16-cr-00205-O, 2016, Available at: https://regmedia.co.uk/2016/11/14/fifafraudindictment.pdf.

[183] Ibid.

[184] Ibid.

In the above-discussed United States versus Clark case, EA Games failed to prove that FIFA in-game tokens constitute its intellectual property, as no trademark, copyright or patent evidence particularly for such tokens was provided by the company.[185] Therefore, the blind application of the intellectual property rights protection framework towards all elements of software can be considered as one violating the rights and lawful interests of consumers by creating a quasi-regulated environment for unfair treatment in the gaming industry without evidential regulatory background.

The approach challenged by the court in the United States versus Clark case is currently followed by the majority of gaming platforms at the market – in-game transactions that require direct or indirect payment are covered under the intellectual property protection framework with no proof of the element of creativity or no evidence of intellectual property rights for particular digital items or computer codes. For example, 1047 Games EULA (the "SplitGate" video game) states:

"*1047 Games offers you the ability to acquire licenses to in-game currency ("Game Currency") or Content, such as by: (a) purchasing a limited license to use Game Currency for a fee ("Purchased Game Currency"), (b) earning a limited license to use Game Currency by performing or accomplishing specific tasks in the Game, or (c) purchasing for a fee, exchanging Game Currency for, or earning a limited license to use Content. Also, 1047 Games may facilitate the exchange of certain Content through the Game, in some cases for a fee. You may only use such Game Currency or Content if you pay the associated fee (if any). When you earn or pay the fee to obtain such Game Currency or Content, you are obtaining from 1047 Games the right to have your License include such Game Currency or Content. Both Game Currency and Content are licensed, not sold, to you under the License*."[186]

In the present EULA, the developer provides a possibility to a player to "earn" a licence for in-game virtual items in a different way, thus, to pay royalties with:

(1) fiat money
(2) labour,
(3) particular virtual item (in-game currency).

[185] Ibid.
[186] SplitGate EULA, available at: https://www.splitgate.com/eula.

It can be seen that gaming companies de facto obtain remuneration from in-game transactions as for the digital service consumer contract, but de jure are trying to hide behind the intellectual property law provisions following the open-source software approach by creating a quasi-regulation for virtual items exchange, while no intellectual property rights for such virtual objects can be established. Only in case of losses as a result of the player's action, the traders do follow the different approaches establishing the monetary value of the virtual items and separating such transactions from the gratuitous subscription contract. Such an approach shows a misbalance between parties in the gaming industry that allows manipulations by the game developers and creates a disproportionate self-regulated market affecting a significant number of consumers in the EU.

Therefore, the intellectual property approach towards digital transactions on gaming platforms cannot reflect the nature of such legal relationships and cannot protect the rights of both parties – the trader, in cases like the above mentioned, when the intangible virtual items are acquired by the users without paying the price of the contract, or the consumer, in cases, when the intangible virtual item has defects, not in conformity with the contract or has different functionality than described in the advertisement by the gaming company.

The above discussed United States versus Clark case raised open questions regarding the status of in-game tokens, intangible virtual items and laws applicable to them, which were not answered in the final judgement, as the case was dismissed due to the defendant's death.[187] Notwithstanding the above, it can serve as a turning point towards the regulation of the in-game transactions and determination of boundaries for intellectual property protection framework usage in the gaming industry. On the current date, there is still no common approach towards in-game transactions, which causes a discrepancy in the legal regulations (application of intellectual property law, contract law or property law in different cases to the similar scenarios), leaves rights both of traders and consumers unprotected and causes monetary loss for both parties.

B. Creative Element in Video Games

Notwithstanding the above mentioned, the virtual worlds and video games can include the element of creativity and can fall under the intellectual property law protection framework. Indeed, there are views that virtual worlds per se can be copyright-protected works. For example,

[187] Holden J., note 12.

in Atari Games Corp. versus Oman case, the court held that a video game can be considered as a copyright protected compilation of audio-visual elements.[188] In the Nintendo of Am. Inc. versus the Elcon Indus case, the court stated that the computer-operated graphical elements, backgrounds, non-user created elements of a virtual world can be considered as copyrighted works.[189] Therefore, the virtual world as a whole can be considered as an original copyrighted work created by the video game developer that is falling under the scope of intellectual property law protection, subject to the presence of the element of creativity.

At the same time, the copyright protection of a virtual world as a whole is not resulting from copyright protection of its separate elements, including virtual items and virtual tokens - elements which trigger most disputes in free-to-play video games as obtained by players in exchange for direct or indirect payment under gratuitous contract (see above FIFA case). Moreover, copyright protection of the virtual world as an end product does not deprive players of intellectual property rights protection in relation to their own creative works in the virtual worlds, which require separate examination on the subject of the intellectual property protection application.

There is a widely accepted approach in the market to treat video games as computer software, which can be explained following the Atari, Inc. versus Amusement World, Inc. case. In this case, a video game was considered by a court as an engineering work created by developers due to the fact that computer code is not an original work but was already used previously (for example, Battlefield and Need for Speed: the Run video games share the same source code).[190] Thus, apart from the originality of audio-visual content in a game, or a visual representation of virtual elements in a game, the originality of a game code should be assessed.

In accordance with the provisions of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, computer software and its preparatory design material is protected as literary works within the meaning of

[188] Case Atari Games Corp. v. Oman, 979 F.2d 242, 247 (D.C. Cir. 1992), available at: https://caselext.com/case/atari-games-corp-v-oman.

[189] Case Nintendo of Am., Inc. v. Elcon Indus., 564 F. Supp. 937, 943, available at: https://law.justia.com/cases/federal/district-courts/FSupp/564/937/1407344.

[190] Ramos A. et all., 'The Legal Status of Video Games: Comparative Analysis in National Approaches', WIPO study, July 29, 2013 available at: https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf; Ramos A., 'Video Games: Computer Programs or Creative Works?', August 2014, Bardají & Honrado, Abogados, Madrid, Spain, WIPO magazine, available at: https://www.wipo.int/wipo_magazine/en/2014/04/article_0006.html.

the Berne Convention for the Protection of Literary and Artistic Works subject to the originality of such software or a program.[191] Following the Berne Convention and mentioned Directive 2009/24/EC, originality is a crucial element in order to classify a game or gaming element (for example, virtual goods) as intellectual property of a game developer.[192]

According to article 2 of the Berne Convention for the Protection of Literary and Artistic Works, as "literary and artistic works" are considered every "*production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression*".[193]

Video games per se can include the following creative elements:[194]

(1) Audio-visual elements:
    a. Animation;
    b. Images;
    c. Sound recordings;
(2) Computer code:
    a. Source code;
    b. Ancillary code;
    c. Plug-ins.

Following the findings of the Nova Productions Limited versus Mazooma Games Limited & Others case, the court stated that not all elements of the game are covered under the copyrights protection framework as most if not every work derives from another work, particularly, there is no effective protection for games against copying of the game where a party copies the rules

[191] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version, OJ L 111, 5.5.2009, p. 16–22; Copyright Law in the EU, Salient features of copyright law across the EU Member States, European Parliamentary Research Service, Comparative Law Library Unit, June 2018 - PE 625.126.

[192] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), WIPO Lex No. TRT/BERNE/001; Directive 2009/24/, note 191; Copyright Law in the EU, Salient features of copyright law across the EU Member States, European Parliamentary Research Service, Comparative Law Library Unit, June 2018 - PE 625.126, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf.

[193] Berne Convention, note 192.

[194] Ramos A. et al., note 190; Van der Velden S., 'Playing the game of video game classification Game Over for Europe?', Master Thesis 2016 – 2017, Tilburg University, Faculty of Law, LL.M. Law and Technology, available at: https://arno.uvt.nl/show.cgi?fid=144375.

of a game but not its graphics.[195] The above-described approach focusing on the unique creativity of each element of the game is valid not only for audio-visual elements of the game (its graphics) but as well for gaming software (its computer code).

While assessing audio-visual or graphical content on a subject of creativity can be an easier case due to the distinctive nature of visual or audio representation based on the originality, however, with computer codes or software the situation is different. In the United States (Computer Associates International versus Altai case) the abstraction-filtration-comparison approach (or a creativity test) was developed in order to determine whether particular software elements were copied.[196] Later the same method was used in Europe in the Sonera Systems Oy versus VF Partner Oy case.[197]

The abstraction-filtration-comparison approach consists of three steps:

(1) Abstraction – the elements of computer software are extracted in a reverse manner in order to map the sequence of the developer's actions while creating a computer code;
(2) Filtration – the substantial elements of the computer code are filtered in order to exclude code elements that are dictated by the external factors, interface etc.;
(3) Comparison – the substantial code elements of original work are compared to the substantial code elements of the allegedly infringing work.[198]

Thus, in order to determine whether a particular video game element is protected under the intellectual property protection framework, the element of originality and creativity or each separate element needs to be accessed.[199] The existing approach of the intellectual property protection framework application to all components of the video game notwithstanding the nature of the transaction and the presence of the element of creativity cannot be compliant with the existing rules in relation to intellectual property, do not correspond to the nature of business relationships and cannot satisfy interests of both parties in the gaming industry.

[195] Case Nova Productions Limited v. Mazooma Games Limited & Others, (2007), EWCA Civ 219, para 31, available at: https://www.casemine.com/judgement/uk/5a8ff71260d03e7f57ea71d6.
[196] Case Computer Associates International v. Altai, (1992), 982 F.2d 693, 2d Cir., available at: https://caselaw.findlaw.com/us-2nd-circuit/1233733.html.
[197] Case 3571, Sonera Systems Oy v. VF Partner Oy, (1999), R 99/661; Saluveer A.-L., 'The Concept of Derivative Works Under the European Copyright Law in Relation to the Digital Era: Free and Open Source Software Licencing', Lund University, Master Thesis, at: 4, available at: http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=4461961&fileOId=4461970.
[198] Case Computer Associates International v. Altai, note 196; Saluveer A.-L., note 197.
[199] Ramos A. et al., note 190; Ramos A, note 190.

Considering the above-mentioned complexity of intellectual property rights framework applicability (requirements on proof of copyrights and their registration in relation to each element of a video game), the existing approach taken in the gaming industry can be named as quasi-intellectual property-based, as de facto developer versus player relationships are self-regulated based on the contract with enforced legal analogy. Thus, the intellectual property rights of game developers are based not on the licencing regime in the country of establishment or international level but based on contract – EULA.[200]

While applying the self-regulatory approach and regulating relationships contractually, the interests of both parties should be maintained, and the relationships should not be regulated using historically outdated legal analogies. Therefore, the nature of business relationships between players and game developers should be taken into account and the alternative to the current intellect approach considered on doctrine level.

C. Collaborative Platforms

Nowadays in-game virtual property relationships are limited not only to the developer versus player relationships. There are various new businesses operating on the gaming market – third parties, which are selling items on intermediary platforms for particular video games;[201] or third parties, which connected by agreement with a gaming company in order to provide an online platform for users to play a particular game. In those cases, a player is limited by several EULAs from different traders, which can conflict with one another providing further complexity to the developer versus user relationships and introducing multi-party levelling to the contractual arrangements.

For example, online intermediaries for collaborative gaming, such as CRAYTA, provide online platforms for several gaming companies.[202] According to the EULA available on CRAYTA, the players acknowledge that *"this EULA for the Platform is an agreement between you and Unit 2 Games only and not Epic Games, Inc. Without prejudice to the foregoing, you are required to have a separate license with Epic Games, Inc. and you agree to comply with the End User License Agreement of Epic Games, Inc. as may be updated from time to time and made*

[200] Greenspan D, et al. 'Video Games and IP: A Global Perspective', 2014, WIPO magazine, available at: https://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html.
[201] Holden J., note 12.
[202] Information on CRAYTA platform, note 113.

…"[203] Therefore, the player is bounded by the EULA offered by the collaborative platform and by the EULA offered by the particular video game operating on such platform. In such cases, even if to follow intellectual property approach towards in-game transactions, it is unclear who owns which intellectual property rights – the gaming company, or the gaming platform.

Besides virtual items transactions managed by video game companies, companies trading virtual assets were created following the demand. Therefore, virtual items applicable for the particular video games can be purchased not only on a specific gaming platform but as well on external authorized and non-authorized secondary marketplace. For example, on the Markee Dragon or G2G websites it is possible to purchase so-called game-codes, which are virtual items (both functional and not) used in a variety of different video games, including in-game tokens,[204] for example, on mentioned platforms, it is possible to purchase:

(1) 750 gold crowns of the obsidians[205] (in-game money from the "Shroud of the Avatar" video game) for 10 U.S. dollars or 500 PLEX (in-game money from the "EVE Online" video game) for 19.99 U.S. dollars,[206]
(2) A virtual horse from the "Crowfall" video game for 30 U.S. dollars,[207]
(3) A noble founder's pack (skin for the "Legends of Aria" video game) for 39.99 U.S. dollars, [208]
(4) Defiant Vented Lightsaber (weapon for the "Star Wars: TOR" video game) for 8.21 U.S. dollars.[209]

In order to access online marketplaces for virtual items, similar to the collaborative gaming platforms, the player will agree to both to "Terms of Service" agreements of the virtual marketplace as well as for EULA of the gaming company (sometimes additionally also EULA of the gaming platform). Moreover, if an external marketplace is not authorized by the gaming platform, such a purchase can lead to a direct breach by a consumer of the gaming platform EULA.

[203] CRAYTA EULA, note 114.
[204] Information on Markee Dragon, note 115; Information on G2G platform, note 115.
[205] Information on Markee Dragon, note 115.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Information on G2G platform, note 115.

As a result, the consumer can be bonded with more than two EULAs per one transaction, however, de facto such agreements will neither protect the rights of the consumer nor of the traders, as intellectual property regulations are not applied towards defects in codes, which resulted in the dysfunctionality of the virtual item, destruction of such virtual item or non-delivery, etc. Moreover, the proof of intellectual property rights ownership in regards to the in-game currency or virtual items that are traded on non-authorized platforms is questionable as such "external" items are traded outside of the platform, thus, the so-called "intellectual property" of the game developer copied and distributed without proper authorization. However, taking into account the above-discussed, due to the lack of creativity in the separate elements of the video games, such intellectual property rights protection cannot be property proven and, thus, protected respectively.

D. User-Created Content

Most of the digital items available in the virtual worlds are created on virtual platforms by the game developer and exist only on these virtual platforms, however, in some video games, virtual items can be created by users (for example, skins) or third parties (marketplaces for virtual items). Game developers create a virtual word base (design of the virtual space) and the players can populate such a digital world with virtual items and own-made avatars.[210] Interaction between user-made and developer-made game elements is fluid and continuous.[211]

In virtual worlds with constant interaction between platform and users, if to regulate all in-game relationships applying the intellectual property rights framework it is hard to distinguish who will have the intellectual property rights related to particular virtual objects, for example:

(1) The virtual item, avatar or skin to the virtual item or avatar was created and designed by the player but designed using an online platform operated by the gaming company or third party. Who will have the intellectual property right ownership in relation to such a virtual item – the player, the gaming company or the company operating the online platform?
(2) The virtual item, avatar or skin to the virtual item or avatar was created and designed by the external platform not related to the gaming company (an online marketplace for virtual items), but when applied to the particular video game such a program code can become a virtual item. Who will have the intellectual property rights ownership in regard to such a

[210] Reuveni E., note 154.
[211] Ibid.

virtual item – the third-party marketplace, the gaming company or the company operating the online platform?

Following the intellectual property law approach, the binary nature of intellectual property rights requires strict determination of the copyright owner or author and a copier.[212] Indeed, there are legal provisions regarding collaborative authorship, however, in shared authorship, the creative work is representing the final element that is copyright protected.[213] In video games where the virtual world is constantly evolving with input from both developers and a mass of users, there is no final creative work produced.[214]

Video game as a whole product if users can create their own digital content and contribute to the gaming experience of other parties, for example, like in massively multiplayer online video games, the end product cannot be determined. While the creation of s specific virtual item, for example, a players' avatar designed by a player on the gaming platform using gaming interface can be considered as end product produced, however, as it does not exist separately from evolving gaming interface the certification of shared authorship is also not possible. Therefore, the collaborative nature of creative elements in a virtual world does not fit the concept of the binary framework of the intellectual property rights approach.[215]

There is a view in the doctrine, that the above-mentioned collaboration can be explained through the derivative works concept.[216] The term of "derivative works" is initially coming from the legal framework of the United States and is defined as the "*work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, consideration, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work*".[217]

At the same time, according to the Berne Convention for the Protection of Literary and Artistic Works, "*translations, adaptations, arrangements of music and other alterations of a literary*

[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] U.S Code Title 17 Chapter 1 § 101.; Saluveer A.-L., note 197.

or artistic work shall be protected as original works without prejudice to the copyright in the original work."[218]

While issuing guidance to the previous European Copyright Directive, the Foundation of Information Policy Research defined the derivative works as works that were based on the original work, on the elements of the original work or any other pre-existing works, existing in any form in which the original work may be "*recast, transformed or adapted*".[219]

The original author of the code (the game developer in our case) entitles a secondary creator (a player) to develop creative elements of the game based on the developer's code. However, even following the derivative work concept in such a case is not sufficient to regulate all rights and obligations arising from the game participation. In derivative work a rightful owner of the original work, thus, a developer, needs to grant permission to the secondary creator to use original work in order to create a derivative work, and such permission would give a full scope of independent intellectual property rights for the derivative work to the secondary owner.[220] When a secondary creator utilizes original creative work (game code) without permission the secondary creator loses any rights to the new work.[221]

Thus, a player who creates derivative work (new avatar, for example, skin of virtual weapon) based on the permission granted by the developer, has a right to forbid a developer or any third party to use such a derivative work or use this derivative work on its own discretion. However, the complexity of a case influences the fact that such a derivative work can exist on a particular video game platform solely or in connection to such a gaming platform. Moreover, the majority of EULAs, indeed, make users abolish any rights on a derivative work created while using the gaming platform in order to avoid any derivative rights ownership claims.

For example, Blizzard Entertainment EULA states:

"*You hereby grant Blizzard a perpetual, irrevocable, worldwide, fully paid up, non-exclusive, sub-licensable, right and license to exploit the User Content and all elements thereof, in any and all media, formats and forms, known now or hereafter devised. Blizzard shall have the unlimited right to copy, reproduce, fix, modify, adapt, translate, reformat, prepare derivatives,*

[218] Berne Convention, note 192.
[219] Brown I., 'Implementing the EU Copyright Directive', 2003, available at: http://www.fipr.org/copyright/guide/eucd-guide.pdf; Saluveer A.-L., note 197.
[220] Reuveni E., note 154.
[221] Ibid.

add to and delete from, rearrange and transpose, manufacture, publish, distribute, sell, license, sublicense, transfer, rent, lease, transmit, publicly display, publicly perform, provide access to, broadcast, and practice the User Content as well as all modified and derivative works thereof and any and all elements contained therein, and use or incorporate a portion or portions of the User Content or the elements thereof in conjunction with or into any other material… Blizzard may remove any User Content and any related content or elements from the Platform at its sole discretion".[222]

The above-mentioned provisions are included in a standard form one-click contract that a player signs in order to access the game before creating any derivative works or secondary content. The player is deprived of any intellectual property rights over virtual objects created within the gaming platform prior to familiarizing with interface and accessing the scope for creativity. In virtual worlds where players are expected to use their creativity in order to populate such virtual world and attracts other consumers through network effect, such an approach can be considered as unfair treatment. Moreover, on gaming platforms when players are expected to use creativity in order to create unique collectable digital pieces using own creativity, for example, Non-Fungible Tokens on Blockchain platforms, such an approach would create significant misbalance between parties as NFTs de facto treated as high-value commodities. Thus, such mass EULAs provisions cannot fulfil players' expectations in a guaranteed minimum of the intellectual property rights protection and consumer guarantees, which will be investigated further in chapter III of the present thesis following the reasons explained in the part on the property law approach of the present chapter.

Notwithstanding the above-explained in relation to the derivative works concept approach, the specific of derivative works in software contracts should be taken into account while determining whether collaborative items can be considered as copyright works (based on the dual nature of video games in respect to (1) audio-visual content or (2) software, as explained above).[223]

According to the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs, the computer program is aimed "*to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to*

[222] Blizzard Entertainment EULA, note 164.
[223] Ramos A. et al., note 190; Ramos A, note 190.

permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function".[224] The directive states that unauthorised creation of a derivative work based on a computer code forming computer software (i.e., unauthorised reproduction, translation, adaptation or transformation of the form of the code) should be considered as an infringement of the exclusive rights of the code author, nevertheless, derivative works that are created in order to achieve the interoperability of an independently created program with other programs do not require such authorisation.[225]

If to treat a video game as software, the interaction between players and the platform is a part of a video game per se and is a required functionality of such software. Any interaction with gaming code, for example, creating user content in a particular game, when the functionality of such a game permits and encourages such user behaviour, would be considered as a derivative work that does not require authorisation, as such an authorisation already allowed by the functionality of the game.

In certain video games, the developers intentionally create only a skeleton of a virtual world allowing players to populate such a world with elements of their own creativity. For example, in such video games as "Sims" or "Second life" players create not only their own avatar but also a "living environment" where such an avatar exists and interacts with other players.

Thus, even if de jure EULA forbids any derivative works, however, de facto the gaming interface explicitly allows and encourages such creation, the authorization for derivative works should be considered as granted. Moreover, if the EULA forbids any derivative work creation and the gaming interface do not explicitly forbid such a creation, permission should not be required as long as the elements of the original work do not prevail in the derivative work.[226]

Taking into account the collaborative nature of the gaming industry, not only intellectual property rights of the game developers should be taken into consideration, however, as well as intellectual property rights of the players in relation to the works created on such gaming platform (if the element of creativity is present and the gaming interface allows so). The approach is taken currently in the standard term EULAs by granting all exclusive rights for user-created

[224] Directive 2009/24/EC, note 190.
[225] Ibid.
[226] Reuveni E., note 154.

content back to developers, allowing permanent exclusion from the gaming platform and deprivation of access to the creative work of players can be considered as unfair. Moreover, such an approach violates all principles of intellectual property law and authorship.

E. Collaboration in Virtual World. Element of Creativity in User Content.

Not only intellectual property rights of the game developers, but as well as the intellectual property rights of the players should be addressed in the gaming industry, including but not limited to in contractual relationships between parties. As explained in the previous part, the element of creativity should be accessed in order to understand whether particular work can be considered as one requiring intellectual property protection. Thus, the element of creativity in user created content should be assessed in order to understand whether specific element of a virtual world can fall under the intellectual property rights protection framework.

For example, if to apply the abstraction test principle (used in Nichols versus Universal Pictures historical case) to the user-created content, it can be concluded that the more general and abstract the avatar is, the more likely the avatar is only an idea than a copyrightable expression.[227] Thus, in order particular player's avatar to be considered a creative work, specific distinguishing characteristics - i.e., story behind the character or distinguishable graphic representation – should be present.[228]

Taking into account the collaborative nature of a virtual world, in reality, it is very complicated to distinguish the element of creativity of each player in the scope of the gaming interface or particular virtual world. Generally, the players have a limited selection of avatar appearance choices, and several avatars can look the same within the gaming platform. Therefore, the element of creativity in graphics of a particular avatar will be absent and no copyright protection can be granted unless a specific story is present behind a particular character (for example, John Neverdie, as explained above, can be considered as a copyrighted character).[229] Moreover, if the gaming interface offers an extensive number of design possibilities that allow unique creativity (for example, City of Villains video game allows staggering range or player's appearances), that can be considered as creative work in specific cases.[230] In the same way, if the

[227] Ibid.
[228] Ibid.
[229] Ibid.

[230] Information on City of Villains, available at: http://www.cityofvillains.com/gameinfo/synopsis.html.

gaming platform allows player's own character design (apart from selected appearances pre-defined in a game), such an avatar can be considered as a creative graphical work and fall under the intellectual property protection framework.

Apart from the design of pre-defined items, the video game interface might allow different ways of creative expression as well. For example, players can be allowed to create their own intangible item, play virtual instruments, or paint a virtual painting in the game. The same as with players' avatars, the extent of players' creativity needs to be assessed in each separate case, which is defined by the possibilities of the gaming interface per se. Considering the above, the more limiting the developer's code is, the less likely in-game artistic work can fulfil originality condition.[231]

In cases, when the game code allows an element of creativity for each player and facilitates the creation of individual virtual items, the individual user-created item (i.e., painting drawn in a virtual world) should enjoy all full spectre of the intellectual property protection as original artistic work, not a derivative work.[232]

This is valid predominantly for video games created on Blockchain platforms. Blockchain technology allows the creation of "non-fungible tokens" which facilitate the distribution of collectable digital art.[233] For example, CryptoKitties is a video game that allows the creation and distribution of virtual collectable creative items through NFT on a Blockchain network.[234] Such NFT based games allow not only creative digital content placement, but also facilitate digital art transfer through Blockchain tokens. Various Blockchain platforms facilitate NFT transfer and creation by users as well as famous artists. For example, a singer Grimes sold her collection of digital art represented in NFT for around 6 million U.S. dollars.[235]

The game developers benefit from the collaborative nature of virtual worlds – addition of new creative virtual items that populate a particular virtual world[236] and attracts new users, thus, a

[231] Reuveni E., note 154.
[232] Ibid.
[233] Clark M., 'NFTs explained', the Verge, 2021, available at: https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.
[234] Information on CryptoKitties, note 159.
[235] News Report, 'Grimes Sells The Guardian's $ 6 Million Digital Art Collection', the Guardian, 2021, available at: https://www.theguardian.com/music/2021/mar/02/grimes-sells-digital-art-collection-non-fungible - tokens.
[236] Reuveni E., note 154.

revenue income for game providers as well. Following the utilitarian theory introduced by Jeremy Bentham, the right to action is understood entirely in terms of consequences resulted.[237] Based on the utilitarian view, one way to maximize the overall good is to consider the good of others as own good.[238] Having less creative collaborative contributions to the virtual world, the overall public benefit of such collaborative contributions would result in a diminishing effect on the overall public good.[239]

Utilitarianism focuses on the public good and win-win solutions. In the virtual worlds, both parties benefit from the reciprocal contribution: game developers benefit from the network effect and population of the "skeleton" of the gaming platform created, players benefit from the possibility to exercise their own creativity and use the digital products. Thus, as per the utilitarian theory, the grant of copyrights for such newly created digital items populating virtual worlds would facilitate the collaborative nature of the gaming platform and would maximize the result for the public good.

Considering the above-mentioned, the gaming platforms cannot lawfully abolish intellectual property rights and obligations of players through contractual means, when the gaming platform interfaces allows player's creativity for the benefit of the game provider. If a player is allowed to create own unique creative digital item (i.e., NFT), such a player is entitled for intellectual property rights protection mechanism, including but not limited to the prohibition of further usage by the gaming platform and royalties payment when gaming platform benefiting from such a usage. For example, if player is excluded by the game developer from the access to the gaming platform or when virtual creative item is destroyed as per the developer's negligence.

F. Intermediate Conclusions

Following the historical approach taking the roots from the first open-source software, currently relationships between game developers and players are still regulated contractually under the umbrella of intellectual property protection framework. The intellectual property law approach towards gratuitous software access was taking as a base for regulating relationships

[237] Bentham J., 'An Introduction to the Principles of Morals and Legislation', 1781 ed., available at: https://www.reed.edu/humanities/hum220/syllabus/2010-11/Bentham-Principles.pdf.
[238] Lastowka G., Hunter D., 'The Laws of the Virtual Worlds', 92 CAL. L. REV. 1, 72, 2004; Bentham J., note 237.
[239] Reuveni E., note 154.

in the industry due to the lack of alternative regulatory framework. In the modern reality with the technological and regulatory development in digital service provision and consumer contracts, such an approach cannot satisfy the need in legal protection and remedies mechanism for both game developers and players.

Notwithstanding the above, currently, standard term EULAs produced by the game developers not only regulate intellectual property rights for the gaming software but as well as for paid digital content inside the game (i.e., separate virtual items) and user-created content. Having a look at the EULAs of the popular video games, it can be concluded that the scope of the intellectual property rights transfer is extensive, players are abolished from any rights for the user-created content and purchased digital content (see above Blizzard Entertainment EULA provisions). At the same time, game developers have no proof of the intellectual property rights ownership other than EULA and the creativity of such digital elements is in question per se.

Fewer game developers, indeed, allow players limited freedom in the intellectual rights protection by regulating access rights to the user content in a particular game. For example, Linden Lab EULA (the "Second Life" video game) states:

"*Your interactions with Second Life may include use of the Second Life permissions system and the copy, modify, and transfer settings for indicating how other users may use, reproduce, distribute, prepare derivative works of, display, or perform your Content in Second Life subject to the Agreements...If you do not wish to grant users of Second Life a User Content License, you agree that it is your obligation to avoid displaying or making available your Content to other users. For example, an island or estate holder may use Virtual Land tools to limit or restrict other users' access to the Virtual Land and thus the Content on the Virtual Land*."[240]

The scope of the intellectual property rights protection defined in each EULA has a dual nature regulating not only developer to user copyrights transfer but also a user to developer intellectual property rights transfer:

(1) the developer grants non-exclusive intellectual property rights to each player that subscribes to game participation;
(2) each player that creates any derivative work grants exclusive right for such derivative content to a game developer;

[240] LindenLab EULA, available at: https://www.lindenlab.com/legal/second-life-terms-and-conditions.

(3) in limited scenarios video game interface can allow players to execute their intellectual property rights and grant non-exclusive rights for derivative works created in a virtual world to other users.

Moreover, video games can be hosted on various third-party platforms, virtual items can be traded on external authorized and not authorized marketplaces, gaming platforms can facilitate virtual items creation for further trade or benefiting from the network effect. The above-mentioned adds scalability and complexity to the intellectual property framework application. Such multi-party, multi-platform relationships cannot be solely regulated by various conflicting EULAs notwithstanding the creative input of each party and platform.

Considering the complexity of virtual worlds, collaborative nature of majority of video games and monetisation of in-game virtual items, sole intellectual property approach towards gaming company versus consumer relationships cannot fit all parties' needs and cannot effectively manage all spectrum of gaming industry-specific legal relationships.

Indeed, intellectual property relationships in video games need to be regulated in order to provide the expected level of copyright protection both for developers and for players (in case a gaming interface allows creativity), however, gaming platform versus player relationships cannot be regulated solely under non-exclusive licencing agreement focused on uniform rights of game developers over software. Standard terms EULA created by a game developer should be accepted only in pay-to-play video games with limited gaming interface that does not allow collaborative nature of virtual world creation and cannot be applied to complex virtual environments and monetized free-to-play video games due to the outdated nature.

Intellectual property rights protection framework can be applicable on the stage of video game access acquisition by a player (notwithstanding the medium of representation) regulating third-party gaming platform access, copy creation and other copyrights resulting from access to video games per se. However, further relationships, microtransactions, user content creation cannot be regulated solely under framework licensing agreement. Therefore, a different approach towards virtual property and complex virtual worlds should be taken into account in order to protect the rights of consumers and to secure the European Digital Single Market Strategy.

2. "No Legal Intervention" Approach

As was discussed in the previous part, the game developer (gaming company, collaborative gaming platform or online marketplace for virtual items) and the player enter into the End User License Agreement on the initial stage of business relationships in order to access the digital services - access to the free-to-play or pay-to-play video game. Indeed, currently, access to the gaming software or online gaming platform is regulated merely under the intellectual property law framework, however, the following in-game transactions, despite the purely commercial nature of legal relationships, are as well included under the licensing regime. Such a mismatch in the subject of the licensing contact, unfortunately, is left out of the scope of the policymakers' attention.

EULAs generally regulate not only the intellectual property rights of developers and users but as well as virtual property's status and players' behaviour in a virtual world. Notwithstanding the extensive regulatory scope of standard term EULAs, some authors argue, that the virtual reality issues should not be governed by the law at all, as players use video games in order to escape from reality[241] and actions, which are generally allowed in a video game, for example, as robbery or destruction of virtual property, are forbidden by the law in the "real-life" world.[242]

Even though such an approach can have a valid point in pay-to-play video games when a player transfers licensing fee for access to a video game and no further transactions or paid content is possible, however, in free-to-play video games, such an approach can violate both rights of players and game developers.

The abolishment of property rights for purchased virtual items and regulation of in-game transactions under the intellectual property framework is justified by the developers as required for the removal of limitations in the industrial ability to control online recourses of a virtual world and for the control the relationships in such virtual world in order to maintain its functionality.[243] Indeed, a game scenario might involve actions that would de-evaluate the value of a

[241] Nelson J.W., 'The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea', McGeorge Law Review, Vol. 41, 2010, available at: https://www.mcgeorge.edu/documents/publications/MLR4104_Nelson_ver_09_FINAL.pdf.

[242] Cifrino C.J., 'Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must be the Governing Paradigm in the Law of Virtual Worlds', Boston College Law Review, Vol. 55, Iss. 1, 2014, available at:https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3354&context=bclr.

[243] Fairfield J., note 165.

virtual item. For example, when a player purchases virtual property (i.e., virtual house or virtual land) of a certain value and the developer creates new similar property, this reduces the value of the initial property purchased.[244] However, such a situation can happen in a "real-life" world as well – investments are always bare the element of a risk and manufacturers manipulate the supply in order to create the demand for the product.[245] However, such an element of a risk is not a valid ground to eliminate the regulation and property rights protection in "real-life" world, thus, should not be valid in a virtual one as well.

Apart from the above discussed, there are views that the regulation of the virtual world should be done on the basis of self-governance – the government-imposed regulatory regime is not required due to the exterritorial character of virtual worlds and diversity of its users.[246] However, such an approach as well cannot grant an expected level of consumer protection taking into consideration the inequality of developer versus user relationships and the standard term EULA. For the self-governance, both parties should have a bargaining power to agree mutually on the approach. In the standard term contract dictated by the game developer self-regulatory approach triggers unfair treatment.

In modern realities, players expect the same level of legal protection as granted by law to tangible items while purchasing virtual items online, as notwithstanding the medium of representation the item owner expects a guaranteed level of integrity of such item. For example, in the Entropia Universe video game a virtual battle resulted in more than 200 000 U.S. dollars damages in virtual property.[247] Thus, when a virtual intangible item is acquired for "real-life" money, the owner would expect a certain level of legal protection and legal enforcement if required.[248]

EULAs regulate the virtual property rights of each player not only in the relationships between one another as well as facilitating the abolishment of any property claims against the game

[244] Ibid.
[245] Ibid.
[246] Johnson D.R., Post D.G., 'Law and Borders - the Rise of Law in Cyberspace', Stanford Law Review, Vol. 48, p. 1367, 1996, at 1397, available at: https://ssrn.com/abstract=535/.
[247] McCormick R., 'Spaceships worth more than $200,000 destroyed in biggest virtual space battle ever', the Verge, Jan 29, 2014, available at: https://www.theverge.com/2014/1/29/5356498/eve-online-battle-sees-200000-dollars-worth-of-spaceships-destroyed.
[248] Brown P., Raysman R., 'Property Rights in Cyberspace. Games and Other Novel Legal Issues in Virtual Property', the Indian Journal of Law and Technology, 2006, available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/3184/Property_Rights_Cyberspace_Games_Other_Virtual_Property.pdf?sequence=1&isAllowed=y.

developers. On one hand, if certain property distortion actions are prescribed by the game scenario, players should not be punished by the law (for example, virtual property destruction in a virtual battle prescribed by the game scenario). However, in free-to-play video games, the gaming company should be liable for non-conformity of digital goods (specific code, which is a virtual item purchased by the player), non-delivery of such virtual goods, and for the destruction of property if it occurred due to the errors in the code or security breach.

Leaving in-game transactions and virtual property status out of the scope of any legal regulation can lead to the misbalance in rights between the parties, as generally, EULAs in free-to-play video games abolish all rights of the players on the digital content purchases in the game. For example, according to the EULA of the "Rocket League" video game:

"Virtual Currency and Virtual Goods obtained by you are licensed to you, and you hereby acknowledge that no title or ownership in or to Virtual Currency and Virtual Goods is being transferred or assigned hereunder. This Agreement should not be construed as a sale of any rights in Virtual Currency and Virtual Goods...You are prohibited from converting Virtual Currency and Virtual Goods into a unit of value outside of the Software, such as actual currency or actual goods...Psyonix, in its sole discretion, reserves the right to charge fees for the right to access or use Virtual Currency or Virtual Goods...Psyonix further reserves the right, in its sole discretion, to determine the amount of and manner in which Virtual Currency is credited and debited from your User Account in connection with your purchase of Virtual Goods or for other purposes."[249]

Following the above provisions, the game developer clearly states that no virtual property ownership rights are granted to players and players are provided only with a non-exclusive licence for virtual items on the gaming platform.

On the other hand, the same EULA states:

"You may purchase Virtual Currency and Virtual Goods only within the Software, or through a platform, participating third-party online store, application store, or other store authorized by Psyonix (all referred to herein as "Software Store"). Purchase and use of in-game items or

[249] RocketLeague EULA, note 175.

currency through a Software Store are subject to the Software Store's governing documents, including but not limited to, the Terms of Service and User Agreement."[250]

Therefore, Psyonix (the "Rocket League" video game developer) provides the possibility of the intangible virtual items exchange on the gaming platform itself, as well as on external platforms and third-party online marketplaces. In the present case, EULA that regulates access to the free-to-play video game (with no remuneration required) also regulates in-game transactions (involving remuneration) and player's behaviour on external platforms with third parties framing such regulation into intellectual property law legal framework. At the same time, as was discussed previously regarding FIFA case,[251] the developer usually cannot prove intellectual property rights for particular in-game virtual items.

Notwithstanding the absence of intellectual property rights proof for virtual items, as well as taking into account the possibility of user content creation, gaming companies regulate the transactions with such virtual items that are made for the remuneration both in gaming platforms and on third-party platforms based on the unilateral self-regulatory approach that created significant misbalance between the consumers.

Both free-to-play and pay-to-play video games allow in-game transactions with intangible virtual items, which are regulated by the terms of standard EULAs. A standard self-regulatory regime protects only the interests of the developers and leaves the interests of players without proper attention. In the majority of pay-to-play video games, in-game transactions do not require any payment, as the gaming company already received final license payment under the initial EULA; however, in free-to-play video games, the main revenue of the gaming company is formed by the income from in-game transactions on intangible virtual items exchange. Thus, in-game transactions in free-to-play video games should be subject to a separate regulatory approach.

Particular in-game actions, such as virtual items distortion or damage, can be allowed under the game scenario (i.e., in-game battles), however, certain players' behaviour is regulated in the EULA as well. For example, Blizzard entertainment EULA states:

[250] Ibid.
[251] United States v. Clark, note 182.

"*You agree that you will not, in whole or in part or under any circumstances, do the following: … harassment, "griefing," abusive behaviour or chat, conduct intended to unreasonably undermine or disrupt the Game experiences of others, deliberate inactivity or disconnecting, and/or any other activity which violates Blizzard's Code of Conduct or In-Game Policies.*"[252]

The Linden Lab's Policy (the "Second Life" video game) prescribes clear rules on virtual advertisements in the video game:

"*.. "ad farm" means advertising or content intended solely to drive an unreasonable price for the land parcel it is on, usually by spoiling the nearby visual environment for others…when advertising crosses the line into harassing behaviour or "visual spam," and the intent is purely to compel another Resident to pay an unreasonable price to restore their view, it violates the harassment policy in the Community Standards.*"[253]

The EA Games EULA (the "FIFA" video game) states:

"*When you access or use an EA Service, you agree that you will not: …Interfere with or disrupt another player's use of an EA Service. This includes disrupting the normal flow of game play, chat or dialogue within an EA Service by, for example, using vulgar or harassing language, being abusive, excessive shouting (all caps), spamming, flooding or hitting the return key repeatedly; Harass, threaten, bully, embarrass, spam or do anything else to another player that is unwanted, such as repeatedly sending unwanted messages or making personal attacks or statements about race, sexual orientation, religion, heritage, etc. Hate speech is not tolerated; Contribute UGC or organize or participate in any activity, group or guild that is inappropriate, abusive, harassing, profane, threatening, hateful, offensive, vulgar, obscene, sexually explicit, defamatory, infringing, invades another's privacy, or is otherwise reasonably objectionable."*[254]

Considering the above mentioned, apart from regulating the intellectual property rights of developers, standard term EULAs generally provide virtual world laws regulating in-game actions of players, including but not limited to individual communication between players, censoring comments, advertisement, players' identification, and virtual property rights. Indeed, players' communicational behaviour in a video game can be regulated by a particular gaming

[252] Blizzard Entertainment EULA, note 164.
[253] Linden Lab Policy on ad farms and network advertisers, available at: http://wiki.secondlife.com/wiki/Linden_Lab_Official:About_ad_farms_and_network_advertisers.
[254] FIFA EA Games EULA, available at: http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/#section6.

policy in order to provide the best user experience and to secure virtual space from illegal content. However, such regulations should not violate legal standards and freedoms provided in the "real-life" world and do not create a separate virtual legal system. Thus, the "no legal intervention" approach indeed can be applied in cases of excessive contractual regulation of players' behaviour that would not normally be regulated in a "real-life" world.

Considering the monetization of in-game transactions in free-to-play video games, "no legal intervention" approach cannot fulfil customer's expectation regarding legal guarantees on transactions with virtual items. "No legal intervention" approach can be applied only in limited cases, for example, in pay-to-play video games, where the player does not have any further contractual interaction (i.e., regarding in-game transactions) with the developer after purchasing the access to the software. Interactions regarding in-game behaviour that is allowed in a "real-life" world and guaranteed in international conventions and national constitutions (i.e., freedom of speech, freedom of expression) can be as well prescribed contractually in compliance with the international regulatory standards.

Based on the above mentioned, the level of "legal intervention" required for the developer versus user relationships can be defined by the type of video game and its characteristics. In free-to-play video games, the parties enter into open-source free subscription contracts and digital service contracts involving remuneration. In pay-to-play video games, the parties enter into a remuneration-based license agreement and no further legal relationships regarding the in-game transactions needed (if otherwise is not prescribed by the game functionality).

The arguments towards the "no legal intervention" approach can be valid only in cases when no monetary interest is involved. Therefore, no legal regulation is required for in-game activity in cases when the gaming company receives remuneration solely for access to the particular software and all its components, and no additional money investments, no additional legal contracts or external platforms to conclude transactions are required.

The relationships between the player and the gaming company on different stages can be separated in a following way:

Type of the gaming platform	Free-to-play video games or pay-to-play video games with in-game purchases	Pay-to-play video games without in-game purchases

Subscription or access to the video game	EULA or "Terms of Service" agreement	EULA or "Terms of Service" agreement
In-game transactions on intangible virtual items	A separate agreement for every in-game (or on external online marketplace for the virtual items) virtual transaction involving intangible virtual items	No legal intervention, regulated by the game scenario

Considering the above mentioned, in pay-to-play video games it is possible to govern the legal relationships between the developer (gaming company, collaborative gaming platform or online marketplace for virtual items) and the player solely by "EULA" or "Terms of Service" agreement under the intellectual property rights framework, and no legal interventions are required for in-game virtual items exchange as no additional monetary investments are expected from the player. However, in free-to-play video games more complex approaches need to be applied in order to protect the rights of both parties and to secure the European Digital Single Market Strategy.

3. Property Law Approach

As explained above in the present chapter by providing extracts from popular video games EULAs, generally standard term contracts regulate not only intellectual property rights both of a developer and a player but also focus on in-game behaviour and property rights of a player on in-game content – intangible virtual items or user-created content.

For example, Madfinger Games (the "Shadow Gun War Games" video game) EULA states:

"*Madfinger Games a.s. is the owner and licensee of all rights, titles and interests to the Game clients, service, Games, accounts and all features and components thereof. The service or Games may contain materials licensed by third parties to Madfinger Games a.s., and those third parties may enforce their ownership rights against you if you violate this agreement. The following, without limitation, are owned or licensed by Madfinger Games a.s.:*

…6. Items: Virtual goods, currency, potions, wearable items, pets, mounts, etc.;

…12. All Accounts. Note that Madfinger Games, a.s. owns all Accounts, and that all use of an Account shall work to Madfinger Games´ benefit. Madfinger Games, a.s. does not recognize the transfer of Accounts. You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift, or trade any Account, and any such attempt shall be null and void and may result in the forfeiture of the Account."[255]

Thus, EULAs regulated property rights for intangible virtual items under the framework of intellectual property protection. However, as explained above in the present chapter, particularly with reference to the FIFA case, the developers usually cannot provide any evidence of such intellectual property rights as well as to prove originality or creativity of such content in order to justify the usage of the intellectual property protection framework.

In free-to-play video games, the business model per se expects players to invest "real-life" money in exchange for intangible virtual items or access to such intangible virtual items. From the property law perspective, video game, which allows the purchase of intangible items online for "real-life" money (commoditized video game) bears the character of the contract on the transfer of property and, therefore, relevant legal provisions protecting virtual property should be applied.

Nowadays with fast technological development, a legal collision in regards to the digital content, virtual items, the intangible property takes place – developer versus user relationships can fall both under historically applied legal approach on intellectual property law regulation, rules on digital services and digital content, properly law provisions at the same time.[256] Therefore, in order to provide legal certainty in regards to the rights and obligation of both parties, to eliminate legal collisions and to determine legal system applicable to the developer versus user relationships on intangible virtual items purchase, the nature of such relationships should be investigated.

The present part will examine in detail an approach taken by developers in the standard terms EULAs from the property law perspective in order to determine the legal basis for EULA provisions regulating ownership rights for the virtual property, particularly provisions abolishing

[255] Mad Finger Games EULA, available at: https://www.madfingergames.com/eula.
[256] Harvey D.J., 'Digital Property Revisited', April 26, 2020, Chapter 5, available at: https://ssrn.com/abstract=3585485.

all rights of players for purchased virtual content, user-created content and player's avatar or player's account.

A. Property versus Intellectual Property

In order to determine whether the existing approach can be sufficient in order to protect the rights of both parties, considering the nature of developer versus user relationships in relation to the intangible virtual items purchase, the difference between intellectual property and property law should be examined.

Property law provides the right in rem (rights against a particular object or against everyone) to its holders to and such right is applicable both to tangible (for example, software on tangible media) and intangible items (for example, bank account); intellectual property law, on the other hand, gives personam (rights against a particular person) rights to its holders.[257]

Having a look at the standard EULA, it becomes clear that the rights and obligations prescribed are neither purely in rem nor in personam,[258] as such provisions both regulate in-game transactions providing limited rights for players to make decisions regarding virtual property owned and, at the same time, abolishing rights of players outside of gaming platform or authorized marketplaces.

For example, Linden Lab EULA (the "Second life" video game) provides to player rights to forbid access to the players' virtual property facing another player on the gaming platform and, at the same time, acknowledges the developer as a sole owner of such rights:

"*You may permit or deny other users to access your Virtual Land on terms determined by you. Any agreement you make with other users relating to use or access to your Virtual Land must be consistent with the Agreements, and no such agreement can abrogate, nullify, void or modify the Agreements. You acknowledge that Virtual Land is a limited license right and is not a real property right or actual real estate, and it is not redeemable for any sum of money from Linden Lab. You acknowledge that the use of the words "Buy," "Sell" and similar terms carry the same meaning of referring to the transfer of the Virtual Land License as they do with respect to the Linden Dollar License. You agree that Linden Lab has the right to manage, regulate, control, modify and/or eliminate such Virtual Land as it sees fit and that Linden Lab shall have no*

[257] Mulligan Ch., note 167.
[258] Ibid.

liability to you based on its exercise of such right. Linden Lab makes no guarantee as to the nature of the features of Second Life that will be accessible through the use of Virtual Land, or the availability or supply of Virtual Land."[259]

According to the above-mentioned EULA, the developer allows a specific player to forbid to other players of the same video game to have access to his\her virtual real estate,[260] and to trade virtual tokens (Linden dollars), which purchased in advance for "real-life" money, with other users.[261] Therefore, the gaming company grants intellectual property rights to an unlimited amount of users and the particular user can restrict such rights to other users. From this example both in rem and personam rights can be observed. Thus, "de jure" relationships are regulated by intellectual property rights, however, "de facto" the transfer of property rights for intangible item with the right to make a decision on the property (right to sell the virtual land to another user) can be observed analysing the legal nature of the developer versus user relationships.

Moreover, certain games allow peer-to-peer virtual items exchange on authorized online marketplaces. For example, Sony Entertainment launched the peer-to-peer exchange platform "Station Exchange" in order to trade virtual items designed for the "EverQuest II" video game on online auctions.[262] In the "Counterstrike Global Offensive", a separate marketplace called "Steam" was created to trade intangible virtual items.[263] Currently, "Steam" platform is used as a shared collaboration platform and online marketplace for virtual items for different video games and "Steam" (Valve Corporation) EULA states:

"*Steam may include one or more features or sites that allow Subscribers to trade, sell or purchase certain types of Subscriptions (for example, license rights to virtual items) with, to or from other Subscribers ("Subscription Marketplaces"). An example of a Subscription Marketplace is the Steam Community Market. By using or participating in Subscription Marketplaces, you authorize Valve, on its own behalf or as an agent or licensee of any third-party creator or publisher of the applicable Subscriptions in your Account, to transfer those Subscriptions from*

[259] LindenLab EULA, note 240.
[260] Second Life EULA, available at: https://www.lindenlab.com/legal/second-life-terms-and-conditions.
[261] Ibid.
[262] Press Release, Sony Online Entertainment Releases Station Exchange Online Gaming Auction, 2007, available at: https://www.sony.com/content/sony/en/en_us/SCA/company-news/press-releases/sony-online-entertainment/2007/sony-online-entertainment-releases-station-exchange-online-gaming-auction-site-white-paper.html
[263] Information on Steam platform, available at: https://store.steampowered.com/app/730/CounterStrike_Global_Offensive/.

your Account in order to give effect to any trade or sale you make… Valve shall have no liability to you because of any inability to trade Subscriptions in the Steam Trading Marketplace, including because of discontinuation or changes in the terms, features or eligibility requirements of any Subscription Marketplace. You also understand and acknowledge that Subscriptions traded, sold or purchased in any Subscription Marketplace are license rights, that you have no ownership interest in such Subscriptions, and that Valve does not recognize any transfers of Subscriptions (including transfers by operation of law) that are made outside of Steam."[264]

The above-mentioned EULA both determines exclusive intellectual property rights of a developer on the virtual items created in the game, including user-created content, and provides a right to a player to purchase, trade and exchange such virtual items with other users or on third-party platforms. Such a legal model has hybrid character providing a symbiosis of rights both in rem and in personam.

In order to distinguish intellectual property and property law elements in a particular virtual world, the element of creativity should be assessed. For example, a "real-life" pen has no creative value, however, who owns the pen has a right to redeem its value from a person destroying the object as per the property law framework.[265] An URL has no creative value; however, indeed, it has a value and is protected under property law framework, not an intellectual property framework.[266] In the same way, a creative value of a particular virtual property (for example, using abstraction-filtration-comparison approach explained above in the present chapter) as well as the ownership of creative rights (please see the explanation on user-created content given above in the present chapter) should be accessed.

Therefore, in order to understand the scope of applicability both of property rights and intellectual property rights, to determine the rights owner who has the ability to protect the intangible goods in a video game from third parties and to transfer such a right, it is important to identify whether the property law elements are present in the specific EULA. Particularly, it is important to identify so in relationships where:

[264] Ibid.
[265] Fairfield J., note 165.
[266] Ibid.

- the intangible virtual item sold on an authorized third-party platform as a "code" for a specific game,
- the intangible virtual item sold on an unauthorized third-party platform as a "code" for a specific game,
- the intangible virtual items peer-to-peer exchange is authorized by a particular EULA.

B. Nature of Legal Relationships

Analysing the legal doctrine on the property law, it can be seen, that the property law elements are present in in-game transactions in video games.

Following Locke's view on property rights and his labour theory, anything that man mixed his labour with and incorporate it with something that his own, becomes man's property.[267] In free-to-play virtual worlds, players create avatars, purchase avatars' appearance, or so-called skins, additional virtual items. As per data available, the average player in Germany, the United Kingdom, the United States and Japan spends around 7 hours per week for video games, 5% of players spend over 20 hours per week.[268] In the United States average player spends 229 U.S. dollars, while 25% of players spent over 500 U.S. dollars.[269] Indeed, some players claim that playing a video game requires time and investments equal to a "real world" job and numerous online marketplaces for virtual items trade show that such intangible virtual items have "real world" value.[270] Therefore, a player spending a significant amount of time, labour, money and skills in order to achieve some fame and assets in the virtual world is entitled to have the property rights for such virtual objects and avatars, as per Locke's labour theory on property rights.[271]

On a contrary, developers follow the formalistic approach and state that no virtual items would be possible without a gaming code applied to a particular gaming platform, thus, without gaming software virtual items would have no value.[272] The gaming companies tend to transfer such

[267] Reuveni E., note 154.

[268] Statista, Average weekly hours spent playing video games in selected countries worldwide as of January 2021, available at: https://www.statista.com/statistics/273829/average-game-hours-per-day-of-video-gamers-in-selected-countries/; LimeLights, The state of online gaming - 2020, available at: https://www.limelight.com/resources/white-paper/state-of-online-gaming-2020/.

[269] Miller G., 'How much money do gamers REALLY spend?', European Gaming, 2020, available at: https://europeangaming.eu/portal/latest-news/2020/04/17/68743/how-much-money-do-gamers-really-spend/.

[270] Brown P., Raysman R., note 248.

[271] Cifrino C.J., note 242.

[272] Brown P., Raysman R., note 248.

a formalistic approach into the standard term EULA and contractually stipulate the unilateral right to terminate all relationships with a player with no remuneration in case of the account closure.[273] There is a valid point in such statements, indeed, virtual items would lose value without virtual world, however, if a video game is commoditized and players are expected to invest "real-life" money into virtual items, such player should have legal merit for enforcement and protection.

In Bragg versus Linden Lab court case, a player was able to purchase virtual property in the "Second Life" video game on unauthorized auction for 300 U.S dollars and, as a result, was excluded from the game participation by the developer as a violation of standard term EULA.[274] No virtual property value was refunded to the player.[275] In the present case, the court provided an analogy to a "Second Life" as an actual territory and to virtual property as actual physical property.[276] Even though the case was finalized by a settlement and restoration of rights of a player,[277] it bears significant importance in the separation of intellectual property concept from the property concept in the virtual world.

On the author's opinion, a similar approach should be applied in relation to the online gambling platforms– once the gaming platform ceases to exist, or the player's account is closed for any reason, the player's open balance or unused stakes are returned to the player.[278] Considering the fact that the virtual items in commoditized video games have monetary value, once the developer decides to close the virtual world, or the player's account as per EULA provisions, all "real-life" value items purchased by the player should be refunded. In video games intangible virtual items purchased for "real-life" money can be treated as a representation of value, similar to tokens in casinos, thus, a player's property.

Specific virtual worlds can be more popular than others and, therefore, virtual items purchased by the players can have a different value than at the moment of purchase. For example,

[273] Ibid.
[274] Bragg v. Linden Research Inc, 2007, 487, F. Supp. 2d 593, available at: https://h2o.law.harvard.edu/cases/4435.
[275] Bragg v. Linden Research Inc, note 274.
[276] Ibid.
[277] Ibid.
[278] German Federal Interstate Treaty on Gambling, 2021, available at: http://starweb.hessen.de/cache/DRS/20/9/03989.pdf

"There.com" virtual world was closed down due to its unpopularity and revenue loss,[279] while the alternative virtual world "Second Life" is still in usage and has a history of most valuable virtual items' purchases.[280] In such a case when the player's virtual property is terminated based on the virtual world's devaluation, the refunded amount should be calculated based on the market value of such an item. The same should be valid for the player's account termination at the player's or developer's discretion when the virtual item increased in value over time since the moment of purchase. For example, EA Games terminated several video games due to the platform issues,[281] thus, such closure was not related to virtual items and the virtual world's devaluation, but to the discretion of the game developer and the value of digital items should have been refunded to the players.

On the other hand, the above-explained determination of value should be valid only in relation to functional or cosmetic virtual items purchased by the player, however, not in relation to the in-game tokens or virtual currency purchased by the player in order to serve as means of exchange in the particular virtual world. Such purchase results only in price obfuscation mechanisms and the devaluation procedure should not be applicable – if a player purchases virtual tokens in the gaming platform in order to purchase further digital content from the game developer, such unused balance in case of the virtual world's closure or player's account termination should be refunded fully and equal to the monetary value spent.

Apart from the above explained, considering the provisions of Hegel's personhood theory, the closest connection to the property should be prioritized in disputes over property.[282] Following Hegel's view on the concept of property, the property should be treated as an extension to ones' personality, and, thus, a necessary expression of human freedom.[283] As per Hegel's concept, in cases when the loss of items would result in serious effect to an individual's personhood, due

[279] News Report, 'Virtual world There.com shutting down March 9', VentureBeat, 2010, available at: https://venturebeat.com/2010/03/03/virtual-world-there-com-shutting-down-march-9/#:~:text=There's%20no%20there%20anymore.,to%20grow%2C%20but%20revenue%20decreased.

[280] News Report, 'Real life $3.1 million home for sale in Second Life', 2007, CNN, available at: https://money.cnn.com/galleries/2007/real_estate/0708/gallery.luxury_secondlife/index.html; News Report, '6 Lessons on the Future of the Metaverse From the Creator of Second Life', 2021, Time, available at: https://time.com/6123333/metaverse-second-life-lessons/.

[281] News report, Dozens Of EA Titles Going Offline Following GameSpy Shutdown, Including 'Battlefield' And 'Crysis', Forbes, 12.05.2014, available at: https://www.forbes.com/sites/erikkain/2014/05/12/dozens-of-ea-titles-going-offline-following-gamespy-shutdown-including-battlefield-and-crysis/?sh=3d9c82663a6f.

[282] Reuveni E., note 154.

[283] Ibid.

to items' intimate connection to one's personality, the property rights over such an object should be recognized.[284] The close connection between the player and his or her avatar should be taken into consideration determining the property rights over such an avatar. Some players can define themselves as their avatars and transfer avatars' characteristics or achievements into real life as well.

Virtual world events can trigger "real-world" friendship and even marriage.[285] Players impersonate their avatars and transfer virtual world communication and relationships into "real-life" world, thus, having a strong connection with such an avatar. There are cases when the economic and social situation of a player in real life can influence what he or she seeks to achieve virtually by way of building social networks or acquiring virtual goods in order to achieve "real-life" profit.[286] Therefore, in disputes between a gaming company and a player over the avatar, the player should be favoured, following Hegel's personhood theory on property rights.

Another example of such a strong connection between a player and avatar can be Jon Jacobs - known under "Neverdie" avatar, a club owner in the "Entropia Universe" video game.[287] Jon "Neverdie" Jacobs opened his own company named "Neverdie",[288] which is specialized in Ethereum-based Teleport tokens transactions to be used in various virtual worlds.[289] In the described case, a player's connection to a virtual reality avatar was transferred to a "real-life" world and his reputation and earnings from the participation in the video game were transferred to a "real-life" business. Therefore, players should be entitled to property rights for such an avatar following the personhood theory.

The ownership rights over avatars and personal accounts were as well questioned in a court, particularly transferring the online account ownership after the death of a person, under whose name such an account is registered, was challenged in the court by the relatives of a deceased.[290]

[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Aitken R., 'President Of Virtual Reality' Behind Neverdie Creates Teleport Crypto Token, Raises $3.5M', Forbes, 2017, available at: https://www.forbes.com/sites/rogeraitken/2017/08/02/president-of-virtual-reality-behind-neverdie-creates-teleport-crypto-token-raises-3-5m/#20a4d056273b.
[288] Information on Neverdie Company, available at: https://neverdie.com.
[289] Aitken R., note 287.
[290] Eunjung Chung A., 'After Death, Fight for Digital Memories', Washington Post, 2005, available at: https://www.washingtonpost.com/archive/politics/2005/02/03/after-death-a-struggle-for-their-digital-memories/074e8451-e756-4f6f-8c47-01b86f3e465b/.

The website developers refused to provide access to the personal data of deceased persons based on privacy reasons and relatives claimed that the personal pictures or notes are a part of a heritage and memorabilia that needs to be passed to the rightful owners.[291] If to apply a property law approach in such a situation, avatar or personal account is a property of a player and in case of death or a limitation of liability should be transferred to the rightful heir or a legal guardian. The arguments of transfer of account ownership are as well supported, taking into account the commoditization of video game and principles of responsible play,[292] as players with limited liability can spend a significant amount of money for in-game purchases without access of legal guardian to such an account.

Important to underline that in the European regulatory framework such an account ownership rights transfer for deceased persons can be covered based on the national regulations under the data protection framework.[293] Therefore, the European legal culture dedicates high value to personal data and the ownership of such a personal data in relation to digital accounts, however, leaves such regulation to member states to establish, which can create a difference in treatment of the European consumers in the gaming industry due to the cross-border nature of business.

Considering the above-mentioned, after entering into the EULA, the nature of in-game relationships between a developer and a player on purchase of intangible items (game codes or intangible virtual items), creation of avatar, and purchase of in-game tokens express the property law character. Initial EULA grants non-exclusive license for developer's intellectual property on a particular virtual world as a sole product, thus, right to access such a virtual world as a whole, however, as discussed above in the present chapter, the intellectual property rights on particular virtual items, virtual tokens or user-created content (avatar, for example) are questionable. Therefore, the contractual relationships between players and gaming platforms or online marketplaces should include property law provisions in relation to the player's avatars, purchased virtual items, balance leftovers in the in-game tokens or any other monetary value items. In case of the termination of the business relationships between players and platforms, balance leftovers, even if represented in virtual items, should be refunded.

[291] Ibid.

[292] International Game Technology PLC, Information on Responsible Gaming, available at: https://www.igt.com/-/media/c92f980d4f7f410cb1f0cea0c5b7e811.ashx.

[293] 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 (General Data Protection Regulation), OJ L 119.

C. Virtual Property Rights

As explained in the previous parts, analysing the nature of the legal relationships between parties in the gaming industry, it can be seen that the nature of the transaction is hybrid including both intellectual property law element, property law elements and elements of consumer contracts on the digital content supply or digital service provision. In pay-to-play video games, when the contract is executed at the moment of purchase with no further payments required, the business relationships between parties can be limited to the intellectual property law protection and consumer contract in relation to the digital content purchase. In free-to-play video games, the situation is complex and involves multi-parties and multi-layer contractual relationships, thus, the consumer protection and e-commerce framework in relation to the free-to-play video games should be investigated in detail.

In-game transactions on intangible virtual items with the involvement of "real-life" money should be considered as separate contracts on the transfer of digital content. And, following the property law approach, such virtual items should be considered as players' property. Therefore, relevant legal norms regulating the digital content purchase and conformity of digital content should be applied to such transactions. The player should be entitled to trade such virtual items on external platforms, forbid access to such virtual items, and request a refund from the developer when such virtual items are damaged or destroyed as a result of a developer's actions. The player should have the possibility to claim remuneration for the damages to the player's virtual property in cases if such damages occurred not by the virtual events in the game, but by the "real-life" events, for example, error in the code, a breach in the security of the video game or account blocking eliminating the physical access of a player to own property.

At the current stage, a legal mechanism allowing the protection of the virtual property is far from being available on the European market. However, in some countries players already have the opportunity to enforce property rights in relation to the virtual property in the "real-life" courts. For example, in China a player, whose virtual property was stolen by the hacker, received remedies from the gaming company in an amount equal to 1 210 U.S. dollars as a result

of a court decision.[294] In its reasoning, the Chinese court stated that the breaches in the game security resulted in the destruction of the player's property.[295]

The virtual property status is discussed not only in the court. A Chinese insurance company launched an insurance program in order to protect virtual property in video games.[296] In South Korea, the law stipulates that the virtual property of a player holds a value that is independent of the game developer.[297] In Taiwan virtual property is protected from fraud and theft under the property law regime.[298] In the Netherland in-game actions conducted in order to seize virtual items of other players were considered as a crime (the Runescape case and the Habbo Hotel case).[299]

Ownership over virtual items can be explained by the virtual property concept. Virtual property can be defined as a computer code stored on a remote source system or generated through specific software, with which one or more persons are granted certain powers to control the computer code, to the exclusion of all other people,[300] and with which such a code, when applied to specific software or digital platform, can represent a virtual item.

In order to understand whether the "real-life" property regulations can be applied to the virtual property, the nature of "real-life" property (tangible and intangible) and virtual property should be assessed. The "real-life" property, the same as virtual property, can share the following common characteristics:

(1) Rival nature; the code allows the creation of copies of the code due to the limited creative nature (creative element of code should be assessed as discussed above in the present chapter in relation to the intellectual property approach); the rival character of

[294] News Report, 'Online gamer in China wins virtual theft suit', CNN, 2003, available at: http://edition.cnn.com/2003/TECH/fun.games/12/19/china.gamer.reut.

[295] News Report, 'Online Gamer in China Wins Virtual Theft Suit', Reuters, available at http://edition.cnn.com/; Knight W., 'Gamer Wins Back Virtual Booty in Court Battle', NewsScientist.com, 2003, http://www.newscientist.com/article.ns?id=dn45102003/TECH/fun.games/12/19/china.gamer.reut/.

[296] Ibid.

[297] Brown P., Raysman R., note 248.

[298] Ibid.

[299] Tycho Adriaans, 'Owning the Virtual Fruit. Protecting User Interests in Virtual Goods under Dutch Law', Tilburg University, 2017, available at: http://arno.uvt.nl/show.cgi?fid=142260.

[300] Blazer Ch., 'The Five Indicia of Virtual Property', Pierce Law Review, Vol. 5, 2006, available at: https://ssrn.com/abstract=962905.

physical property can also be transferred to the digital virtual property.[301] For example, NFTs, that are used to create unique collectible items online, as explained above.

(2) Persistent nature; the virtual item or digital content needs to be created once and it will have the persistent state similar to the physical object creation.[302] For example, when a player logs out from a video game, his or her account does not cease to exist (including account closure). A positive action from a developer is required in order to delete the account permanently or destroy a virtual property;

(3) Interconnected nature; the same as in the physical world when two people looking at the same physical object see the same, in the digital world users experience the code in the same way.[303] For example, a code applied to a particular gaming platform would represent the same virtual item (skin or intangible virtual object as sward or house), which as well enables virtual items or digital codes trading and creates the demand for online marketplaces for virtual items.

Based on the views available in doctrine, the cross-platform existence of the virtual property as well can be named as one of the characteristics of the virtual property that creates an economic value for such virtual items.[304] However, in the author's opinion, the availability of virtual items on a third-party platform (i.e., eBay) is not a mandatory condition to name a virtual item as virtual property, as the availability of such item on only specific authorized platform can indicate the exclusivity of such content or limited distribution network, similar to physical products that are available only on the supplier's service platforms solely.

Worth mentioning that tangibility is not a mandatory element of property rights.[305] It is possible to purchase an interest in an airspace that is intangible and such an interest would be considered as one's intangible property, thus, no questions should arise regarding the intangible virtual goods in video games as well, following the principle of the legal analogy.[306]

Property law is solely an allocation system ensuring that the particular rights over tangible or intangible objects are secured notwithstanding whether issues arise online or offline.[307] Players

[301] Fairfield J., note 165.
[302] Ibid.
[303] Ibid.
[304] Blazer Ch., note 300.
[305] Fairfield J., note 165.
[306] Ibid.
[307] Ibid.

purchase virtual items as a result of the developers' investment in computer hardware, software, and intellectual property.[308] Therefore, it is important to find the balance not only between the interests of players during virtual property transactions but also between the interests of players and developers or digital service providers.[309]

In order to secure such a balance, the user-created content should be examined separately. The value of a virtual item can be added by the user or even created by the user as per the game functionality. The property owner is more likely to add value to the particular item, improve it, when such a person thinks that the item belongs solely to himself or herself, which also benefits all community participants,[310] as well as developers, in the case of video games. In the gaming industry, the player's ability to add such value and its extent is determined by a game scenario and gaming software functionality. In virtual worlds player's avatar can be an example of such a value-added item – the player improves the ability of one's avatar, invests in additional skills, spends labour, interact with other players. In such a way player should be granted ownership right if such add-ons created the actual value of the avatar or refunded for such additional value by the initial owner – the developer.

The above-mentioned characteristics of virtual property can also serve to differentiate the concept of virtual property from intellectual property. Virtual property has a rival character when intellectual property is non-rival.[311] For example, playing a movie on a video streaming platform does not eliminate the possibility for other users to watch the same movie at the same time. In video games, virtual items cannot be used by other players once purchased and are belonging to a particular avatar or player's account, which shows the rival nature of the virtual property. Thus, in order to define whether a particular item is a virtual property, it is important to determine whether the virtual item is rival or based solely on the exclusion rights.[312] However, worth underlining that public accessibility to the virtual property is not determining non-rival character of a particular virtual item.[313]

[308] Blazer Ch., note 300.
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.

The existence of property rights over a virtual object does not eliminate the intellectual property rights for the same virtual object (in case the element of creativity is present, as explained above).[314] The ownership of a virtual object does not abolish intellectual property rights over such virtual object, however, protects the interests of the owner of such a virtual object, in the same way as ownership of a book does not abolish the intellectual property rights of the author but stipulates ownership over a particular physical object.[315] With a purchase of a physical book, the consumer obtains property rights over such a physical object. The same approach should be taken in relation to purchased digital objects or virtual items, including but not limited to the refund in case of unilateral withdrawal from the contract initiated by the developer in the digital world, when such a virtual item is stored or available solely within the developer's platform.

The establishment of virtual property status can be applied not only to the gaming industry but to the digital service provision or digital content supply as a separate industry in order to secure the rights of consumers, facilitate free trade in relation to the digital products and ensure the integrity of such products from the platforms' unilateral actions. As an example of virtual property rights protection and fair treatment from the trader's side, can be taken issue with Amazon Kindle happened in 2009.[316] Amazon unilaterally deleted numerous digital copies of books from the user's Kindle devices,[317] even though such actions would be impossible in the "real-life" world in relation to the physical copies of purchased books, however, in the digital environment, where the developer is in sole possession of a platform, such actions can be regulated over the contractual relationships. Notwithstanding the sole control and unilateral deletion, Amazon refunded to all consumers affected the price spent for digital book purchases.[318]

Moreover, the books are usually creative works and are placed under the intellectual property rights protection framework. However, various virtual items might not represent a work of art per se, thus, the different statuses and different regimes should be applied not only contractually, but as well as on the regulatory level. The balance between the property right of players

[314] Fairfield J., note 164.
[315] Ibid.
[316] Perzanowski A., Hoofnagle Ch.J., 'What We Buy When We 'Buy Now', UC Berkeley Public Law Research Paper No. 2778072, 165 University of Pennsylvania Law Review, 2017, available at: https://ssrn.com/abstract=2778072; Stone B., 'Amazon Erases Orwell Books from Kindle', New York Times, 2009, available at: http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html.
[317] Ibid.
[318] Ibid.

and the intellectual property rights of developers (as well as players for user-created content) should be established in the standard term EULAs as a general rule.

Considering the above-mentioned, transactions in virtual items in the gaming industry bear the character of virtual property, not intellectual property (depending on the element of creativity), thus, the virtual property status should be established on the Community level and players should be granted the respective level of protection in case of property destruction, loss or deprivation due to the developers' action or negligence.

D. Intermediate Conclusions

The present part examined various views present in doctrine in relation to the status of virtual property. The author analysed differences between intellectual property, physical property and virtual property within the perspective of such framework application to the gaming industry. Virtual property as a separate notion holds a rival, persistent and interconnected nature that is shared together with the "real-life" physical property.

Intellectual property, on the other hand, is a separate notion, which cannot replace virtual property by its nature. The intellectual property rights over a particular virtual item does not exclude virtual property rights over such an item. The game developer could hold intellectual property rights over a particular virtual world as a sole product or over gaming platform, however, the creativity or each element of the virtual world should be accessed in order to determine whether it can fall under the intellectual property protection framework.

In free-to-play video games, players are contracted for open-source access to the gaming platform and for de facto separate contractual relationships on the supply of digital content or digital service provision. In cases, when a player is expected to purchase a particular digital content in the digital platform from a developer or third parties, the player should hold virtual property rights over such a virtual object, including but not limited to the right to decide in relation to such virtual object and right for a refund in case of virtual property destruction, malfunction or non-conformity. Thus, in video games when the developer is in unilateral control over the player's virtual property – the player is entitled to a refund in case of unilateral termination of virtual item ownership or access to the platform.

Considering the above mentioned, the virtual property should expect the same level of legal protection and consumer guarantees as to the "real-life" property, notwithstanding the fact that the virtual property exists on a specific gaming platform and is controlled by a developer, as

the same level of legal guarantees is expected in relation to the standard types of property. For example, a central depositary platform holding and controlling shares or a file-sharing platform in digital form are expected to refund the intangible property in case of loss or unlawful destruction as a particular level of data integrity and consistency of actions on the owner's discretion is required from a controller. Thus, if the "real-life" tangible and intangible property has a specific legal framework securing the ownership rights, third-party obligations and enforcement mechanism, the virtual property should be subject to the same treatment and similar guarantees to the virtual property owners.

In commoditized free-to-play video games, the purchase of virtual items that would determine the legal status of virtual property should be defined through direct and indirect transactions. In free-to-play video games, not only virtual items per se, but as well as virtual tokens, intangible virtual items that were purchased by a player in exchange for fiat money should be considered as player's property and the relevant legal framework should be amended respectively on a national and Community levels in order to ensure payment transaction transparency. The issues arising from payments under the gratuitous subscription contracts, including but not limited to the transparency requirements and prise obfuscation practices will be examined in detail in the next chapter.

Thus, the current approach taken by the developers that stipulates unilateral possession of player's property, facilitates property expropriation and seizure, abolish all rights of players over virtual objects should be treated as disproportional and recognized as invalid on the Union level in order to secure rights of consumers and enforce Digital Single Market Strategy.

The developers' own determination "it is not a virtual property" mentioned in the standard term EULA should not have any legal value when the nature of the virtual item falls under the virtual property concept,[319] and such concept and framework for legal protection should be determined on the European level in order to secure fair treatment not only in the gaming industry but as well as in transactions with digital content.

[319] Blazer Ch., note 300.

4. Contract Law Approach

The relationships between players and game developers are regulated based on the intellectual property law framework under the provisions prescribed in the standard terms EULA. Notwithstanding the contractual provisions referring to the intellectual property law regulation, following the arguments presented above and analysing the nature of developer versus user relationships, such contracts cannot be fully regulated under the intellectual property law framework.

Standard term EULAs, indeed, can be partially classified as ones including intellectual property nature, particularly, in relation to access to the virtual world per se (if the element of creativity is present), however, due to the specific nature of virtual worlds, the possibility to create user-content and the absence of copyrights in relation to particular virtual items such a pure approach cannot satisfy consumers' expectations and protect interests of both parties.

Considering such a mixed nature of each EULA, the intellectual property rights protection cannot be determined as the main subject of a contract and, therefore, EULAs cannot be fully addressed as license contracts per se, as they include characteristics of a consumer contract, contract on digital content supply, digital service provisions or even intermediary platform service contracts. The present part will investigate in detail the mixed nature of EULAs and "Terms of Service" agreements in the gaming industry, using "real-life" examples from valid EULAs used by the developers in popular video games. Moreover, the author will analyse on a high level the existing intellectual property, consumer protection and e-commerce framework in relation to consumer contracts and licence agreements and will determine whether the contract law approach can be applied to regulate the business relationships in the gaming industry.

A. Contractual Overregulation

Historically EULAs were used as self-regulatory copyright evidence by software providers in order to determine software itself as copyright-protected work of art at a time when the legal status of software was still unclear.[320] When intellectual property rights laws worldwide were expanded to cover computer programs, and in certain jurisdictions software was granted as well as patent protection, contractual licenses were used for inputting additional legal protection to the already patented products.[321] In certain cases, licencing contracts were facilitating

[320] Elkin-Koren N., note 178.
[321] Ibid.

the limitation on usage of informational society services or goods that were not otherwise protected under the intellectual property protection framework, such as a database of phone numbers.[322]

However, with the development of legislation, particular European regulations on digital goods, digital service and digital content, the extra-contractual measure overregulating virtual worlds lead to the creation of collisions and disruptions within the consumer protection framework of the European Union. Additionally, such contractual overregulation created an unfair framework through standard terms provisions abolishing all player rights in relation to user-created content or purchased virtual items.

Apart from the intellectual property rights regulation in the virtual worlds, the majority of EULAs are as well regulating players' in-game behaviour, relationships with third parties on external platforms and, in certain cases, as well anti-money laundering obligations of the developer. Thus, the hybrid nature of the standard term contract used in the gaming industry involves various aspects and touches upon various legal areas.

Indeed, analysing the nature of EULA from the contract law perspective, it can be concluded that overregulation of social behaviour in the virtual world cannot have legally binding character regarding all members of the virtual community as there is no horizontal enforcement possible.[323] Meaning that, if a certain EULA stipulates legal obligations for players not to harass or grief any third party during the gameplay, however, player A harasses player B, then the player B would have no legal possibility to protect against such harassment and would not have a legal mechanism to enforce such a EULA, as player B would not have visibility over the contractual relationships between player A and the developer (only using assumptions that the same version of standard term EULA is applying to player A as well).[324] Thus, certain EULAs by the overregulation of social behaviour during the gameplay establish third-party beneficiary terms without an actual enforcement possibility and also under the framework of intellectual property rights protection.

Indeed, the contractual regulation of social behaviour in a game between third parties under the licensing contract would create a legal collision instead of creating the regulation of business

[322] Ibid.
[323] Fairfield J., note 151.
[324] Ibid.

relationships due to the misbalance between parties and lack of horizontal enforcement. Therefore, a relevant contract between the player and the developer should focus only on the legal rights and obligations between the agreeing parties.

Additionally, to the contractual overregulation, the majority of the EULAs stipulate the unilateral right of the developer to terminate the player's account based on the violation of EULA terms, including but not limited to norms stipulating social behaviour with third parties. For example, Cortopia AB EULA (the "WANRS" video game) states:

"*Cortopia may, in its sole discretion, cease to provide any or all of the items or services offered in connection with WANDS (including patches and updates) and terminate the EULA. Cortopia may communicate such termination to the user upon 30 days' notice in any of the following manners: (i) when the user logs into the user Account (ii) in a notice on Cortopia's website; (iii) via electronic mail; or (iv) in another manner that Cortopia deems suitable to inform the user of the termination. If Cortopia terminates the EULA pursuant to this section, the user will not be entitled to receive a refund of any Fees."*[325]

In commoditized free-to-play video games, in case of the termination of a player's account by the sole discretion of the game developer, such a player can lose all purchased virtual items with no possibility to refund. Some authors argue that the principle of "good faith" should be applied while moderating content or blocking players' accounts in violation of the code of conduct.[326] However, such a principle is a subjective notion and would be accessed by the court only on a case-by-case basis.[327] Such unilateral termination of the subscription contract with an open balance represented in virtual items leads to the misbalance of parties in the self-regulatory regime created by EULA and can result in material damages to the interests of the players by seizure of purchased virtual items.

Following the Digital Service Act provisions, online platforms are responsible for the content moderation; however, such content moderation cannot interfere with the fundamental rights of consumers using such a platform, in particular freedom of expression, the right to an effective remedy, non-discrimination, rights of the child as well as the protection of personal data and

[325] Wands Game EULA, available at: https://www.wandsgame.com/eula/.
[326] Goldman E., 'Online User Account Termination and 47 U.S.C. §230(c)(2)', Santa Clara Univ. Legal Studies Research Paper No. 19-11, UC Irvine Law Review, Vol. 2, 2012, available at: https://ssrn.com/abstract=1934310
[327] Ibid.

privacy online.[328] As per the Digital Service Act, the Member states would need to adopt specific rules in order to ensure that online platforms, particularly large online platforms, are implementing effective consumer protection mechanisms and mitigation systems in order to ensure effective remedies in case of infringement are taken.[329] Video game platforms should be taken into account while implementing rules prescribed in the Digital Service Act in order to create a transparent framework providing effective remedies to the player for the unilateral termination of EULA or unilateral access block to the player's account in order to ensure that fundamental rights of consumers are protected on the Union and national levels.

Considering the above mentioned, the contractual relationships between players and developers should focus on the regulation of the factual business relationships based on the nature of the business (i.e., intellectual property rights over creative content, digital service provision, virtual property clauses) and should not take an over-regulative approach and create quasi-governance between third parties.

B. Licence Agreement

From the European contract law perspective, there is no common approach or harmonized framework towards the status of license agreements in the European Union. This causes different interpretations and different approaches towards licensing agreements among the European entities, regulatory bodies and created legal collisions.

One of such legal collisions was addressed to the European Court of Justices (hereinafter referred to as – the "ECJ") in the Falco Privatstiftung and Thomas Rabitsch versus Gisela Weller-Lindhorst case. Particularly, the ECJ had to decide whether the license agreement can be considered as a contract on service provision in the respect to Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[330] The court explained that in order to qualify specific agreement as the contract for service provision, the party of licensing agreement should carry out a particular activity in return for remuneration, however, in contracts where the owner of an intellectual property right grants its contractual partner the right to use that right in return

[328] Digital Services Act, note 34.
[329] Ibid.
[330] Case C-533/07, Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst, Judgment of the Court (Fourth Chamber), 23 April 2009; Rosen J. (ed.), 'Intellectual Property at the Crossroads of Trade', ATRIP Intellectual Property, 2012.

for remuneration, such an activity cannot be considered a contract for service provision.[331] Therefore, based on the findings of the Falco Privatstiftung and Thomas Rabitsch versus Gisela Weller-Lindhorst case, in order to be qualified as a service provision contract, the nature of the EULA has to express particular service, the certain activity provided in exchange for remuneration.

The strict differentiation between licencing contract and the service provision contract is absent in national laws of Member states as well. In the discussed case, laws on contract provision of different Member states of the European Union were analysed in order to establish a common approach on the community level towards the licencing contract.[332] The court discovered the differences in license agreement definitions and law applicable to licencing contracts in the national laws of the Member states.[333] For example, French law allows the possibility of regulating license agreements under different contract law norms; Austria and Ireland do not have particular definition of the licensing agreement, and the Czech Republic, indeed, established a definition of licensing agreement on the national level.[334] Therefore, the common European standard approach towards licensing agreement and contract law provisions applied to such licencing agreements in currently absent, which significantly reduces the level of legal certainty, facilitates unequal treatment, and unfair terms usage in various industries, including but not limited to licensing agreements and EULAs in the gaming industry.

The Advocate general, in the Falco Privatstiftung and Thomas Rabitsch versus Gisela Weller-Lindhorst case, stressed out that the legal gap in relation to the harmonization of the licencing agreement definition should be eliminated and provided a possible definition of the licensing agreement as "*a reciprocal contract, under which, in essence, the person granting the license confers on the licensee the right to use particular intellectual property rights and, in exchange, the licensee pays license fees to the licensor. By granting the license, the licensor authorizes the licensee to perform an activity which, in the absence of the license, would be an infringement of intellectual property rights*."[335]

[331] Ibid.

[332] Case C-533/07, note 330.

[333] Case C-533/07, Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst, Advocate General Opinion, 23 April 2009.

[334] Ibid.

[335] Ibid.

Taking into account the suggested definition, the developer has to have the intellectual property rights certified for the contract to be considered as a license agreement, not a service contract, however, in the majority of cases, the game developer cannot provide proof of intellectual property rights to particulate intangible items, such as virtual in-game currency or virtual in-game weapon etc. (as a reference to the above discussed FIFA case, when EA Games failed to prove that FIFA in-game tokens constitute its intellectual property, as no trademark, copyright or patent evidence particularly for such tokens was provided by the company).[336]

On the other hand, both European Commission and the Advocate General during the ruling on the above-mentioned case underlined that the notion of service contract might be applied to the intellectual property law agreements in specific cases.[337] The nature of particular relationships should be analysed on a case-by-case basis in order to determine whether the particular contract on the transfer of a certain set of intellectual property rights can be considered as a service contract as well.

In respect to EULAs regulating consumer behaviours, virtual property rights, user-content, the hybrid nature of such a contract can be defined. In free-to-play video games, the access to the gaming platform itself can be regulated under the intellectual property law framework for open-source software, however, all further "paid" relationships are out of scope of the main contract and should be regulated under the digital content supply or digital service provision contract.

For example, ReactGames Studio Limited (the "Days After" video game) EULA states:

"*You can participate in the Game without paying any registration fee. However, if available You may avail yourself of Digital Content in the Game by purchasing with "real-world" money of a limited, simple, non-exclusive, non-transferable, non-sublicensable and revocable license to use (i) Virtual Currency; (ii) in-game virtual items; (iii) other in-game services...*"[338]

As explained in the present chapter, the developer can prove neither the creative element of certain virtual items (for example, virtual currency) nor intellectual property rights ownership regarding specific virtual items. The access to the video game, limitation in copying a particular virtual world as a whole, would fall under the intellectual property rights protection framework. The creativity of a video game as a complex product with a creative story, overall virtual world

[336] United States v. Clark, note 182.
[337] Case C-533/07, note 333.
[338] DaysAfter EULA, available at: https://days-after.com/license/.

design and unique software code can result in intellectual property rights of game developers for such a video game. However, taking into account the collaborative nature of virtual worlds, the possibility to create content by players, the in-game economy based on the virtual items exchange for "real-life" money, EULAs cannot be considered as a pure licencing contracts.

Analysing the ECJ finding in the Falco Privatstiftung and Thomas Rabitsch versus Gisela Weller-Lindhorst case, it can be seen, that the subscription contract in free-to-play video games is, indeed a licensing agreement and cannot be considered as a service contract, as the actions of the developer do not lead to the remuneration payment from the player's side. Moreover, due to the gratuitous nature of such contracts, the European consumer protection and e-commerce framework is partially not applicable to such contracts, as explained in the previous chapter.

Solely intellectual property laws should be applied to the EULAs, which regulate the subscription process itself and usage of the licensed intellectual property rights of the developer on the virtual world as a whole sole product. Thus, EULAs used in pay-to-play video games, in case no further in-game transactions are possible, can be considered as licencing contracts. However, due to the fact that in-game purchases require remuneration for digital content supply and relevant licence for such digital content is absent; such in-game economy contracts should be considered as separate contracts falling under the European consumer protection framework (the issue will be explained in detail in the next chapter of the present thesis).

Considering the above-discussed, the relationships between players and gaming platforms that involve in-game transactions with virtual items are falling out of the scope of the licencing contract, or gratuitous subscription contract, and can be considered as separate contractual arrangements with the nature of a service provision contracts (particularly, digital service provision or digital content supply contracts). Thus, provisions of EULA cannot regulate such in-game transactions disregarding European laws regulating service provision contracts, including but not limited to the consumer protection laws and e-commerce regulations, where the developer acts as a trader and the contracting party acts as a consumer.

C. Consumer Contract

The first licence contract for the software was used under the General Public Licence concept by the Free Software Foundation in the 1980s establishing four freedoms of software developers, particularly, freedom to run the software program, to modify it, to study it and to distribute

it.[339] With the Open-Source Initiative, Creative Commons and Free Software Movement the clauses of licencing agreements for software became more liberal facilitating gratuitous contracts and gratuitous software.[340]

In the modern society with a business model build on micro-transactions in video games, gratuitous software with a lack of consumer protection regulations can trigger misbalanced relationships between parties and facilitate unfair terms in EULAs or Terms of Service agreements. Gratuitous contract on free access to the gaming software and relevant provisions on certified intellectual property rights should be taken separately from the contracts on in-game transactions due to the difference in nature of business relationships, payment models and legal framework. Such contracts that require "real-life" money investments should be regulated on the Community level in order to ensure consumer protection rules, establish information requirements, relevant transparency rules and minimum level of player protection.

In free-to-play video games, the standard term EULA includes the following characteristic with respect to the legal nature of business relationships:

(1) Open software licence contract for a virtual world as a whole;
(2) Gratuitous digital content supply contract for access and usage of the virtual world;
(3) Digital service or digital content supply consumer contract in each case when the commoditized in-game transaction takes place.

Developer versus user relationships are multileveled and include access to both gratuitous content and paid content,[341] including transactions with in-game tokens, crypto-currency and fiat money. Therefore, in mixed nature EULAs, it is important to find the balance between the satisfaction of the interests of developers in order to secure innovation and market expansion, consumer protection framework in order to secure public good, to facilitate cross-border service provision and to endorse European Digital Single Market strategy.

The hybrid nature of the standard term EULA is subject to various legal collisions. The contract law approach in relation to hybrid contracts in the gaming industry was examined in the Bragg versus Linden Research Inc. case in the United States. The present case can serve as an example

[339] Elkin-Koren N., note 178.
[340] Ibid.
[341] Ibid.

of the biased character of the EULA, which includes characteristics of both the consumer contract and the license agreement.[342.]

In the above-mentioned case, the court examined the mandatory arbitration clause in the EULA from the perspective of consumer protection regulations against unfair terms in standard form contracts (adhesion contracts as per the US laws).[343] Within the course of the present case, the court concluded that the mandatory arbitration agreement, which was included in EULA, was unfair and the user, in this case, should be treated as a consumer.[344] In Bragg versus Linden Research Inc. case, the court aimed to protect the rights of the consumer while signing the standard form contract in order to obtain access to the intellectual property rights product as per licencing agreement. Therefore, both contract law and intellectual property rights provisions were applied to the particular EULA, providing that intellectual property protection should not exclude consumer protection law applicability.

Applying consumer protection framework to intellectual property law provisions on access to the video games, particularly in relation to the unfair terms in standard contracts, can be justified also by the fact that a significant amount of players is legal minors (please refer to Pan European Game Information video games classification),[345] that are unable to judge on fairness or transparency of particular legal terms on the stage of obtaining access to the game.[346] The application of the consumer protection regulations to licencing agreements can facilitate equal treatment, strengthen the bargaining power of the players and enlighten the legislative awareness towards the gaming industry.[347]

Worth mentioning, that notwithstanding clearly mentioning intellectual property framework coverage over all types of contractual relationships in the standard term EULAs, during the game participation players' are encouraged to "buy" certain virtual items, not to "licence" them

[342] Bonar-Bridges J., 'Regulating Virtual Property with EULAs', Wisconsin Law Review, 2016, available at: https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/wlron4&id=77&men_tab=srchresults.
[343] Bragg v. Linden Research Inc, note 274.
[344] Ibid.
[345] PEGI classification, available at: https://pegi.info/.
[346] Bonar-Bridges J., note 342.
[347] Ibid.

from the gaming platform (for example, please see information on the "LootHunt" marketplace).[348] Thus, players are de facto encouraged to purchase the digital content, while the contract indicates the licencing procedure, which misleads the players in relation to the nature of the legal relationships and can be considered as unfair consumer practice. Taking into account the standard nature or "take it or leave it" nature of video game EULA, such marketing of virtual items purchase as the process of granting ownership rights over such items can be considered as breach of transparency principle and consumer protection guarantees.

Following the data concluded in the research in relation to digital content purchase on the internet, over 80% of consumers in question were convinced that by clicking on the "buy now" button while accessing digital book or digital music they were obtaining ownership rights over such an eBook or mp3 file.[349] However, after replacing the button "Buy now" into "Licence now", only 50% of consumers were still convinced of the ownership rights over such digital products.[350] In the same way, the increase in the consumers' acknowledgement in relation to the actual nature of the legal relationships was shown when consumers were shortly informed about rights over virtual items during the purchase.[351] The presented data shows, that the current approach taken by the game developers leads to a misbalance of parties' rights and obligations, misleads players regarding the legal consequences resulting in virtual items purchase and facilitates unfair commercial practice in the gaming industry.

The alternative views are as well present in the doctrine claiming that the standard term EULA cannot be considered a valid contract, but a unilateral licence instead, as the contract needs to represent the consent of both parties, which is de facto absent in a mass contract.[352] The absence and legal validity of the consumers' consent should be taken into account considering the age classification of the majority of video games and significant minors' participation (therefore, a lack of legal capacity to express consent and conclude a contract respectively). Players cannot be considered agreeing to a licence contract if they are not adequately informed of the contract conditions and do not have the capacity to properly understand the economic consequences of

[348] Information on LootHunt Platform, available at: https://loothunt.com/offers/fallout-76-pc/items/?typeId=546530340&gameId=1016879440&platformId=702035651.
[349] Perzanowski A., Hoofnagle Ch.J., note 316.
[350] Ibid.
[351] Ibid.
[352] Elkin-Koren N., note 178.

contract terms.[353] Even if the player has the legal capacity to provide the consent for the gratuitous subscription contract conclusion, further paid content is out of the scope of the consent provided and should be accessed separately. Thus, it is important to establish a transparency level, mandatory pre-contractual information requirements and level of legal capacity expected for particular types of video games, especially commoditized free-to-play video games. The issues connected to the transparency of the standard term EULAs will be investigated in detail in the next chapter.

EULAs used for such mass-produced content as video games are often drafted unilaterally by multinational corporations acting as game developers and enforced against single consumers, therefore, relatively restrictive and limiting consumers' freedoms.[354] Consumer interests are not represented in such contracts as a unique market failure regarding the sole user is insignificant taking into account the scalability of the industry.[355] Players are usually vulnerable and at a disadvantage while confronting the game developers.[356] Thus, in order to protect individual users, joint actions on the European Union level should be taken into consideration.

Considering the fact that not all players are following the same pattern – i.e., not all players are minors or not all players are purchasing in-game virtual items - in order to secure the interests of all groups of gaming platform users, the modular system of contractual provisions or standard term EULA can be applied to the developer versus user relationships.[357] The players can be offered several different sets of terms and conditions depending on the legal capacity of the player or contractual choice of the player. In such a way developers would need to restrict certain features of virtual worlds available for such group of users – i.e., restrict paid content when a player is under legal age stipulated in certain jurisdictions, restrict user-created content feature if a player chose not to agree to granting irrevocable unilateral licence for the derivative work to the developer.

Such modality in EULAs or mass contracts concluded between players and developers can facilitate fair treatment and transparency in the legal relationships between the virtual world users, as players would be aware of certain limitations and could select the level of liability or

[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Ibid.

legal guarantees expected based on the consumer interests invested in the video game. However, modality would be efficient if applied not only contractually, but through the respective interface of the virtual world - in cases when EULA regulates all legal relationships under one framework, if a player, for example, does not agree for paid content at the moment of the contract signature, such paid content should not be available in the game. Such an approach will ensure transparency, separate contractual arrangements regarding various types of legal relationships, separate consent and will facilitate consumer protection in the gaming industry.

D. Intermediate Conclusions

Considering the above-mentioned, the standard term EULA cannot be considered as a purely licencing agreement unless applied to the pay-to-play video games with no further monetization. In free-to-play video games, EULAs represent the hybrid contractual arrangements including elements of the licencing agreement in relation to the video game access as well as consumer contract.

Following the contract law approach, two different views towards the contract law provisions application to EULAs can be distinguished:

(1) Contract law provisions application to EULA aside from the intellectual property law provisions; EULA should be accessed on the subject of unfair terms in standard form contracts notwithstanding the legal framework applicable – property law, intellectual property law etc.
(2) Contract law provisions application to in-game transactions, as a separate contract on digital service provisions or digital content supply in exchange for remuneration.

Typical EULA used by gaming companies has a mixed contract nature and includes characteristics both of license agreement, regulating copies of specific software, and of consumer contract on the digital content supply (game-specific codes or so-called virtual items). Therefore, each EULA should be accessed on the subject of the consumer protection regulations, i.e., rules regulating unfair terms, standard terms, conformity of digital goods, digital service provision and digital content supply. The mandatory consumer protection requirements should be applied to the in-game transactions in the same manner as to the contracts on digital service provisions or digital content supply in exchange for remuneration (notwithstanding the fact whether the remunerations is done directly or through price obfuscation models).

Mass contracts used in the gaming industry, as well as the game interface, should differ depending on the players' category based on the legal capacity of the player, player consent and the respective nature of the legal relationships agreed. In such a case, different sets of contractual provisions would be applied to the different groups of players based on the nature of legal relationships and their level of commoditization. With different sets of contractual provisions, the legal capacity of a player and following players' consent, relevant content should be modified as well in order to avoid post factum disputes, consumer rights violations and to facilitate legal transparency in the developer versus user relationships. The grouping of players based on specific categories of players' interests and mandatory contractual requirements expected can be applied in order to enable proper evaluation of the economic consequences of the game participation and disable digital content that is out of the scope of the actual contract or given consent. This will facilitate a better user experience, ensure transparency in consumer contracts and will provide legal certainty and enforcement mechanisms to both parties.

The existing European framework should be updated to include the relevant provisions regulating the standard terms in intellectual property contracts for gratuitous game access (free-to-play video games), mandatory contractual provisions and information requirements in consumer contracts on video games and in-game transactions in order to provide legal certainty to the business relationships between parties in the gaming industry, to ensure transparency, to eliminate legal collisions, to protect minors, to empower equal treatment in the gaming industry and to facilitate European Digital Single Market Strategy.

5. Intermediate Conclusions to the Legal Approach to the Developer versus User Relationships in the Gaming Industry

The present chapter examined existing approach to the regulation of the business relationships between players and game developers and suggested alternative views towards regulation of both access to the virtual worlds in pay-to-play and free-to-play video games as well as in-game transactions. Particularly, the author investigated whether sole intellectual property law framework can be applied to the developer versus user relationships in the modern realities focusing on virtual economy business model and examining doctrine views and existing EULA examples from the popular video games.

Following the historical approach that was established together with the first open-source software due to the lack of the legal framework applicable, the relationships between game developers and players are up to date regulated based on quasi-intellectual property governance system stipulated only contractually. Due to the complexity of transactions within virtual worlds and lack of legal clarity in relation to the status of virtual currency, in-game tokens or virtual items, standard term EULAs expand the scope of self-established intellectual property rights to all kinds of relationships within the gaming platforms and introduce horizontal self-regulation for players behaviour, virtual property and liability between third parties.

In order to determine whether intellectual property framework can be applied to the particular type of the business interaction, the element of creativity should be determined. The same is valid for user-created content, players' avatars, and virtual property. Analysing standard term EULAs it can be seen that the game developers tend to abolish all players rights for creative works produced during the gameplay by requesting to grant exclusive rights back to the developer before even creating such a creative content.

Moreover, due to the collaborative nature of the virtual world and multiparty relationships, the intellectual property framework regulations of one EULA can conflict with another one creating legal collision for players' obligations, liabilities and licencing regime of intellectual property rights or user-content. For example, one player can participate in various EULAs for (1) gaming platform, (2) video games per se and (3) online marketplace for virtual items managed by different parties.

Considering the complexity, collaborative nature and monetisation of the majority of virtual worlds, the intellectual property approach towards gaming company versus consumer relationships cannot fit all parties' needs and cannot effectively manage all spectrum of gaming industry-specific legal relationships. Therefore, the intellectual property approach can be applied solely to the pay-to-play video games with no further commoditization, in cases when the contract is executed at the moment of gaming platform purchase. For any other types of business relationships, hybrid approach should be taken into account.

Based on the above mentioned, the level of "legal intervention" required for the developer versus user relationships can be defined by the type of video game and its characteristics. In free-to-play video games, the parties enter into open-source free subscription contracts and digital service contracts involving remuneration. In pay-to-play video games, the parties enter

into a remuneration-based license agreement and no further legal relationships regarding the in-game transactions needed (if otherwise is not prescribed by the game functionality).

Moreover, the author examined the "no legal intervention", that stressed that overregulation in the gaming industry eliminates the enjoyment and purpose of the virtual world's existence. In the author's opinion, no legal intervention (as an addition to intellectual property framework application to gaming platform access) can be applied only in non-commoditized pay-to-play video games when the contract is executed in the moment of the agreement between parties, similar to the intellectual property approach as explained above, due to the complexity of transactions, involvement of minors and lack of transparency in relation to the economic consequences of the game participation.

In free-to-play video games, players are contracted under gratuitous subscription contracts, however, de facto separate contractual relationships on the supply of digital content or digital service provision and licencing arrangements can be observed in the majority of cases. Following the property law approach, if the player is expected to purchase a particular digital content during the game participation or acquire through labour, the player should hold virtual property rights over such a virtual object, including but not limited to the right to receive a refund in case of virtual property destruction, malfunction, non-conformity or damage as a result of the developer's actions or negligence, similar to the depositary platform holding intangible property in "real-life", notwithstanding the fact that the virtual property exists on a specific gaming platform and is controlled by a developer.

Therefore, the current approach taken in the industry that stipulates unilateral possession of players' virtual property in the standard term contract, abolishes rights of players over virtual objects and should be treated as disproportional on the Union level. The respective amendments to the existing regulatory framework are required in order to determine the status of virtual property in the gaming industry for securing rights of consumers and enforcing the Digital Single Market Strategy.

Indeed, both property and intellectual property rights of parties, as well as code of conduct in a game, can be stipulated contractually. However, taking into account the hybrid nature and the complexity of the business relationships in the gaming industry, standard term EULAs show characteristics of both licencing agreement and digital content supply contract, which leads to

the consumer contract framework application in order to ensure fair treatment and consumer protection in such mass contracts on the Community level.

The author underlines that due to the establishment of multi-level legal relationships in virtual worlds, a modal approach towards the contractual provisions of EULA should be taken into account by the gaming companies, which would lead to the grouping of different sets of contractual provisions. While applying a modal approach, the gaming platforms would provide players with a possibility to opt-in for certain rights and obligations based on players' interests, which would determine the game interface available to them. In such a case, different sets of contractual provisions would be applied to the different groups of players based on the nature of legal relationships, their level of commoditization, players' consent or level of legal capacity, which will result in the blocking of elements of the game interface based on the specific contractual provisions. This can ensure a higher level of transparency and provide relevant freedom to both consumers and developers on the scope of rights and obligations applied.

Following the contract law approach, the below-provided sets of norms can be distinguished in mass contract EULAs on a high-level:

(1) Licence contract provisions applicable to the video game as software and virtual world as a sole product;
(2) Consumer contract provisions applied to the digital content supply or digital service provision on the access to the video game as sole product. Such contract can be gratuitous (free-to-play) or with monetary value expressed (pay-to-play);
(3) Consumer contract on digital content supply/purchase, where the player acquires property rights over a particular intangible virtual item existing on a particular platform and controlled by a particular trader. Such contract can be concluded in exchange for remuneration represented in fiat money, crypto-currency or in-game tokens.

Therefore, specific sets of mandatory contractual provisions need to be considered on the EU level in order to secure harmonization in consumer protection in the gaming industry focusing on unfair terms in standard terms EULAs, transparency of legal relationships between parties, players' consent for non-gratuitous content in free-to-play video games, conformity of digital content and mandatory information requirements in consumer contracts in the gaming industry.

The above-mentioned provisions will be investigated in detail in chapter III of the present research focusing on separate issues in the European consumer protection framework in the scope of the gaming industry.

III. ELECTRONIC COMMERCE AND CONSUMER PROTECTION IN VIDEO GAMES. LEGAL CHALLENGES

Following the standard business models used at the market, the revenue in the gaming industry is directly dependent on the two types of transactions: (1) access to the virtual world in pay-to-play video games and (2) in-game intangible virtual items purchase in free-to-play video games.

In pay-to-play video games, the business model is focused on the game acquisition following three steps: (1) consumer purchases the game access, (2) consumer enjoys playing the game, (3) consumer repeats purchasing games from the developer.[358] In the above described economic model, game developers are wagering on the cyclic character of the gaming industry - the demand for the gaming software tends to decrease after two years on the market, expecting players to purchase new gaming products after two years.[359] In pay-to-play video games, the monetization happens on the state of the game access acquisition, thus, the relevant digital services through electronic means are provided for remuneration, which happens on the stage of EULA conclusion and before granting access to the certain virtual world.

[358] Davidovichi-Nora, note 6.
[359] Crandall R., Sidak, J.G., 'Video Games: Serious Business for America's Economy', Entertainment Software Association Report, 2006, available at: https://ssrn.com/abstract=969728.

In free-to-play video games particularly, the developer offers free gaming access and expects consumers to accumulate their network by social marketing, inviting friends to play, creating new in-game social connections, in order to create a scalable network of users before monetizing in-game transactions.[360] Following the engagement theory, the longer the consumer participates in gaming activity, the more possible such consumer will purchase in-game virtual items.[361] Based on the economic theory the consumers will purchase in-game virtual items with greater will when such intangible virtual items are specifically designed for such consumer needs, thus, the game developers create a wide range of virtual items per each separate virtual world[362] and invest a significant amount of money into research and development.[363] For example, EA Games spends 16-22% of the revenue each year on technology and market research and development.[364] Such an approach as well created various possibilities for user-created content, players' creativity and encourages in-game transactions.

The business model of commoditized video games is directed towards the facilitation of microtransactions and in-game purchases by creating specific features of gaming interface allowing peer-to-peer exchange, fiat money to in-game tokens conversion, online marketplaces for intangible virtual items and user content. Such interface features can also be directed towards price obfuscation and various unfair commercial practices including psychological mechanisms in order to facilitate a longer duration of gameplay and higher spending.

In free-to-play video games, monetization happens on the stage of in-game transactions while the game access is free. In such a case, the standard free-to-play EULA would include (1) licence agreement characteristics on the stage of the game access, (2) gratuitous digital service contract, (3) consumer contract on the digital content supply on the stage of the in-game transaction, while in pay-to-play video games contractual relationships are limited to (1) licence agreement characteristics on the stage of the game access, (3) consumer contract on the digital content supply on the stage of contract execution. Taking into account the complexity of legal relationships in free-to-play video games and the difference in status between gratuitous contracts and service provision for remuneration from the consumer protection perspective, the

[360] Davidovichi-Nora, note 6.
[361] Ibid.
[362] Ibid.
[363] Crandall R., Sidak, J.G., note 359.
[364] Ibid.

legal collisions arising from the regulations of the free-to-play game will be examined in detail in the present chapter.

The gaming industry only in the European Union worth over 22 billion Euros,[365] which is a significant amount compared to overall 269 billion Euros spent for e-commerce online shopping for physical goods.[366] Apart from the platforms for video games, both authorized and independent marketplaces for in-game virtual items exist on the market. The above-explained shows, that the gaming industry takes an important place in electronic business activity on the European market, therefore, the consumers around the EU are affected by the legal norms applied and the self-regulatory legal framework used by the game developers.

Despite the significant revenue turnover and scalable prices for in-game virtual items, e-commerce in the gaming industry is not under the EU spotlight when it comes to the relevant regulatory amendments. Notwithstanding the fast technological development and variety of solutions for electronic commerce, the ways of market access and distribution platforms, the EU consumer protection and e-commerce legal framework in majority still has a focus on online marketplaces for physical goods and, partially, digital service provision in large scales.

Apart from the outdated legal approach towards e-commerce, the gaming industry is currently regulated using an archaic intellectual property law approach, which was initially enforced contractually in order to protect the interests of developers in the new emerging trend in relation to the open-source software, which was unregulated on that stage.[367] At the current stage, the relevant legal protection for software programs as a whole product was established in the regulatory framework, however, the archaic approach with the enforced standard term contract remained unchanged notwithstanding the above. Considering the findings presented in chapter II of the present research, taking into account the current market availabilities, online marketplaces for digital content, user-created content and scalability of the in-game transactions, enforcing contractually intellectual property framework towards relationships that are by the nature are digital service provision contracts significantly facilitates misbalance between the parties in the gaming industry and leaves a room for unfair business practices.

[365] Interactive Software Federation of Europe, note 2.
[366] 'E-commerce in Europe 2020. How the pandemic is changing e-commerce in Europe', Report 2020, PostNord, available at: https://www.postnord.se/siteassets/pdf/rapporter/e-commerce-in-europe-2020.pdf.
[367] Elkin-Koren N., note 178.

One of the main purposes of e-commerce is the facilitation of cross-border trade and cross-border service provisions.[368] Video games as online platforms involve a significant number of players all around the world, including but not limited to the European Union, endorse a significant number of digital transactions with the usage of virtual tokens, crypto-currency, smart contracts and involve minors as well. Therefore, special attention to the existing and prospective legal framework is required in order to facilitate consumer protection and e-commerce in modern business models on the Community level.

Not all legal regulations on e-commerce and consumer protection can be applied to the gaming industry and, considering the contractual intellectual property enforceability and the mixed nature of standard terms EULA, in the majority of cases the contracts between players and the developers have over-regulative nature and include unfair terms abolishing the bargaining power of the player and players rights for certain digital content and/or remuneration.

The present chapter will examine in detail the applicability of existing European e-commerce and consumer protection regulations to the gaming industry, particularly, to in-game transactions. The author will examine issues arising from the hybrid models with paid content under the gratuitous contract, especially in cases, when access to a particular video game is free of charge; however, in-game purchases are pre-defined by the business model. Moreover, the issues with players' consent requirements will be examined in detail, focusing on the gratuitous contracts with in-game transactions and determining whether separate consumer consent is required or whether EULA can be considered as a subscription contract. Additionally, the price obfuscation mechanisms with the usage of alternative methods in modern e-commerce will be analysed in detail from the perspective of the transparency requirements.

The digital economy and e-commerce can facilitate unfair consumer practices that are not acceptable in the offline world, for example, price discrimination (geo-blocking, targeting, IP address discrimination), and dynamic pricing strategies (variability of the price depending on the demand characteristics or the supply situation).[369] The present part will analyse the consumer protection framework applicable for consumer contract examining "real-life" examples present in valid EULAs for popular video games. Moreover, the European legal regulation on unfair terms in standard terms consumer contracts and conformity of goods with the focus on

[368] Noll J., note 45.
[369] Duch-Brown N., Martens B., note 47.

digital content supply or in-game transactions in video games will be analysed in the present chapter in order to define practices used in the gaming industry that can be considered as unfair from the consumer perspective. Apart from the consumer protection issues, the variable random digital content present in video games, such as loot boxes, will be examined by the author in the scope of minors' participation and gaming regulations around the European Union.

The present chapter will explain the necessity of amendments to the specific legal norms, including but not limited to general and sector-specific mandatory contractual requirements and customer protection guarantees, in order to secure equal treatment, consumer and minors protection during e-commerce activity in the gaming industry. The author will show that the harmonisation of relevant e-commerce norms applicable to the gaming industry and audio-visual content is a crucial part of the European Digital Single Market Strategy

1. Gratuitous Digital Content Contracts. Consumer Protection in Free-to-Play Video Games

Video games are classified as pay-to-play video games (payment is done in exchange for granting access to such a video game) and free-to-play video games (access to free-to-play video game is gratuitous; however, the trader gains revenue from in-game micro-transactions). Moreover, various hybrid models with a mix of both are available at the market. The business models used in the gaming industry accepts various forms of remuneration: from fiat money as a standard mean of exchange to crypto-currencies, in-game tokens usage and personal data transfer.

Together with the adoption of the Digital Content Directive, the regulatory framework on consumer protection was expanded to cover as well as gratuitous contracts for digital content supply, in which the consumer is expected to transfer data in exchange for counter-performance.[370] However, the contracts, including contracts on free or open-source software, where the consumer transfers personal data to the trader solely to fulfil the trader's obligations prescribed by the law; such contracts would fall out of the scope of the Digital Content Directive.[371] Thus, the exclusion from the "no legal intervention" approach followed mutually in relation to the gaming industry was introduced recently.

In free-to-play video games, the player has a choice to play for free without the direct engagement in micro-transactions, or to purchase functional or cosmetic virtual items that might as

[370] Digital Content Directive, note 74.
[371] Ibid.

well improve player's capacity to proceed in the video game. In such a case, both scenarios are covered under the same EULA and regulate player versus developer relationships regarding free content and build-in payments. However, taking into account that the EULA is accepted by a player during the free service access such contract is considered as gratuitous contract per se.

In free-to-play video games, the business model is focused not on the revenue from the in-game advertisement, but on the possibility of micro-transactions, which leads to the question of whether the personal data of players is collected as remuneration for the content with free access or solely as part of the fulfilment of the developers' obligation to ensure legal age and legal capacity for monetary transactions.

In the present part the author will focus on the nature of gratuitous contracts in free-to-play video games, particularly, whether such contract can be considered as free subscription contract, whether build-in payments can be regulated by the same EULA as free access and what rights and obligations both parties would be subject to in free-to-play contracts with build-in payment possibility.

Additionally, the present part will investigate the notions of the monetary interest in relation to the transactions with intangible virtual items online. The determination of monetary interest in free-to-play video games is an essential notion needed to determine whether the particular transaction can be considered as a commercial transaction and whether remuneration condition is fulfilled in the standard form EULA from the perspective of a consumer contract, as remuneration for such transaction can take place not only in the traditional sense – payment with fiat money, but also specialized in-game tokens, crypto-currency or player's data.

Together with the fast technological development and the Bitcoin boom in 2014, various crypto-currencies became popular as remuneration for gaming transactions. Blockchain technology is currently used for gaming platforms and for non-fungible tokens creation that are as well applicable to the gaming industry. Such availability in indirect payment methods on the gaming platforms created a business practice for price obfuscation in order to mislead the consumer in relation to the total price of the gratuitous subscription contract. The present part will focus in particular on the Blockchain status and crypto-currencies status in order to determine whether those can be considered as remuneration for digital service provision in the scope of the existing e-commerce and consumer protection framework in the EU.

As explained in the previous chapters, the trader versus consumer contracts, in which the trader undertakes to provide specific digital service and the consumer does not transfer fiat money or personal data as counter-performance, are generally excluded from the scope of the European consumer protection framework. The author will focus particularly on the nature of remuneration as consumers' counter-performance in free-to-play video games. The present part will examine in detail gratuitous contracts from the scope of the consumer protection perspective and will focus on consumer counter-performance in such "free" digital content contract, particularly, when the payment is performed by personal data of the player or using the price obfuscation mechanisms. The present research will analyse the nature of remuneration in consumer contracts and will explain whether personal data collected during the signup and EULA acceptance can be considered as consumer contracts per European consumer protection law.

A. Data as Remuneration in Consumer Contracts

The standard term EULA in both free-to-play and pay-to-play video games has a mixed nature regulating player versus developer relationships regarding licencing of the intellectual property rights focusing on the access to the virtual world and the digital content supply in the consumer contracts.

The present part will focus on the notion of remuneration and price of the contract in free-to-play video games particularly, as in the pay-to-play business model the player pays fiat money or monetary value in order to access the game. In free-to-play video games, on the other hand, the access is gratuitous; however, the game functionality allows build-in payments for the acquisition of the in-game virtual items in exchange for fiat currency, crypto-currency, in-game tokens or the same virtual items. At the same time, the game that positions itself as "free-to-play" can require personal data transfer in exchange for a game subscription, thus, digital service provision and digital content supply. The present part will examine in detail such "remuneration" in personal data for the digital service provision in the gaming industry.

The Consumer Rights Directive defines sales contracts and service contracts as contracts where the trader undertakes certain responsibility on the transfer of goods or services to the consumer, and the consumer, on the other hand, undertakes to pay the price of the contract.[372] Apart from the fiat money transfer in the traditional sense of the consumers' counter-performance, the personal data transfer can be considered as the remuneration under the digital content supply or

[372] Consumer Rights Directive, note 29.

digital service provision contract.[373] For example, social media networks, search engines, various shared collaboration platforms often use personal data as a tool to create targeted advertisements, which provides main revenue to the company, while consumers enjoy free digital services.[374] Such a business model comes under the slogan – "*If you are not paying for the product, the product is you*".[375]

The data of individual consumers might not have a significant impact on the company's business, however, the cumulative data of consumers coming from mass contracts has value for the business in modern realities.[376] The personal data collected or processed is subject to strict regulation in the EU, however, for the purpose of the present research the data is divided into the following categories:[377]

(1) Personal data required for the performance of legal obligations (for example, consumer due diligence in order to fulfil anti-money laundering obligations where applicable);
(2) Personal data required for the service provision (for example, location or IP address collection for augmented reality video games);
(3) Personal data requested in exchange for services (for example, data is transferred for purpose of the further targeted advertisement);
(4) Personal data produced during the usage of the digital service (for example, user-created content in the video game associated with the particular player).

The study shows that the consumers are willing to share their personal data in exchange for digital content, including but not limited to cases where privacy concerns are involved.[378] For example, 43% of consumers in question agreed to share their personal data in exchange for certain discounts, 39% to resolve technical or other problems connected to digital content or

[373] Digital Content Directive, note 74.
[374] McFarlane G., 'How Facebook, Twitter, Social Media Make Money From You, Advertising is the key to how social media companies earn revenue', Investopedia, 2020, available at: https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx.
[375] Ibid; Bedir C., 'Data as Counter-Performance: Yet Another Point Where Digital Content Contracts and the GDPR Conflict', 2018, available at: https://ssrn.com/abstract=3648092.
[376] Mak V., 'Contract and Consumer Law', Research Handbook on Data Science and Law, Tilburg Private Law Working Paper Series No. 07/2017, Edward Elgar, 2018, available at: https://ssrn.com/abstract=3161930.
[377] Ibid.
[378] Bedir C., note 375.

digital service with consumer support faster.[379] The traders, on the other hand, are willing to obtain personal data from consumers, especially, in the business models where the digital content is free; however, the revenue comes from the paid marketing activity.[380]

Due to the fact that in modern realities personal data became quasi-commodity, particularly, in the gratuitous digital content supply and digital service provision contracts, the European regulator took the initiative to provide specific consumer protection guarantees for the free digital content supply contracts, where the personal data is expected as remuneration, and adopted the Digital Content Directive. The legal regime that is created by the Digital Content Directive creates parallel legal regulation to the 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 (hereinafter referred to as - the "General Data Protection Regulation" or the "GDPR"), which do not self-exclude but complement one another in order to provide a comprehensive level of data protection and consumer protection on the Community level.[381]

In modern realities, consumers value personal data over the money, therefore, from the contractual relationships perspective the highest level of consumer protection should be expected in gratuitous contracts, where the trader's service provision is requiring personal data transfer.[382] And, indeed, with the Digital Content Directive and General Data Protection Regulation, the players can expect a certain level of data protection and consumer protection in digital contracts with reciprocal data provision required from the consumer. However, in practice, it is unclear which data is exchanged for the contract purpose and legal obligations solely and which data in purely commercial purposes.

For example, the gaming platform hosting service, game software, game development and system architecture can be supplied by third parties for each particular video game. In such a case the trader would share personal data of the player for contractual obligations fulfilment with

[379] DeNisco Rayome A., 'Report: Despite privacy concerns, 43% of consumers offer personal data in exchange for discounts', the Tech Republic, 2017, available at: https://www.techrepublic.com/article/report-despite-privacy-concerns-43-of-consumers-offer-personal-data-in-exchange-for-discounts/.

[380] McFarlane G., note 374.

[381] Bedir C., note 375.

[382] Mańko R., 'Contracts for supply of digital content, A legal analysis of the Commission's proposal for a new directive', European Parliamentary Research Service, Members' Research Service, May 2016 — PE 582.048, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/582048/EPRS_IDA%282016%29582048_EN.pdf.

third parties for such contract performance, moreover, such data sharing can be required for the fulfilment of legal obligations (i.e., associating players account with payment account) and for marketing obligations performance (i.e., shared revenue deals with third parties per attracted player for affiliate advertisement). Therefore, legal certainty is required in order to apply the European consumer protection framework to the gratuitous consumer contracts in the digital environment and in order to fulfil consumer expectations while purchasing digital content, even when such content is initially free.

In the Google case that was examined in the French Tribunal de Grande Instance of Paris, it was concluded that terms of Google+ service were unfair as they did not explicitly made consumers aware of the commercial value of the personal data collection and its further usage for the commercial purposes.[383] In the same way, Lazio Regional Administrative Court in Italy has issued a decision recognising the commercial value of data and forbidding Facebook advertising its services as "free".[384] Therefore, as explained by the court in the above-mentioned cases, commercial purpose of the personal data collection and usage should be explicitly stated in consumer contracts and in cases when the personal data is, indeed, used for commercial purposes, the consumer should be explicitly informed and consented respectively.

The contract should be an exchange fulfilling its purpose, facilitating the division of labour and the best use of resources, if such an exchange is planned by the parties and regulated by reciprocal promises which arise from the expectation of the parties.[385] In the free-to-play gaming model, the consumer is expected to enjoy free service, however, to participate in in-game transactions. Players, on the other hand, expect certain guarantees from the virtual property obtained and from the virtual items possessed in the virtual world. Therefore, the EULAs should de jure represent parties' expectations and should not hide behind intellectual property framework and advertisements as a "free" digital service, where specific counter-performance is expected from the consumer.

[383] Loos M., Luzak J., 'Update the Unfair Contract Terms directive for digital services', Study Requested by the JURI committee, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 676.006 – February 2021, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf.

[384] Ibid.

[385] Sacco R., 'Le contrat sans volonté, l'exemple italien', Le rôle de la volonté dans les actes juridiques, Etudes à la mémoire d'A. Rieg, Bruylant 2000, available at: https://www.legiscompare.fr/web/IMG/pdf/9._CH_1_Contrat.pdf.

Even though, such terms as "counter-performance" or "data as a commodity" are not used in the Digital Content Directive[386] due to the contradiction to the nature of personal data as a fundamental right,[387] the Digital Content Directive de facto expanded consumer protection regime for the gratuitous digital content supply contracts, in which players provide data to the trader that is later used for the purposes other than needed to the contract performance or trader's compliance with legal obligations.[388]

The Digital Content Directive regulates consumer protection norms in the digital contracts that are concluded between consumers and traders, including consumer contracts, where digital content or digital service is free, however, the personal data transfer is expected from the consumer as counter-performance.[389] The Digital Content directive is applicable to consumer contracts, where the consumer does not pay remuneration in the traditional sense (fiat money), however, when the consumer provides personal data that are used for the "*purposes other than solely supplying the digital content or digital service, or other than complying with legal requirements*".[390] Thus, despite the difference in wording, de facto personal data equals a payment of the price in consumer contracts under the Digital Content Directive.[391]

Certain consumer guarantees provided in the Consumer Rights Directive were expanded as per the Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 as regards the better enforcement and modernisation of Union consumer protection rules (hereinafter referred to as "New Deal for Consumers"). The rules established in the New Deal for Consumers Directive ensure that in online contracts on digital content supply or digital service provision in which the consumer does not pay a price in the traditional sense but provides personal data to the trader the same level of consumer protection is granted as in the contract.[392]

[386] Mańko R., note 382.
[387] Opinion 8/2018 on the legislative package "A New Deal for Consumers", EDPS, 2018, available at: https://edps.europa.eu/sites/edp/files/publication/18-10-05_opinion_consumer_law_en.pdf.
[388] Bedir C., note 375.
[389] Digital Content Directive, note 74.
[390] Ibid.
[391] Bedir C., note 375.
[392] Proposal for Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (New Deal for Consumers) PE/83/2019/REV/1, OJ L 328.

Thus, the New Deal for Consumers Directive extends the scope of the Consumer Rights Directive to be applicable to the contracts with a price of the contracts stipulated in the consumer's personal data provision.[393]

Notwithstanding the above-mentioned, the Digital Content Directive and the New Deal for Consumer Directive do not define personal data or data required for the performance of the consumer contract or legal obligations under such contract, which might cause difficulties in the qualification of digital content supply or digital service provisions contracts.[394] Both the Digital Content Directive and the New Deals for Consumers Directive, indeed, indicate that only contracts where the personal data of the consumer is collected for the necessary performance of the contract or fulfilment of the legal obligations would be considered as truly "free" contracts and be out of the scope of such directives.[395] For the determination of the lawfulness of personal data procession in consumer contracts, the provisions of article 6 of the GDPR should be taken into account, which defines lawful data procession as follows:

"Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

[393] Ibid.
[394] Bedir C., note 375.
[395] Digital Content Directive, note 74; New Deal for Consumers, note 392.

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."[396]

Despite the provided framework under the GDPR, it is still unclear what exactly data is required for the digital content supply or digital service provision contract performance. For example, in video games particularly, a player's age collection can be considered as one required for the contract performance, as certain games have different age classifications under PEGI.[397] As the majority of free-to-play games allow build-in payments that require certain legal capacity, thus, credit card details collection and, respectively, name, last name, date of birth, the residential address can be required for billing information and legal capacity confirmation. Moreover, in certain cases, where the video game offers loot boxes, gaming regulations are applied,[398] thus, the game provider is required to collect certain data in order to fulfil the licencing requirements and anti-money laundering obligations. The issue with loot boxes' availability in video games will be discussed further in detail in the present chapter.

For example, Blizzard Entertainment EULA (the "World of War Craft" video game) states:

"*You may establish an Account only if: (i) you are a "natural person" and an adult in your country of residence (Corporations, Limited Liability Companies, partnerships and other legal or business entities may not establish an Account); and (ii) you are not an individual specifically prohibited by Blizzard from using the Platform. When you create or update an Account, you must: provide Blizzard with accurate and up to date information that is personal to you, such as, but not limited to, your name and email address. Additionally, in order to play certain Games or use certain features offered on the Platform, you may also be required to provide Blizzard with payment information (such as credit card information)."*[399]

On the other hand, the data protection and privacy policy for the above-mentioned video game states:

"*We process your information in accordance with the legal bases determined as follows:*

[396] General Data Protection Regulation, note 293.
[397] PEGI classification, note 345.
[398] Information on loot boxes, Netherlands Gaming Authority, available at: https://kansspelautoriteit.nl/english/loot-boxes/.
[399] Blizzard Entertainment EULA, note 164.

1. *Necessary for the performance of your game contract or any other feature you request or enable. These are required, and ceasing their processing will remove access to certain features or to the game service altogether…*
2. *Consent. You can withdraw your consent to these at any time…*
3. *Legitimate interest. We use your information for purposes that are not harmful to your privacy and that can be reasonably expected within the context of your relationship with Blizzard…*
4. *Legal obligation. We process your information due to a legal obligation or right…"*[400]

Blizzard Entertainment example shows that the game provider collects certain information for (1) contractual obligation performance including but not limited to player's identification and payment method data collection, (2) legal obligations performance, including but not limited to litigations participation, (3) marketing purposes.

Moreover, the same data protection policy states:

"*For certain forums, anyone posting or replying to a post may be doing so using their Real ID -- that is, their full first and last name -- with the option to also display the name of their primary in-game character (see discussion regarding Real ID below). Some of Blizzard's products, services and features require that we share information with (1) our partners and service providers, (2) with other players and/or the general public, (3) with subsidiaries and affiliates, or (4) for legal reasons or in the event of a dispute... Blizzard may provide information to its vendors, consultants, marketing partners, research firms and other service providers or business partners. For example, we may provide information to such parties to help facilitate event ticket sales, conduct surveys on our behalf and process payments for our products and/or games. We share some of our players' game data with our community of developers, who create applications and websites that benefit our player community. You may opt out of having your game data included in this program by opting out of game-data sharing in the Privacy section of your Battle.net account.*"[401]

[400] Blizzard Entertainment Privacy Policy, available at: https://www.blizzard.com/en-gb/legal/8c41e7e6-0b61-42c4-a674-c91d8e8d68d3/blizzard-entertainment-privacy-policy.
[401] Ibid.

Therefore, it can be seen that the personal data of players is shared further with third parties for the purpose of contract performance and marketing. Thus, in the present case, the data collected by the trader not only for the performance of the contractual and legal obligations but as well as for other purposes (i.e., marketing activity), however, at the same time, the player is provided with the possibility to opt-out from unnecessary data collection. In the provided example, the player is paying for the access to the video game with personal data and, additionally, with fiat money.

Moreover, worth clarifying that not only personal data collected under GDPR by the trader is protected by the European consumer protection law, however, as well as user-created content enjoys a certain level of consumer protection guarantees. As per the New Deal for Consumers Directive, any data that is generated by consumers during the digital service or digital content supply provided by a trader should not be used by the trader with a certain exception.[402] The trader can use consumer-generated data produced during the digital service or digital content supply in cases where such a user-created content cannot be separated from the digital service per se, has no utility outside of such a digital service, only relates to the user's activity when using the digital service, has been incorporated into digital service and cannot be segregated, and/or has been produced jointly by the other consumers.[403] From the virtual world perspective, the user-created content, unfortunately, falls under the exceptions stipulated in the New Deal for Consumers Directive, as in the majority of virtual worlds users simultaneously create content and enrich such a virtual world. It is usually not possible to segregate such user-created content from the virtual world per se.

The above-discussed exception gives a conclusion that no specific and additional user consent is required in order for the consumer-created content to be used by the developer in the video game. However, the author is convinced that in free-to-play video games, when the gaming model itself facilitates the user-content creation and the developers benefit from such an enriched virtual world, the user-created data usage should be remunerated on the stage of the termination of the legal relationships when it is impossible to segregate such a consumer-created data.

[402] New Deal for Consumers, note 392.
[403] Ibid.

Considering the above-mentioned, the nature of legal relationships between the developer and the player and the purpose of the personal data collection needs to be accessed in each specific case in order to understand the scope of the consumer protection framework applicable under the European consumer protection laws. However, the explained approach is valid solely regarding access to the free-to-play video games as a whole virtual world product and excludes cases, where virtual items purchase is pre-defined by the game interface and expected as standard players' behaviour. The detailed approach towards gratuitous contracts with build-in payments will be explained further.

As explained above, on examples from popular video games' EULAs, the contractual arrangements between players and game developers do not provide transparency to the data usage, user-created content data usage and, instead, create a self-regulatory approach that contradicts principles of consumer protection and data subject protection accepted on the EU level. Moreover, such an approach where free to play video games are advertised as "free", however, de facto expecting direct or indirect remuneration from the consumer in personal data or any other monetary value should not be discriminated over direct remuneration contract and should enjoy a full level of the consumer protection guarantees available for paid and offline products.

B. Monetary Interest. Virtual Tokens

Free-to-play video games follow the micro-transaction business model when the revenue is gained from build-in payments, data transfer or marketing placement in the virtual world. Video games that are positioned as "free" are granting free access to the gaming product, however, the revenue is gained from build-in payments requested for functional and aesthetic virtual items that might serve solely as virtual décor, or that might provide a significant advantage to one player among others. Such a system, on the other hand, creates artificial attraction for players to purchase digital content and to benefit from the network effect. Such a business model focused on digital items circulation not only within one platform but also on external platforms managed by the game developer or on external third-party platforms.

Free-to-play video games are designed in order to facilitate money transfer from players to gaming platforms for virtual transactions. Such transactions are based on virtual items players buy in order to gain some skills, which other players do not have[404] (functional virtual items or power-ups), or in order to change the appearance of an avatar (virtual items without functional

[404] Davidovichi-Nora, note 6.

characteristics, for example, skins). Both functional virtual items, which are helping the player to win the game or to gain the advantage compared to other players, and virtual items without specific function can cost an insignificant amount of money, so the player cannot realize the real cost of the game in total and can reach up to the price of a modern flat. Such prise obfuscation methods can interfere with the transparency principle and can eliminate the possibility for players to evaluate actual economic consequences of the gameplay.

The payment model in different video games can vary from direct payments for virtual items through gaming interface to indirect payments through the purchase of in-game tokens, crypto-currency, virtual items exchange. The gaming platforms can accept payments directly, creating virtual items marketplaces or using third-party providers for digital content supply applicable to the particular gaming platforms.

Apart from the gaming platform-specific virtual items transactions, the new type of business – companies trading virtual assets or online marketplaces for virtual items – were created following the demand. For example, on the "Markee Dragon" (marketplace virtual items) 750 gold crowns of the obsidians[405] (in-game money from the Shroud of the Avatar video game) are available for purchase in exchange for 10 US dollars, 500 "PLEX" (in-game money from the "EVE Online" video game) are available for purchase in exchange for 19.99 US dollars.[406] The above shows, that gaming platforms allow indirect virtual trade transactions, where the player is required first to purchase in-game means of exchange - virtual money – in-game tokens, and only then virtual items can be purchased on online gaming platforms. Such a system facilitates price obfuscation and complexity of the legal regulations applicable to the gaming industry.

The price obfuscation mechanisms used by the game developers include various indirect transactions. There are several scenarios available: the player can connect a bank card to the game account at the beginning of the game, conclude one-time payment from a bank card, transfer a certain amount of money on an in-game account or in-game wallet and pay from such an account, to exchange money for virtual in-game tokens and pay for virtual items with such tokens, or to conclude crypto-currencies exchange as means of payment. For example, in the "EVE Online" video game the player is required to buy so-called "PLEX" items, which further will

[405] Information on Markee Dragon, note 114.
[406] Ibid.

be traded into the "Interstellar Kredits" (in-game virtual tokens) and in the end, traded for virtual items; in the "Entropia Universe" video game players exchange fiat money for the "Project Entropia Dollars" in order to buy virtual items.[407]

The majority of the gaming platforms use in-game tokens, which might not always be monetarized (in some games the player earns in-game tokens playing the game, for example, "Linden Dollars" in the "Second Life" video game).[408] Notwithstanding the monetization of virtual items inside a particular video game, such items can be traded externally on authorized or non-authorized online marketplaces for virtual items. Such platforms as the above-mentioned "Markee Dragon" website earn a profit selling not only functional virtual items and skins but also in-game tokens (means of payment in virtual worlds) in exchange for "real-life" money (for example, in "FIFA").[409]

At the same time, in play-to-ear video games, the gaming interface allows players to trade virtual items on peer-to-peer markets within the gaming platform and withdraw the income from the gaming platform into the "real-life" world. For example, in the "Entropia Universe" video game, it is possible to withdraw money from in-game accounts – basically, to convert "Project Entropia Dollars" back to fiat money.[410] Moreover, in order to fasten the money turnover in the above-mentioned video game, the special crypto-currency "DeepTocken" was created.[411] Therefore, players can earn "real-life" money not only by playing a video game but as well as benefiting from crypto trading. Additionally, the monetization of the game experience can be established both online and offline, when the player transfer accounts or virtual property from one another. For example, Jon Jacobs earned for living managing a virtual "Neverdie"

[407] News Report, 'Meet the gamers willing to spend hundreds of thousands living their video game fantasy', the Telegraph, 2018, available at: https://www.telegraph.co.uk/news/2018/07/16/meet-gamers-willing-spend-hundreds-thousands-living-video-game/.

[408] News Report, 'Real Money Trading in Games: a Cryptocurrency Solution', Hackernoon, 2017, available at: https://hackernoon.com/real-money-trading-in-games-a-cryptocurrency-solution-5fdc719cc4f6.

[409] Holden J., note 12; Lopes R., 'FIFA 17 Players Cards Guide-Cards Colors and Categories', FIFAU – Team, 2016, available at: https://www.fifauteam.com/fifa-17-players-cards-guide-colours.

[410] Information on Entropia Universe platform, available at: http://universe.entropialife.com/Gamers/Withdraw.aspx.

[411] Evaluation of regulatory tools for enforcing online gambling rules and channelling demand towards controlled offers, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, European Commission, 2019, available at: https://publications.europa.eu/en/publication-detail/-/publication/98774c9a-2441-11e9-8d04-01aa75ed71a1/language-en.

club in the "Entropia Universe" video game and in the end sold it for more than half of a million US dollars.[412]

Apart from direct and indirect in-game transactions on the gaming platforms, it is possible to purchase money value vouchers suitable for particular video games in exchange for crypto-currency. After applying such a gift card or voucher to a particular video game, the player will have the money credits or in-game tokens available on the in-game wallet for the purchase of the virtual intangible items on the gaming platform. For example, on the "BitRefil" platform it is possible to purchase gift vouchers in exchange for Bitcoin or other Altcoin for the "League of Legends" video game.[413]

Moreover, various Blockchain-based video games and online marketplaces are available to the consumers. For example, "CryptoKitties" video game is based on the Ethereum blockchain platform and focused on the Ethereum-based smart contracts exchange with collectable "CryptoKitties" as a contract subject.[414] On "Enjin" Ethereum-based platform it is possible to trade items from particular video games, for example, from World of Warcraft, using smart contract platform and blockchain-based Enjin coins.[415] In CropBytes video game, player has an opportunity to trade items that were produced on the virtual farm for crypto-currency.[416]

The above shows that crypto-currencies are also widely involved in the chain of transactions with virtual items – they can be used as direct means of exchange (direct purchases of virtual items in exchange for crypto-currency), indirect (when crypto-currency is traded for virtual means of exchange - in-game tokens), or even produced or traded on the gaming platform by the players (for example, as Non-Fungible Tokens).

Considering mentioned above, the presence of significant turnover on virtual transactions in free-to-play video games, including but not limited to virtual trade of items on gaming platforms between gaming companies and players, peer-to-peer trade and availability of online marketplaces for virtual items create a need in the complex regulatory framework in order to

[412] Chiang O., note 157.
[413] Information on Bitrefill, available at: https://www.bitrefill.com/buy/league-of-legends-eu/?hl=en.
[414] Information on CryptoKitties, note 159.
[415] Information on Enjin, available at: https://www.enjin.com/game/wow-guild-website-hosting.
[416] Information on CropBytes, available at: https://www.cropbytes.com/.

secure price transparency and fair consumer practice. However, at the current date, the subsequent regulation targeting transactions with virtual items, alternative means of payment and trading platforms are not available on the Community level.

Notwithstanding the availability of various technological solutions for the digital service supply or digital content purchase, the legal framework applicable by the game developers does not change and still follows the historical approach - the intellectual property framework. Standard term EULAs include clauses that protect rights for virtual items that cannot be proved other than contractually, clauses facilitating exclusive rights transfer for user-created works, non-transparent clauses explaining the possibility of payment without the detailed conditions for such transactions, and disclaimer that all paid digital content is an integral part of the digital service and no rights obtained after payment.

Taking into account the above-described complex payment models with involvement of in-game tokens, virtual economy and crypto-currency, it is important to determine how exactly fiat money are entering the gaming system or determining the monetary interests of the transaction in order to identify the nature of further transactions, the scope of the parties' rights and obligations and to define the applicable legal framework in each case. The present part will investigate in detail the element of the monetary interest and the nature of payment used in various business models applicable to the gaming industry and will analyse the legal framework applicable to the various digital transaction including ones with involvement of fiat money, in-game tokens and crypto-currency.

According to the Consumer Rights Directive, service contract is defined as a "*contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof*".[417] In a traditional sense, under the price of the contract the notion of money or means of exchange is understood, however, European regulations on digital market transformation applied a different approach. Following the provisions of the Digital Content Directive, contract on digital content supply or digital service provision is considered as service that allows the consumer to "*create, process, store or access data in digital form*" or service that "*allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that*

[417] Consumer Rights Directive, note 29.

service" in exchange for money or a digital representation of value.[418] Moreover, the above-mentioned directive stipulates that the payment of a price is not a mandatory provision for the contract to fall under its scope. Even though free digital services are not regulated by the Digital Content Directive, the digital content supply and digital content provision that is done in exchange for the personal data provision falls under the scope of the legal obligations of the trader and are subject to the provisions of the directive.[419]

Therefore, the digital content or digital service can be provided in exchange for fiat money, in exchange for the digital representation of a value or in exchange of personal data in order to fall under the provisions of the Digital Content Directive. As explained in the previous chapter, the player cannot benefit from various consumer protection guarantees during the free digital services or digital content supply contract, however, taking into account the personal data provided during the account creation in the majority of video games, it is important to determine whether such a personal data is provided solely for the trader's performance of the legal obligations, or is used for commercial purposes as well.

Taking into account the hybrid business model used in the free-to-play video games, the nature of business relationships, price of the contract, the monetary value of the digital content supply or a digital service provision should be determined in relation to each separate transaction under the subscription contract in order to define the applicability of certain consumer protection guarantees. First of all, the current legal framework expects the price of the contract or the counter-performance of the consumer to be represented in fiat money.

Money, notwithstanding their form, have three different functions: they work as a medium of exchange (a means of payment with a common trustable value), as a unit of account (which allows services and goods to be priced), and as a store of such common trustable value.[420] Money also can be considered as the cost to acquire financial resources.[421] One of the world's leading economical theorists, Narayana Kocherlakota, defines money as an economy's memory - a substitute for the freely accessible and publicly available interface that records who owes what to whom.[422] Thus, money or monetary system represents a publicly available

[418] Digital Content Directive, note 74.
[419] Ibid.
[420] European Central Bank, 'What is money?', 2015, available at: https://www.ecb.europa.eu/explainers/tell-me-more/html/what_is_money.en.html.
[421] Smithin J.N., Controversies in Monetary Economics, 1994.
[422] Kocherlakota N., 'Money is memory', Journal of Economic Theory, vol 81, issue 2, 1998.

memory system that provides a widely accepted means of exchange to evaluate particular services and products.

"Digitalisation" per se refers to the process of changing the representation of the information from physical to digital form, when applied to money, this refers to producing the digital representation of money in the traditional sense.[423] The term "digital twin" is used to explain the digital representation of physical objects in the modern world.[424] Apart from money in traditional sense, the digital representation of money and digital representation of value or price of both physical and digital items take place in modern reality.

According to the Directive on the taking up, pursuit and prudential supervision of the business of electronic money institutions (hereinafter referred to as - the "Electronic Money Directive"), electronic money can be defined as a monetary value, which is stored electronically (in a smart card or the computer memory) or/and magnetically, is issued on a funds receipt for the payment transaction purpose, represents a claim on the issuer, is used as a means of payment and medium of exchange, and is accepted by a legal entity or a natural person other than the electronic money issuer.[425] As can be seen, various payment methods are defined as means of exchange as parties are free to choose the nature of counter-performance that is expected and accepted within the course of the duration of the agreement.

Currently, there are various availabilities of digital payment services for businesses on the market. For example, with PaySafeCard it is possible to purchase a voucher and pay with a digital PIN code through various businesses,[426] the same model is possible with crypto-currencies vouchers accepted by popular video games through Bitrefill.[427] The market opportunities allow parties to decide the payment method or counter-performance accepted in a specific case, thus, to create own means of exchange. Moreover, not only gaming platforms do offer direct innovative payment technologies, but various e-wallets can provide alternative third-party solutions

[423] Gartner, 'Gartner Glossary', 2021; Carstens A., 'Digital currencies and the future of the monetary system', Hoover Institution policy seminar, Basel, 2021, available at: https://www.bis.org/speeches/sp210127.pdf.

[424] Weingärtner T., 'Tokenization of physical assets and the impact of IoT and AI', Lucerne University of Applied Sciences & Arts – School for Information Technology, available at: https://www.eublockchain-forum.eu/sites/default/files/research- paper/convergence_of_blockchain_ai_and_iot_academic_2.pdf.

[425] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267.

[426] Information on PaySafeCard, available at: https://www.paysafecard.com/en/

[427] Information on Bitrefill, note 408.

for the consumer's counter-performance or payment of the price of the contract between the trader and the consumer.

The monetary value of a certain product or a service can be represented not only as fiat money, electronic money, but as well as a digital representation of a value. The definition of the digital representation of a value is not available on the Community level, however, such a notion is explained to define innovative means of payment, such as crypto-currencies, for example. Fiat money, indeed, are accepted as means of exchange in a specific country or region, are issued and controlled by the centralized authority, however, the parties are free to agree on the alternative or digital representation of the payment or of the price of the contract. Moreover, the consumers' counter-performance to the contract can be represented in personal data provision or in payment of a digital representation of value.

As was mentioned above, the transactions with intangible items in video games have digital content as a subject of the contract and by its nature correspond to the digital service contracts, under which the consumer (or player) undertakes the responsibility to pay the particular price for such digital services. Therefore, contracts, in which money in the traditional sense (fiat money) are offered as remuneration for digital services (virtual items transactions), can be considered service contracts under European law. On the other hand, the situation with contracts, where the virtual items are exchanged for virtual tokens or virtual currency slightly differs.

Even though particular games/software/access can be purchased in exchange for virtual currency,[428] the status of virtual currencies is still uncertain in the European Union. Virtual currencies are defined as a digital representation of value,[429] however, the treatment regarding consumer rights in contracts with such a digital representation of value is still undefined.[430]

The legal status of virtual currencies or crypto-currencies in the EU has gone through a long path and still there are ongoing discussions on the European Crypto-Assets Directive adoption.[431] Initially, the status of virtual currencies was brought up on the European level by the

[428] Narciso M., note 70.

[429] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, PE/72/2017/REV/1, OJ L 156.

[430] Narciso M., note 70.

[431] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 COM/2020/593 final.

European Central Bank in 2015. According to the Virtual Currency Schemes published by the European Central Bank, it was underlined that crypto-currency cannot be defined as "electronic money" in the scope of the Electronic Money Directive,[432] because in this context electronic money is just a different form of traditional money, but with the blockchain system application the traditional money is exchanged for crypto-currency.[433]

The Court of Justice while investigating the C-264/14 case underlined that according to mentioned above Virtual Currency Schemes issued by the European Central Bank, blockchain tokens were explained as a virtual currency, which is used mainly for internet payments between private individuals and in certain online shops.[434] Such virtual currency does not have a single eminent and, instead of this, is created directly in internet network using a special algorithm, such system allows the transfer of crypto-currency amounts within the network by anonymous owners who have so-called "blockchain wallets", which are basically crypto-currency addresses and are analogues to a bank account numbers.[435]

The Court of Justice stated that virtual currency can be defined as a type of digital money, which is issued, operated and controlled by such digital money developers, and accepted by members of a specific virtual community.[436] Virtual currencies are analogues to other convertible currencies considering their use in the World.[437] For virtual currencies, the funds are not expressed in traditional accounting units, for example, as in Euro, unlike that money, but in virtual accounting units, for example, like Bitcoin or Ethereum. The same can be applied to in-game tokens, as they represent a value of the virtual items accepted within a platform or cross-platform.

Within the scope of C-264/14 case, the Advocate General has observed that virtual currency has no other purpose than to be a medium of exchange or a means of payment, and the Court of Justice mentioned that transactions with virtual currencies are considered as a service provision, not as a supply of goods, and crypto-currencies can be considered as non-traditional

[432] Electronic Money Directive, note 425.

[433] Virtual Currency Schemes, European Central Bank, 2012, available at: http://www.ecb.europa.eu/pub/pdf/other/ virtualcurrencyschemes201210en.pdf.

[434] Case, C-264/14, Skatteverket v David Hedqvist, Judgment of the Court (Fifth Chamber) of 22 October 2015.

[435] Ibid.

[436] Ibid.

[437] Ibid.

currency on which both parties of such transaction agreed.[438] The court defined crypto-currency as digital means of exchange, digital representation of payment based on the agreement between parties and underlined that the transactions with involvement of such a digital representation of value can be considered as digital service provision contract. Thus, transactions with virtual items, including but not limited to crypto-currencies and in-game tokens are considered as transactions of digital content supply and the respective consumer protection rules applied to paid service contracts should be applicable.

After the explained case was ruled, the research on virtual currencies significantly went forward and the nature of virtual currencies was defined on the Union level. First, the European Central Bank explained the position on defining crypto-currencies as a digital representation of a monetary value, which can be used as an alternative to established money variations.[439] After that, in the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereinafter referred to as - "Anti Money Laundering Directive"), the definition of virtual currencies was adopted on the EU level in order to avoid differences in the interpretation among member states by fitting alternative payment methods in already existing frames of electronic money or financial securities or even property-related legal framework.

The Anti Money Laundering Directive defined virtual currency as "*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically*".[440]

Virtual currencies are put under the scope of the digital representation of value on the Union level, not money in the traditional sense. Virtual currencies can be considered as a counter-performance for the digital content supply or digital service provision contract. Therefore, the consumer is entitled to the set of guarantees described by the Digital Content Directive while performing transactions with virtual items, including but not limited to transactions with virtual currencies or in-game tokens. The parties contractually agree to accept specific monetary value

[438] Ibid.

[439] Virtual currency schemes – a further analysis, European Central Bank, 2015, available at: https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf.

[440] Anti-Money Laundering Directive, note 429.

as a means of exchange within the course of the business relationships and transactions on purchase of such items would be classified as paid digital service.

Important to underline that the notion of virtual currencies explained above is defined widely and does not cover only well-known crypto-currencies based on blockchain technology, such as Bitcoin or Ethereum, but is as well applicable to various alternative digital currencies, such as stable-coins, non-fungible tokens (NFT) and in-game currency.

From the regulatory point of view, virtual currencies or digital tokens are differentiated into the following categories:

(1) Payment tokens – digital representation of mean of exchange with the main function of counter-performance in exchange for a particular service or item;[441]
(2) E-money token - a type of digital asset used as a means of exchange that maintains a stable value by referring to the value of a fiat currency that is considered as a legal tender;[442]
(3) Utility tokens – digital representation of the right or a particular service with the main focus on the service usage.[443] Utility tokens are often accepted only by the issuer of a utility token;[444]
(4) Asset tokens – digital representation of a share or an asset with the main focus on investment in a particular value;[445]
(5) Asset-referenced token - a type of digital asset that maintains a stable value by referring to the value of several fiat currencies, several commodities, several crypto-assets, or a combination of such assets.[446]

Stable-coins, such as Facebook Libra or Diem can be defined as "payment tokens", as the value of the virtual currency is stable and the token itself represents the means of exchange for a particular good and service, where accepted.[447] Non-fungible tokens, such as collectable digital

[441] Weingärtner T., note 424.
[442] Crypto-Assets Directive, note 431.
[443] Weingärtner T., note 424.
[444] Ibid.
[445] Ibid.
[446] Weingärtner T., note 424.
[447] Ibid; The Swiss Financial Market Supervisory Authority, Stable coins guidelines, FINMA, 2019, available at: https://www.finma.ch/en/~/media/finma/dokumente/dokumenten-center/myfinma/1bewilligung/fintech/wegleitung-stable-coins.pdf?la=en&hash=70408DDE78369718148808FD4784E742373A0140.

art pieces,[448] can be considered as "asset tokens", as the value of such NFTs changes and represents the interest of the NFT's owner. Digital yuan[449] can be considered as an "e-money token", as it represents centralized means of the exchange connected to the currency that is a legal tender – yuan. On the other hand, in-game tokens are representing a value of a particular digital service, a right for a player to obtain digital service from a game developer, or a specific virtual item on a particular gaming platform. Thus, in-game tokens can be defined as "utility tokens" based on the above-mentioned classification.

Important to underline, that the traditional means of exchange, thus, fiat money, are centralized and accepted by various traders in the country or region based on the legal order or international agreements applicable between national states. All traders located in the specific jurisdiction are obliged to accept certain means of exchange if that is defined on the national level. Alternative payment methods, on the other hand, have limited acceptance and are often limited to a particular industry or technological solution. Alternative payment methods or virtual currencies acceptance by various businesses depends on the legal framework in the jurisdiction of the business establishment.

Member states of the European Union are free to determine the means of payment accepted in the country. For example, in Switzerland, the Swiss Financial Market Authority introduced licensing procedure for stable-coins, which are considered as a digital representation of money with a stable value, as an alternative to money in the traditional sense.[450] Such stable-coins are an integral part of the Swiss national payment system.[451] Thus, stable-coins transfer can be considered a payment of the price of the contract or consumer's counter-performance under the Swiss legislation.

Looking into the gaming-friendly jurisdiction of Malta, it can be seen that Maltese legislation adopted an innovative approach regarding the means of exchange acceptable and, particularly, a monetary stake. Based on Malta Gaming Act, the monetary stake is defined – "*currency accepted as legal tender in the jurisdiction or jurisdictions of its issue, virtual currencies, units of value, tokens of value, goods, services and any form of property which may be traded, sold,*

[448] Information on NFTs on OpenSea platform, available at: https://opensea.io/.
[449] Information on digital Yuan, available at: https://ecnydigitalyuan.com/.
[450] Stable coins guidelines, note 447.
[451] Ibid.

converted into, or otherwise exchanged for money, goods or services".[452] Therefore, following the above-provided definition, not only fiat money but also in-game virtual tokens and crypto-currency can be considered as a monetary stake or monetary value and represent means of exchange. The above-described regulation is applicable to the gambling transactions within the Maltese gaming industry, however, can serve as an example of an innovative approach to the modern economy that facilitates various alternative payment methods and the use of new technologies.

Notwithstanding the legal framework applicable to the business relationships, following the freedom of service provision and principle of freedom of the contract, the parties are free to define the counter-performance expected and accepted for the particular relationships. The parties are free to determine alternative payment methods as a price of the contract unless otherwise prescribed by the applicable law. Therefore, the player and the gaming developer can agree contractually on the price of the contract and price of virtual transactions within the scope of the subscription contract and, the relevant, consumer protection framework should take that into account as a valid remuneration and apply relevant consumer protection and mandatory contractual provisions equally to the paid digital service provision contracts.

Taking into account the above-mentioned, in-game tokens, crypto-currencies, stable-coins, NFT can be considered as a digital representation of a value and, therefore, the contracts concluded with the involvement of such tokens can be defined as a digital service provision contract with the respective applicability of the Digital Content Directive and consumer guarantees prescribed in the relevant legal framework. Such a digital representation of value as counter-performance would represent a monetary interest of a digital service (particular virtual item, in-game token or access to the gaming platform).

Transactions with intangible virtual items between the player (the consumer) and gaming company/intermediation service platform/collaborative service platform (the trader) in exchange for monetary interest fall under the digital service legal framework as follows:

Object of a contract	*Price of the contract*	*Contract type*	*Contract subject*
Virtual item	Fiat money	Service contract	Digital service

[452] Malta Gaming Act, available at: https://legislation.mt/eli/cap/583/eng/pdf1.

Virtual item	In-game token	Service contract	Digital service
Virtual item	Crypto-currency	Service contract	Digital service
Virtual item	Virtual item	------	------
In-game token	Fiat money	Service contract	Digital service
In-game token	Crypto-currency	Service contract	Digital service
Virtual item	Personal data	Service contract	Digital service

The gaming EULAs or Terms of Service contract, in which the consumer is expected to transfer the virtual currency, personal data, purchase in-game tokens, or top-up gaming account with electronic money would be defined as a digital service provision contract and, therefore, a particular mechanism regulating the notion of digital services should be applied to such transactions, for example, the specific information requirement or rules on conformity. However, it can be seen that the "free" contracts or gratuitous subscription contracts and contracts where a virtual item is exchanged for another virtual item (peer-to-peer virtual items exchange) are out of the scope of the Digital Content Directive application.

Even though after the adoption of the Digital Content Directive and Digital Goods Directive various questions arising from online digital content purchase were addressed, however, with fast technological development current narrow approach to the regulations cannot grant a proper level of consumer protection in a significant amount of the player versus developer relationships. Gratuitous digital content, including but not limited to access to free-to-play video games, can serve as an example of the "grey area" in the European consumer protection and e-commerce framework.[453] Notwithstanding the difference in consumer protection treatment, the free or paid character of the digital content does not change the consumer expectations both regarding the quality of the digital content and regarding the level of the legal protection.[454]

In the author's opinion, such a model of treatment of the gratuitous content, established in the European Union, is not fulfilling the main purpose of the consumer protection laws and e-

[453] Narciso M., note 70.
[454] Ibid.

commerce regulations. The relevant Consumer Rights Directive, Digital Content and Digital Goods Directive should be applicable to free digital content as well, or the separate legal framework to be adopted.

C. Intermediate Conclusions

The present part looked into the alternative payment models available in the gaming market that is used by the gaming platforms and gaming models in order to facilitate price obfuscation and to benefit from the lack of the regulatory framework in relation to the gratuitous contracts. Particularly, the author examined the legal framework applicable to the contracts where the consumer is expected to transfer personal data as counter-performance for the gaming platform access as well as investigated the legal status of in-game tokens, virtual currencies and Blockchain platforms in the EU in the scope of the digital service provision contracts.

Under the Digital Content Directive, personal data is considered as a consumer's counter-performance in "free" contracts and due to the highest value for the consumer's privacy, the consumer protection framework was expanded in order to ensure specific mechanisms from the trader focused on data protection, transparency and consumer protection. While examining the nature of legal relationships between the developer and the player in relation to the personal data transfer as counter-performance, it is important to determine the purpose of the personal data collection on a case-by-case basis in order to understand the scope of the consumer protection framework applicable under the GDPR and European consumer protection laws.

Moreover, the author determined that the transparency requirements in relation to the purpose of data collection and data transfer are not fulfilled in the examined EULAs and Privacy policies of the popular video games. The gaming platforms create a contractually self-regulatory approach that contradicts principles of consumer protection and data subject protection accepted on the EU level. Such a business model, in which free-to-play video games are advertised as "free", however, de facto expecting direct or indirect remuneration from the consumer in personal data or any other monetary value should be considered as discriminative over the direct remuneration contract and offline products purchase agreements.

Apart from the personal data transfer, transactions with intangible virtual items in the gaming industry can be concluded using the following exchange schemes:

(1) items are directly purchased in exchange for fiat money on the gaming platforms (transfer is made per each micro-transaction separately or the player is required to deposit fiat money on an in-game account);
(2) items are purchased in exchange for crypto-currency, which was obtained in exchange for fiat money;
(3) items are purchased in exchange for in-game tokens, which, on the other hand, are purchased prior in exchange for fiat money or crypto-currency (also purchased in exchange for fiat money in advance).

Moreover, access to the digital product can be obtained by a player:

(1) for free,
(2) in exchange for personal data transfer;
(3) in exchange for fiat money transfer;
(4) in exchange for virtual currencies.

Therefore, in-game transactions, where the virtual item or in-game token as a virtual item is exchanged by the gaming company or gaming platform for fiat money, personal data, crypto-currency or any item with contractually agreed monetary value, would be considered as paid digital service consumer contracts and should enjoy the same level of the consumer protection guarantees as contracts with the provision of fiat money transfer.

2. EULA as a Subscription Contract. Unfairness Test and Transparency Requirements

According to the study conducted by the DG Connect of the European Commission, most of the EULAs or "Terms of Services" contracts are standard form contracts.[455] This situation is regular in cases where the trader, or online platform, is dealing with a significant amount of consumers and business partners in an automated way.[456] Such a EULA regulates not only the access to, for example, free-to-play video games, but as well as to the build-in paid content available in such a virtual world. In pay-to-play video games, the Terms of Service or EULA fall under the scope of the consumer law protection as the player is required to proceed with the remuneration for the digital content provided by the game developer, notwithstanding the

[455] Study on contractual relations between online platforms and their professional users, DG Connect, European Commission, 2018, available at: https://ec.europa.eu/digital-single-market/en/news/study-contractual-relations-between-online-platforms-and-their-professional-users.
[456] Ibid.

further availability of the build-in payments. On the other hand, in free-to-play video games, the contract is considered as gratuitous as the price of the contract is not prescribed directly in the agreement, however, a player has an opportunity to purchase paid digital content later on, when such a player is bound by the gratuitous contract provisions.

The present part will examine the issues arising from the standard term contracts with a hybrid nature – gratuitous access to the gaming products with the availability of the in-game payments. The author will analyse the consumer protection guarantees applied to the gratuitous subscription contracts and, in particular, transparency requirements, consumer consent and the unfairness test for the terms dictated by the game developer.

EULA is a standard form contract, in which the player has no power to change any of its provisions and, thus, the relationships between the developer and a player bear "take-it-or-leave-it" character. When the gamer wants to play, for example, in the "Diablo III" video game, such a player has no market alternative, as every video game is a unique virtual world. The player has only one option in order to have the access to the content - to agree to standard terms EULA, which, as will be explained further, can be unfair in relation to the consumer rights for digital content. Therefore, the player has a weaker position in the described relationships and, therefore, the player's consumer rights should be protected on the regulatory level.

The usage of standard term contracts in business models targeting a significant amount of consumers can be reasonable, however, the availability of a specific fairness benchmark is crucial for such mass contracts.[457] As per the Unfair Terms Directive, all contractual provisions that consumers had no opportunity to negotiate can be subject to the unfairness test.[458] Core terms stipulate the exception from such a requirement and are considered as negotiated by the parties, however, still can be evaluated by the unfairness test based on the transparency requirement.[459]

[457] Krüger S., 'Study on contractual relationships between online platforms and their professional users', FWC JUST/2015/PR/01/0003/Lot1-02, 2018, available at: https://op.europa.eu/en/publication-detail/-/publication/b3d856d9-4885-11e8-be1d-01aa75ed71a1/language-en.

[458] Case C-92/11, RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV, Judgment of the Court (First Chamber), 21 March 2013; Case C26/13, Kásler and Káslerné Rábai, Judgment of the Court (Fourth Chamber) of 30 April 2014.

[459] Case C26/13, note 458; Case C-143/13, Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA, Judgment of the Court (Ninth Chamber) of 26 February 2015; Case C-96/14, Jean-Claude Van Hove v CNP Assurances SA, Judgment of the Court (Third Chamber) of 23 April 2015..

The transparency principle in the scope of the contract terms per se should be interpreted broadly and should mean not only plain and intelligible language from a grammatical perspective, however, as well as the determination of contract terms being understandable to the average consumer – a consumer who is "*reasonably well informed and reasonably observant and circumspect*".[460] The average consumer should be able to read the terms of the contract and to evaluate whether to proceed with further relationships with such a trader without having specific legal knowledge.[461]

As per the study conducted by Dr. Stefan Krüger, the digital forms of business more often suffer from a lack of clarity in standard terms and conditions provided to the consumer, tend to limit traders' liability and represent imbalanced relationships benefiting traders.[462] Taking into account the fact that specific online gaming platforms per se represent unique products on the market and often take the dominant position in the industry, the minimum level of the harmonized consumer protection mechanism should be not only prescribed on the Community level but also effectively enforced.

From the European consumer law perspective, the relevant legal rules affecting the contractual parties are different for gratuitous and paid contracts. Therefore, a different set of consumer protection legal requirements will be applicable to pay-to-play and free-to-play EULAs. The present part will focus on free-to-play video games and will examine in detail whether the so-called "free" subscription contracts rules can be applied to video games that include both free and paid digital content. Particularly, the present part will analyse the unfairness test and transparency principle's application to various relationships between the player and the game developer, including but not limited to the transparency principle's application to core terms in free-to-play video games and choice of law. Core terms and choice of law provision were selected as main provisions impacting the effective legal protection of the consumers, as the price and the subject of the contract determine whether the player would enter into specific legal relationships, the choice of law will determine whether a specific player will take legal action in case of any legal breaches.

[460] Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, Judgment of the Court (Fifth Chamber) of 16 July 1998.
[461] Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, Judgment of the Court (Third Chamber) of 28 July 2016.
[462] Krüger S., note 457.

A. Hybrid Business Model

As explained above, in free-to-play video games, the game developers tend to use hybrid business model and price obfuscation mechanisms advertising gaming products as "free", however, the game participation can facilitate in-game purchases from players not only to improve the gaming experience, express own creativity but as well in order to obtain advantage amount other players and to pass to next level following the gaming scenario.

Apart from the coverage of the legal relationships under the gratuitous contract provisions, various gaming platforms characterise free-to-play video games as "free", even though such games include build-in payments. For example, the home page of "EVE Online" video game state that "*EVE Online is a community-driven spaceship MMORPG where players can play free, choosing their own path from countless options*".[463] However, at the same page of "EVE Online", the player is able to purchase package of virtual items, including in-game tokens, skins, extra skill points and virtual pilot clothing for 230 Euros in total.[464] As explained in the previous chapters, such practice can be considered as unfair and misleading.

Indeed, players have the possibility to choose whether they would like to play for free, or they would like to gain benefits facing other players, especially, in MMORPG games, by purchasing digital content from the dame developer. However, the legal status of both categories of players is established under the same contract – standard term EULA. The modality of contractual relationships and the modality of the functionality of the virtual world can facilitate clarity in relation to the consumers' and traders' rights and obligations as well as ensure transparency in the applicable framework.

Notwithstanding the above, by offering gratuitous software, the game developers benefit from such software of gaming platform access distribution in various ways. The below analysis is relevant not only to the free-to-play video games, but to all gratuitous or freemium products. The traders are interested in monetizing the product developed, and such a monetization can be expressed as follows (while the access remains de jure free of charge):

(1) Digital content is purchased in exchange for direct or indirect payment,
(2) Digital content is free, a consumer is expected to provide personal data in exchange for free digital service,

[463] Information on EVE Online, available at: https://secure.eveonline.com/?lan=de
[464] Ibid.

(3) Digital content is free in order to widen the consumer database, however, advertisement placement in such a free product brings the main revenue (or so-called payment with data business model),

(4) Digital content is, in general, free, however, consumers are offered build-in payments.[465]

Paid digital content supply or gratuitous digital content supply in exchange for personal data is already regulated on the European level, however, other business models listed still remain in the "grey area" of regulations.[466] Even though Member states are free to implement specific consumer protection regulations for gratuitous contracts, in which the revenue is gained from the advertisement or any by using alternative payment business models,[467] however, taking into account scalability and the cross-border nature of the gaming industry, such an approach can lead to the interests of a significant amount of consumers being disregarded, when on the Community level a different level of consumer guarantees are granted.

Important to underline that the complexity of the business model applied should be always taken into account while accessing the fairness of a particular EULA or "Terms of Service" contract, as in complex business relationships with various services provided the possibility of unfair terms presence increases.[468] In a hybrid business model applied within the gaming industry, one set of provisions can cover both (1) access to the gaming software, (2) intellectual property rights of players and developers, (3) derivative works creation, (4) build-in payments, (5) online marketplaces, (6) peer-to-peer exchanges, (7) good conduct regulations, (8) privacy and even (9) anti-money laundering requirements. Such complexity can lead to the unfairness of terms applied and lack of the proper consequences' evaluations from the consumers' side on the pre-contractual stage.

[465] Ghose A. And H., Sang P., 'Estimating Demand for Mobile Applications in the New Economy', Management Science, Forthcoming, 2014, available at: https://ssrn.com/abstract=2378007; Grochowski M., Jabłonowska A., et al, 'Algorithmic Transparency and Explainability for EU Consumer Protection: Unwrapping the Regulatory Premises', Max Planck Private Law Research Paper No. 21/7, Critical Analysis of Law (CAL), Vol. 8, 2021, available at: https://ssrn.com/abstract=3826415.

[466] Loos M., Luzak J., note 383.

[467] Ibid.

[468] Krüger S., note 457.

Therefore, it is crucial to implement specific standard benchmarks and "back list" or "grey list" of specific terms used industry-wide in order to provide an indicative framework on the unfairness test and to facilitate information provision to the average consumer in relation to the economic consequences of the particular EULA. In specific cases, the length of the EULA or "Terms of Service" contract can have a negative impact on the player to familiarize themselves with such contractual provisions.[469] However, in modern realities visualization of the information, hyperlinks, headlines and separation per topics can facilitate clear and transparent information provision in complex legal relationships.[470]

A business model of free access to digital content with the inclusion of build-in payments for additional digital content provides a middle ground between the paid mobile applications and paid digital products, such as video games, and fully free digital content flooded with constant advertisement.[471] Freemium products or free-to-play video games constitute a golden mean between revenue-driven models satisfying the interests of traders at the same time facilitating the user journey and overall product enjoyment for consumers.

The study shows that such a hybrid model with the inclusion of both free and paid content is established in order to gain higher market share by creating artificial further demand.[472] The developers intentionally lower digital content prices when there is a build-in payment function available.[473] Such an artificial demand creation lowering the price of the digital content or giving a free trial or free access to the digital product is common in virtual worlds, where consumers are populating virtual worlds and adding value to such by user-created content, creating a story and interacting between each other. Thus, a developer is interested in lowering the price of digital content of a collaborative nature in order to have a higher value of such a product by engaging a significant number of consumers.

As explained in detail in the previous chapters, traders apply provisions of an intellectual property right framework and/or bind their consumers with the gratuitous contracts that include limited consumer protection guarantees, however, at the same time, allow micro-transactions. Such an approach is followed due to the "grey zone" in the regulatory framework creating a

[469] Ibid.
[470] Loos M., Luzak J., note 383.
[471] Ghose A. and H., Sang P., note 465.
[472] Ibid.
[473] Ibid.

misbalance between parties and facilitating unfair treatment in the gaming industry. Moreover, the study shows that older consumers are less sensitive to the price change in digital products, while minors and young adults are significantly affected.[474] Therefore, it is crucial to analyse the applicable legal framework to such a hybrid (paid and free content in one product) relationships in order to ensure that consumer rights and rights of minors applicable both to the paid and to the free content are taken into account.

In order to determine the actual nature of legal relationships between parties and the legal framework applicable when no clarity is present in the contract itself, the Schottelius test can be applied. Important to underline that the test on the main subject of the contract explained by CJEU in the Schottelius case should be applied with care. In the above, explained case the court stated that the main subject of the contract was the service provision and notwithstanding the additional water pump supply, the service provision legal framework should be applied.[475] When applied to the gaming industry, the main purpose of the business relationships and interests of the parties should be analysed in each particular case. The interest of the game developer would be focused on revenue; however, the way of revenue collection or consumer's counter-performance should be taken into account. In cases, when the revenue is obtained from build-in payments, once the consumer opted-in for paid digital content, such contract should have been qualified as paid digital content supply. In order to avoid any confusion in a practical application while paid and gratuitous digital content are regulated under the separate legal frameworks, the issues connected with the application of the Schottelius test to hybrid business models should be clarified on the Community level.

Considering the above-mentioned, the players are subject to complex legal relationships covering including but not limited to intellectual property rights, consumer obligations, platform usage, good conduct rules and anti-money laundering obligations. With the application of such a complex hybrid contractual model, the possibility of unfair practices resulting from the self-regulatory approach and standard term usage is increasing. In order to ensure transparency and balance between parties, the modal contractual approach, where the player will have a choice to opt-in for additional obligations going out of scope of the gratuitous subscription contract (i.e., paid content) is advised by the author. Moreover, the modal contractual approach should

[474] Ibid.
[475] Case C-247/16, Heike Schottelius v Falk Seifert, Judgment of the Court (Tenth Chamber) of 7 September 2017.

correspond to the specific gaming interface by locking the gaming functions that the player did not give consent for under the gratuitous access request can facilitate fair treatment in the gaming industry.

B. Consent of the Consumer

The standard term contract per its nature establishes a "take-it-or-leave-it" approach creating a priori misbalance between parties in bargain power to negotiate individual terms by depriving the consumer of the freedom of choice.[476] As a general rule, in order to conclude a contract, a mutual agreement of both parties is required, thus, mutual consent.[477] In the online environment in certain scenarios, it can be complicated to distinguish whether a certain party has explicitly shown consent for the contract as a whole, or for a separate contractual arrangement.[478] The study concluded by the European Parliament establishes that the freedom of choice is significantly deprived in online contracts compared to offline ones and, therefore, digital content supply or digital service provision contract should have a higher level of consumer protection in relation to the consent of the consumer.[479]

According to the current practice, most free-to-play video games are regulated by the "Terms of Service" or EULA, which represent provisions of the intellectual property law and license agreement, not consumer contract, as explained in the previous chapter. However, such free-to-play video game subscription bears characteristic both of licensing agreement and of a consumer contract. Therefore, specific legal regulations of consumer consent for build-in payments availability should be communicated to the consumer in an open and clear manner ,[480] which will be examined in detail further.

As explained above, gratuitous single subscription contracts include build-in payments, therefore, free-to-play video games are not "free" per se – they include a monetary interest of the game developer. Thus, the possibility for build-in payments should be directly prescribed in the contract and the explicit consent of the consumer is required to be requested every time when new built-in purchase needs to be authorized.[481] Therefore, even though the consumer subscribes for "free" digital service, each purchase under such a contract would be out of the

[476] Loos M., Luzak J., note 383.
[477] Bedir C., note 375.
[478] Loos M., Luzak J., note 383.
[479] Ibid.
[480] Consumer Rights Directive, note 29.
[481] Ibid.

scope of the main subscription terms and would require separate explicit consent. In order to facilitate such consent, the modality of contractual arrangements as well as the gaming interface is required.

From the perspective of explicit consent for the contract conclusion itself, certain companies follow a "browse-wrap" approach - while accessing a specific digital service, the consumer is not explicitly familiarized with "Terms and Conditions" but provided with a link on the website and consent is assumed when the service is directly accessed through that link.[482] Such commercial practice, especially applied within "free" digital services, can be considered as unfair and the legal validity of such consent is under the question from the perspective of the General Data Protection Regulation and national laws of certain Member States.[483]

The inclusion of general provisions on the possibility of further payments in the subscription contract can be considered as a contradiction to the Consumer Rights Directive,[484] as the consent of a consumer is supposed to be documented in a clear manner, thus, the consumer has to take positive action.[485] Such a positive action can be concluded as sufficient, when a player, for example, has to enter a gaming account password or pass an additional step of verification prior to each purchase concluded via the gaming account under the free subscription contract.

The gaming company cannot apply default settings for consumer consent (consent on default).[486] Moreover, the trader is also required to provide a specific time slot for the consumer to validate and explicitly agree to the additional purchase arising from the free subscription contract.[487] Any default consent provisions under the subscription contract, automatic withdrawals from a bank account, as well as automatic payment proceeding from in-game wallet topped up with game-specific tokens acquired prior to in-game transactions without explicit secure and time-validated consent, would be considered as non-compliant with the European consumer-protection requirements.

[482] Loos M., Luzak J., note 383.
[483] Ibid.
[484] Common Position on "in-app purchases", note 11.
[485] DG Justice Guidance Document, note 128.
[486] Common Position on "in-app purchases", note 11.
[487] DG Justice Guidance Document, note 128.

Notwithstanding the above-mentioned, various digital service providers tend to abuse the dominant position on the market and do not request explicit consumer consent for varieties of consumer obligations to arise within the scope of gratuitous digital service provision or digital content supply.[488] For example, in the Facebook Germany case, the Bundeskartellamt stated that Facebook was collecting personal data in exchange for gratuitous service without explicit consumers' consent in order to personalize digital content displayed and to offer targeted advertisement.[489] A similar situation is present in the gaming industry, where game developers offer unique video games that also take advantage of the social interactions and user experience establishing a dominant position in the market.

The game developers take prior consent for all in-game purchases as part of gratuitous contract as a standard practice. For example, Blizzard Entertainment's "Terms of Sale" (World of Warcraft and Diablo video games)[490] stipulates, "*by placing an order on the Battle.net shop, you agree that you are submitting a binding offer to purchase digital content, such as digital versions of Blizzard interactive games and digital content for Blizzard products or service from Blizzard Entertainment, Inc. … Your order is accepted and a contract concluded once Blizzard has sent you a Confirmation Email. You hereby expressly agree that the supply of digital content and the performance of Blizzard's services begins immediately after the confirmation email is sent."*[491]

Considering the above-mentioned consumer guarantees and requirements for explicit consent, it can be seen that Blizzard Entertainment deprive players of any possibility to provide explicit consent prior to purchase, on the opposite, such consent is given on the stage of the gaming platforms' access acquisition when the player still does not know whether the further purchase would be required. Moreover, the purchase is confirmed via email without a specific time given for the consumer to confirm an order or a right to withdraw from the contract. Thus, according to the above-explained contractual provisions, even when a player mis-clicked on the purchase button for the virtual item on the gaming platform that would be considered as valid consent from the perspective of the trader, that creates a significant misbalance between parties and

[488] Loos M., Luzak J., note 383.
[489] Ibid.
[490] Information on Blizzard Entertainment products, available at: https://www.blizzard.com/en-us/games/
[491] Blizzard Entertainment EULA, note 164.

provides economic burden to players under the gratuitous contract without a possibility to abort wrongful action.

In the above-provided example, in order to comply with requirements and to request specific explicit consumer consent, Blizzard Entertainment could have sent an email to request a player to confirm a purchase within five minutes from such email receipt. However, the game developer decided to stipulate default consent contractually, which is against the consumer rights protective mechanisms provided by the Consumer Rights Directive.

Taking into account the economic value of personal data in modern realities, worth mentioning that the personal data provision from the consent in free subscription contract can lead to certain implications in relation to the validity of the contract.[492] Analysing Digital Content Directive, it is still unclear whether incorrect or fake personal data provision will impact the validity of the contract and the consent of the consumer for free and paid services as well as the further performance under such digital content supply or digital service provision agreement.[493] For example, if the player provides someone else's personal data, the question on the proper subject of the consent would arise.[494] As a mitigating factor, relevant identity verification should take place on gaming platforms in order to ensure that no data fraud (when data transfer is required as counter-performance) and no money fraud (when monetary value transfer is required as counter-performance) takes place.

Addressing the provisions of the General Data Protection Regulation, it is expected that consent for personal data transfer should be freely given and freely withdrawn.[495] The concept of "freely given" consent can be explained by the recitals 42 and 43 of the General Data Protection Regulation, which stipulate that the consent of the data subject would be considered as freely given if:

(1) such data subject has genuine or free choice,
(2) data subject is able to refuse or withdraw from a consent without detriment,
(3) data procession has a valid legal ground in cases when there is a clear disbalance between parties.[496]

[492] Bedir C., note 375.
[493] Ibid.
[494] Ibid.
[495] General Data Protection Regulation, note 293.
[496] Ibid.

Moreover, in the doctrine the following conditions are specified as essential for the freely given consent in the data protection regulations:

(1) the consent is given on the basis of specific and comprehensive information;
(2) the data subject is fully informed on the consequences of such consent,
(3) there was no pressure on the data subject in terms of the aim of collecting data and obtaining access to a particular service which the data subject regards as essential,
(4) the consent has not been given under any monetary pressure which means as a counter-performance for the benefits received.[497]

Considering the above-provided explanation of the data subject's consent under the General Data Protection Regulation, it can be concluded that if the consumers are required to provide their consent for personal data usage for the purposes that differ from having access to a service or for the performance of a contract, then it is very likely that such data subject consent is not free, and thus it is not valid under the General Data Protection Regulation.[498]

Moreover, such consumer's consent for personal data provision and usage should be represented as active consent, thus, pre-ticked boxes or auto-population cannot be considered as valid consent under the General Data Protection Regulation.[499] The consumer has to conclude positive action in order to agree on such a counter-performance for under "free" subscription contract. Thus, for consent for data transfer to be valid, a player should be clearly informed regarding the consequences of such data transfer, clearly understand the purposes of data collection, and have a right to withdraw the consent and conclude a positive action to give such consent.

Considering the above-mentioned, the relationships between the gamer and the gaming company cannot be limited only to the intellectual property law framework, as in this way trades attract consumers (including minors) with "free" service, micro-transactions and due to the gaps in legislation gain billions in revenue without granting proper consumer protection to millions of consumers. The game developer must comply with the consumer protection guarantees established in the European Union while targeting European consumers and should be

[497] Bedir C., note 375; Resta G., 'Digital Platforms and The Law: Contested Issues', Medialaws, 2018.
[498] Malgieri G., 'User-provided personal content in the EU: digital currency between data protection and intellectual property', International Review of Law, Computers & Technology, 32:1, DOI: 10.1080/13600869.2018.1423887.
[499] Bedir C., note 375.

obliged, including but not limited, to inform the player on the possibility for further payments during the game, to provide the player a time to think, to provide transparent information on personal data collection and usage, to ask the player for the specific explicit and clear consent every time such payment will be proceeded (i.e., by using a password). For the purposes of transparency and the players' consent, the modality of the contractual relationships and the gaming interface respectively should play a crucial role.

C. Transparency Requirements in Relation to the Price of the Contract

The transparency requirements for the contractual obligations are stipulated in various European directives and regulations as well as national laws of the Member states. In standard business relationships it is assumed that the parties are able individually to examine and negotiate the terms of the contract, however, in situations where the consumer is in a weaker bargain position, particularly in standard term EULAs, certain legal requirements for information transparency are imposed on traders.[500]

As per the E-Commerce Directive, general terms and conditions should be available to the consumers in a manner that allows such consumer to store and reproduce them.[501] Following the Unfair Terms Directive, all written contracts should be composed in plain, intelligible language.[502] Moreover, national laws (French and German law, for example) require transparent disclosure of the information regarding the subject matter of the contract and essential terms.[503] CJEU as well expressed the opinion that the consumer should be informed prior to the contract conclusion in relation to the terms and the potential consequences to such terms.[504]

As explained above, in the gaming industry, the consent of the consumer for build-in payments under a free subscription contract cannot be expressed only by accepting the standard term EULA. By signing EULA in order to access free-to-play video games the player is not informed

[500] Mak V., note 376.
[501] E-Commerce Directive, note 26.
[502] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95.
[503] Cartwright J., 'Defects of Consent in Contract Law' in AS Hartkamp cs, Towards a European Civil Code, 4th edn, Kluwer Law International 2010.
[504] Case C-92/11, note 458; Case C-186/16, Ruxandra Paula Andriciuc and Others v Banca Românească SA, Judgment of the Court (Second Chamber) of 20 September 2017.

of the total price of the contract. Moreover, generally EULA neither includes provisions regarding the total price of the goods or services nor describes the manner in which the price is to be calculated, as required per Consumer Rights Directive.[505]

The ability of the consumer to be informed and foresee economic consequences is one of the main conditions required in order to satisfy the transparency provisions prescribed in the European regulatory framework. Such a requirement will be fulfilled if the pre-contractual information available to the consumer would facilitate for the consumer to be reasonably well informed and reasonably observant regarding the consequences of the contract.[506] The consumer needs to be well equipped with the knowledge and data in order to make a decision and wise consumer choice.[507] Thus, the consumer should be in a position to evaluate not only one term of the contract, however, terms in the scope of the legal relationships, the wellbeing of the consumer and economic outcome.[508] In misbalanced relationships between parties, particularly standard term contracts, the transparency requirement should be understood in the broad sense taking into account the level of knowledge of the standard consumer.[509]

In video games particularly, with a significant involvement of minors and absence of age verification, such misbalance can trigger the unfair consumer treatment, when a player agrees for a gratuitous contract, however, is unaware of further economic consequences, amount to be paid to the trader as a result of build in-payments. Moreover, as explained previously, certain video games require a player to provide credit card details on the registration as part of the player's profile completion and further purchases are charged automatically. Such an approach can be considered as a violation of transparency requirements by the game developers, if players are not explicitly informed about paid content and if traders do not repeat such an information and obtain explicit consent before each transaction concluded under the gratuitous contract framework. Fulfilment of the transparency obligations by the traders is considered as fundamental importance for the European consumer protection framework,[510] thus, applicability

[505] Consumer Rights Directive, note 29.

[506] Sitnik P., 'The Dual/Multiple Nature of 'Plain and Intelligible Language' of Unfair Terms in Consumer Contracts under European Law and Its Polish Transposition', Polish Yearbook of International Law, Vol. 38, 2018, available at: https://ssrn.com/abstract=3448254.

[507] Case C-143/13, note 459.

[508] Sitnik P., note 506.

[509] Case C26/13, note 458.

[510] Case C-226/12, Constructora Principado SA v José Ignacio Menéndez Álvarez, Judgment of the Court (First Chamber), 16 January 2014.

of transparency requirements to the price of the contract in such a hybrid models as free-to-play video games is crucial for overall players protection in the gaming industry.

Worth underlining, that a requirement for a term to be expressed in a plain and intelligible language does not correspond to the sole grammatical and linguistic representation of the contractual provision and the broad interpretation should be applied.[511] As will be explained in detail further, game developers include vague terms on the following possible payment obligations, for example, such as "*some aspects of the game will require you to pay a fee*"[512] or "*the services will may require you to pay a fee*".[513] As an analogy, following the European court practice on the applicability of the transparency requirements, it can be summarized that such vague terms as "*changes in the money market*"[514] or "*possibility to pay later on*", as in the present case cannot be considered as drafted in a plain intelligible language even when despite grammatically and linguistically correct.[515]

Therefore, in order to satisfy transparency requirements game developers have to inform players explicitly on terms and conditions of further payments and explain for which items and in what circumstances payment will be required. Such an obligation should be fulfilled and an explanation on the further payment should be provided in detail, especially, when video game offers to purchase not only digital content of aesthetic value (skins, avatar clothes, appearances, environment design), but also of functional items. Functional virtual items can provide an advantage for the particular player over other game participants, can be mandatory in order to pass to the next level in the game or participate in additional rounds or unlock specific game scenarios. Such functional items purchase significantly influence the digital service regarding which the player was initially informed and can be considered as a breach of pre-contractual information obligation and transparency requirements.

The transparency obligations in contractual relationships are aimed to protect the interests of both parties, protect the interests of consumers when bargain power is significantly reduced in standard term contracts and as well as to eliminate the possibility for the consumers to be bonded with unfair hidden terms in subscription contracts when the content is advertised as

[511] Case C-186/16, note 504.
[512] Riot Games EULA, available at: https://www.riotgames.com/en/terms-of-service#id.wa6v53mhvtlz.
[513] War Gaming EULA, available at: https://legal.eu.wargaming.net/en/terms-of-service/.
[514] C-143/13, note 459.
[515] Sitnik P., note 506.

gratuitous, however, the consumer is required to provide credit card information for automatic payment processing or abolish certain level of privacy by sharing the personal data.

In modern digital reality, the transparency of data became a complex issue, where the consumer might not fully understand the services provided due to the knowledge gap in an actual technological solution, as well as might not have a proper overview on the price of the contract when the services are positioned as free, however, the consumer is paying with the personal data[516] or further build-in payments available. Studies have shown that the consumers do not read "Terms and Conditions" in the click-wrap contracts; especially in case the acceptance of such "Terms and Conditions" is linked to the digital content download.[517] This gives a consumer an impression that the contract is executed once access to the digital content is granted.[518] The same can be applied to the gaming industry, the consumer or a player can have an impression that the contract is executed once the digital content assess is granted (both in pay-to-play and free-to-play video games). In such a case, the transparency of the gaming company in regard to the price of the contract and further obligations should be maintained on a higher level, particularly, considering significant minors' involvement in the gaming industry.

Following the provisions of the Unfair Commercial Practice Directive amended under the New Deal for Consumers Directive, it is stipulated that all distance contracts should indicate the following information prior to the conclusion of the contract:

(1) the nature and main characteristics of the goods or services provided,
(2) the identity of the trader,
(3) the total price of the contract,
(4) the right of withdrawal (with certain limitations as per applicable law),
(5) the duration of the contract,
(6) the conditions for terminating the contract.[519]

[516] Mak V., note 376.
[517] Custers B., 'Informed Consent in Social Media Use. The Gap between User Expectations and EU Personal Data Protection Law', 10 Journal of Law and Technology, 2013; Böhme R., Köpsell S., 'Trained to Accept? A Field Experiment on Consent Dialogs' in Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, 2010; Acquisti A., 'Nudging Privacy: The Behavioural Economics of Personal Information', 7 Security & Privacy Economics, 2009.
[518] Ibid.
[519] New Deal for Consumers, note 392.

Thus, transparency regarding the price of the contract is a mandatory requirement in order to comply with the European consumer protection framework. In pay-to-play video games without the possibility for build-in payments, the price transparency requirements are usually met on the stage of access to such pay-to-play video games. However, having a look at the free-to-play video games as well as pay-to-play ones with the availability of build-in payments in the gaming interface facilitating consumer purchases of additional digital content, the total price of the contract as well as the scope of digital service provision is not so straight forward. The consumer is free to determine the scope of the digital service provision itself on an ongoing basis and the total price of the contract will be determined based on such selected scope. The modality of such contracts and the gaming interface can facilitate transparency requirements and the determination of the total price of the contract, when the player does not clearly acknowledge and consent for build-in payments, the interface should exclude such technical possibilities as well.

The Unfair Terms Directive stipulates that the price of the contract should be written in plain and intelligible language.[520] The Unfair Commercial Practices Directive as well establishes that "*a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to… the price or the manner in which the price is calculated, or the existence of a specific price advantage.*"[521]

Moreover, price transparency requirements were investigated in various court cases on the European level seeking the proper interpretation of such a consumer protection guarantee and its application in practice. As a result, it was clarified that the price transparency requirement stipulated in the Unfair Terms Directive should be explained as the requirement to express the

[520] Unfair Terms Directive, note 502.

[521] Consolidated text: 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), OJ L 149.

price of the contract contractually in a way that the consumer is placed in a position enabling such a consumer to evaluate the economic consequences arising from such a contract.[522]

Analysing various gaming EULAs available on the market, it can be concluded that the price of the contract is generally not stipulated or only a possibility of the payment processing is stated without a clear indication in which manner such price will be established later on. For example, the "Linden Lab" EULA (the "Second Life" video game) provided a vague explanation on the further price of the contract being established in digital content (Linden dollars) that is changed at the sole discretion of the company and the company at any time can charge at its sole discretion any additional fees, as follows:

"*3. Fee and Billing Policy*

3.1. "Linden Dollars" are virtual tokens that we license. Each Linden Dollar is a virtual token representing contractual permission from Linden Lab to access features of Second Life. Linden Dollars are available for Purchase or distribution at Linden Lab's discretion, and are not redeemable for monetary value from Linden Lab.

Second Life includes a component of virtual tokens ("Linden Dollars" or "L$"), each of which constitutes a limited license permission to use features of Second Life as set forth below. Linden Lab may or may not charge fees to acquire or use Linden Dollars, and these fees may change at any time."[523]

In the above-explained example, the game developer does not establish a price of the contract, however, says that the consumer is required to purchases later on the digital content or a licence for such digital content, however, as explained in the previous chapters, such virtual items do not represent an intellectual property value and should not fall under intellectual property protection framework.

The "Riot Games" Terms of Service (the "League of Legend" video game) do not apply intellectual property approach towards specific virtual items available in the game, however, again rely on the sole unilateral stipulation and change of the price and terms and conditions of each further payment that is made by the player during the digital service provision, as follows:

[522] Case C-348/14, Maria Bucura v SC Bancpost SA, Judgment of the Court (Sixth Chamber) of 9 July 2015; Case C-621/17, Gyula Kiss and CIB Bank Zrt. v Emil Kiss and Gyuláné Kiss, Judgment of the Court (Third Chamber) of 3 October 2019.

[523] LindenLab EULA, note 240.

"*Some aspects of the Riot Services may require you to pay a fee, and you agree that you'll provide accurate and complete payment info to us or the third-party payment provider used by us. You further agree to pay all fees and applicable taxes incurred on your account. We may revise the pricing for any part of the Riot Services at any time. This can impact on the purchasing power of your Game Currency, though we normally only do this in incremental steps. All fees and charges are payable in accordance with payment terms in effect at the time the fee or the charge becomes due and payable. We may, from time to time, modify, amend, or supplement our fees and fee-billing methods, and such changes shall be effective immediately upon posting in these Terms or elsewhere on our websites, apps or in our games."*[524]

On the other hand, the "Wargaming Group" Terms of Service (the "World of Tanks" video game) ensures that players' declarations of being over 18 years old regarding in-game transactions are recorded during the game access provision (even though the age rating of the "World of Tanks" video game is 7 years old),[525] however, the price of the contract or a manner in which way it will be calculated is not stipulated, as follows:

"*6. Charges and Billing*

6.1 You do not have to pay any registration or subscription fees to create an Account. However, some of the Services may require you to pay a fee. If you decide to subscribe to any such Services, you must ensure that:

a) you are either over the age of eighteen (18) or, if you are under the age of eighteen (18), that your parent or guardian has agreed to and accepted the respective purchase and these Terms of Service on your behalf…

e) you agree to pay all the fees that you incur, unless and until you close your Account and terminate these Terms of Service in accordance with these Terms of Service".[526]

Taking into account the nature of video games as well as overarching minors' involvement in the gaming industry, it can be seen that the European requirements on price transparency are not fulfilled in the various video games offered on the European market. The developers use price obfuscation models in order to disguise the actual nature of the relationships and the price of the contract. The main common characteristic of the gaming EULAs or "Terms of Service"

[524] Riot Games EULA, note 512.
[525] PEGI classification, note 345.
[526] War Gaming EULA, note 513.

contract is the right of the gaming platform on the sole and unilateral change of the price of the contract as well as the absence of the description of the price calculations. As a standard practice, only a possibility of payment is described, which can be considered as a violation of the European consumer protection framework and unfair commercial practice that is tended to mislead consumers regarding final economic burden, especially, taking into account minors' participation in such video games.

As per the Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (hereinafter referred to as the "Price Indication Directive"), the requirements for traders to indicate the selling price and the unit price are a necessity in order to fulfil the consumers' information obligation and to provide consumers with the opportunity to evaluate and compare the price of products, to make informed choices, which will facilitate healthy competition on the European market.[527] The Price Indications Directive stipulated that the selling price and the unit price for all products should be indicated as a part of the consumer information obligations, with the exception of bulk products, where the price is indicated per unit and selling price is indicated only after the consumer selects the quantity.[528]

Even though the above-mentioned directive focuses more on the offline goods and provides the possibility for the Member States to withhold application of the Price Indication Directive to the service provision,[529] including but not limited to digital service provision, however, it shows the difference in approaches to consumer guarantees in online and offline services. In the author's opinion, the consumer protection guarantees in digital goods and services should not provide lenience to traders in relation to the price transparency and indication of the prices for goods and services, especially in contracts that are positioned as gratuitous ones. In contracts on the virtual world access, where the possibility of additional purchases is determined by the gaming interface, thus, as digital service supply or subscription contracts, should enjoy

[527] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998; Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers, COM/2006/0325 final.

[528] Price Indication Directive, note 527.

[529] Ibid.

equal or even stronger consumer guarantees than offline product purchase, due to the extensive post-contractual traders' involvement compared to the offline trade.

As explained previously, the different business models available on the market (for example, counter-performance as personal data transfer, advertisement exposure, derivative work transfer etc.) are covered under the "free" subscription contract, as the consumer is not required to transfer fiat money as the traditional sense of payment for the contract. This creates a significant misbalance between parties and discrimination among consumers,[530] as price obfuscation mechanisms deprive the average consumer of consumer protection guarantees when signing the contract on "free" service, in which the payment is taken in, for example, derivative works creation, required in order to attract more consumers (MMORPG games). At the same time, the consumers enjoy a certain level of consumer protection guarantees in cases when the personal data is transferred is required for commercial purposes in order to access "free" digital service. Such discrimination can lead to the creation of incentives for the gaming industry to move towards business models that will facilitate a dominant position on the market and will not result in an extra obligation to the game developers.[531]

Worth underlining that there are no specific requirements on remedies that the consumer can expect in gratuitous contracts as well as in the contracts where the consumer is expected to provide personal data as counter-performance.[532] The national courts are expected to restore the equality between the parties in the legal relationships and revert the consequences of the unfair term.[533] However, the enforcement through court does not grant effective consumer protection in the gaming industry, from the perspective of the unfair term in free-to-play EULAs, the restitution of the rights and obligations should be clearly specified in the law, considering the hybrid nature of the business relationships and availability of both gratuitous and paid digital content.

Moreover, the indicative list of unfair terms regarding the core provisions of the contract that is present in the Unfair Terms Directive indicates only the payment in fiat money in the traditional sense.[534] This can increase the number of disputes regarding consumer protection guarantees application in gratuitous contracts, create a lack of enforceability of specific legal norms

[530] Mańko R., note 382.
[531] Ibid.
[532] Loos M., Luzak J., note 383.
[533] Ibid.
[534] Ibid.

and facilitate misbalance between parties. Therefore, the European consumer protection framework should be amended respectively in order to facilitate fair treatment and transparency in the player versus game developer relationships as well as compliance with transparency requirements in free-to-play video games. The "black list" and the "grey list" of standard contract terms should be updated in order to include price obfuscation mechanisms, alternative or indirect payment methods used in the gaming industry.

Considering the above-mentioned, it can be concluded that game developers use unfair consumer practice in standard terms contracts in relation to the price of the contract in free-to-play video games. The contract is advertised as "free"; however, the consumers are not informed regarding the actual economic consequences resulting from such a contract, which can be represented in personal data transfer, transfer of intellectual property rights or various indirect payments. The lack of transparency in relation to the price of the contract and the way in which such price is calculated deprives the consumers of effective consumer protection that can be eliminated by using modal contractual terms and the gaming interface.

D. "Free" Subscription

Taking into account the provisions of Article 6 and Annex I to the Unfair Commercial Practices Directive, advertising product as "free" if the consumer needs to pay any other cost than a delivery cost or/and overall presenting the product information regarding the product price by a way that the consumer is unable to have the correct presentation on the cost of the transaction, is considered as a misleading business practice.[535] Any consumer's monetary (freemium products or products with build-in payments) or non-monetary payments (personal data provision or attention to advertisement) should be explicitly mentioned in the contract for the digital service provision or digital content supply contract.[536]

In the Trento versus Sviluppo Case, the European Court of Justice, the concept of the application of the transactional decision was explained in the scope of the Unfair Commercial Practices Directive, as a consumers' decision whether or not to purchase a particular product including any decision directly related to that decision.[537] When applied to the gaming industry,

[535] Unfair Commercial Practices Directive, 521.
[536] Loos M., Luzak J., note 383.
[537] Case C-281/12, Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato, Judgment of the Court (Sixth Chamber) of 19 December 2013.

the concept of transactional decision connected to the determination of the misleading commercial practices would mean that when deciding regarding entering into particular business relationships with a game developer, the player should be able to evaluate the decisions connected to that decision. Thus, while entering into the "free" subscription contract, the decision the consumer should be clearly informed on is the decisions that would be required to be taken by the consumer in connection hereto, for example, the decision to purchase build-in digital content.

If particular commercial practice leads or might lead the average consumer to take a transactional decision that such consumer would not have taken otherwise, then it should be considered as a misleading omission.[538] As explained above, in free-to-play video games, apart from build-in payments as a business model, the personal data of the consumers can be collected and used for commercial purposes. Considering the personal data provision as counter-performance in gratuitous contracts, if the consumer is directly not informed on the usage of consumer's data for commercial purposes, that can as well be considered as misleading commercial practices.[539] Moreover, the advertising products as "free" when the consumer is required to transfer personal data as counter-performance under the contract can be considered as a breach of the Unfair Commercial Practice Directive.[540]

The Consumer Rights Directive requires the trader explicitly request the consumer to acknowledge that placing the order for a particular product follows the obligation to pay, in case such acknowledgement is not explicitly given, the consumer is not considered bound to such contract.[541] Important to underline that the trader's obligation prescribed in the Consumer Rights Directive explicitly to inform the consumer on arising obligation to pay is occurring before the conclusion of the relevant contract.[542] Moreover, as per the provisions stipulated in the E-Commerce Directive, the prices for information society services should be indicated clearly and unambiguously.[543] Therefore, the consumer needs to be informed about all costs of

[538] Ibid.
[539] Commission Staff Working Document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, COM(2016) 320.
[540] Bedir C., note 375.
[541] Consumer Rights Directive, note 29.
[542] Misleading «free» trials and subscription traps for consumers in the EU, European Commission, GfK Belgium, February – 2016, available at: https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=43759.
[543] E-Commerce Directive, note 26.

game participation or about the system how the price of such participation will be calculated prior to the access acquisition to the particular video game (free-to-play or pay-to-play).

Considering the specifics of free-to-play video games, both paid and free content are covered by the EULAs and "Terms of Service" contract, which usually do not explicitly state the price of the contract and overall costs occurred during the game participation covering various products (access to the video game and in-game virtual items transactions), however, such EULAs limit liability of the developer to the price of the game participation (asses only).

For example, the "Rockstar Games" EULA (the "GTA" video game) states: "*To the fullest extent of applicable law, Licensor's liability for all damagers shall not (except as required by applicable law) exceed the actual price paid by you for the use of software*."[544] The "GTA V" video game is a pay-to-play one and the price of the contract is stated as 29.99 Euros for PC download on the website,[545] at the same time, the game allows in-game purchases. The above-mentioned EULA states: "*Licensor, in its sole discretion, reserves the right to charge fees for the right to access or use Virtual Currency or Virtual Good and/or may distribute Virtual Currency or Virtual Good with or without charge.*"[546] Therefore, the consumers that would decide to purchase additional virtual items during the game participation are not explicitly informed regarding the total price of the contract, however, the trader's liability is limited only to the price paid to the access to the video game, excluding the total amount of invested money disregarding the price for in-game purchases.

Certain games, for example, "Crazy Panda" Games, disclose that access is free, however, the certain feature will require payment by an in-game currency that is not a commodity and not a payment as per the civil law, but a computer code that is an integral part of the game:

"2. Game Access is free of charge. Game Features are commercial (paid). 3. There are Features (additional services) in the Game that can be purchased for additional charges; these simplify the gaming process for User by making additional in-game items, advantages and possibilities available, making up the range of extended functions of the Game. 4. Features are priced in specific in-game currency (hereinafter In-Game Currency) that is not actual money in the sense that this term carries under civil law, but constitutes a body of programmed code,

[544] Rockstar Games EULA, available at: https://www.rockstargames.com/eula.
[545] Information on Rockstar Games Store, available at: https://www.rockstarwarehouse.com/store/rsg/de_DE/pd/productID.5342166100#.
[546] Rockstar Games EULA, note 544.

audio and visuals, which is, in turn, an integral component of the Game that enables User to engage with its various functions. The relation between such In-Game Currency and the money paid by User for obtaining the right to use the additional volume(s) of nominal In-Game Currency is determined by Administrator and is displayed/indicated in the in-game shop, which, in turn, does not constitute an object or location of trade in the sense that this term carries under civil law but represent one of the Game's electronic functions."[547]

The above-explained approach does not provide clarity to the consumers on the paid character of the digital services, as it explains that the payment is done by in-game currency, however, indeed, such in-game currency is not considered as money in the traditional sense and the transaction de facto will take place when the player will top-up the in-game wallet with the electronic money transfer or will purchase a certain amount of in-game currency in exchange for fiat money. Therefore, even when EULA or "Terms of Service" explicitly stipulate the possibility of a paid content provision during the gameplay, the transparency on actual mechanics and payment set up is absent taking into account various business models used in the gaming industry – will digital content be purchases in exchange for fiat money, virtual currency, in-game currency or another virtual object.

The legal framework applicable to pay-to-play video games (as paid digital content) is slightly different than one applicable to free-to-play video games (as gratuitous digital content). In free-to-play video games, access to video game is free and the majority of EULAs or "Terms of Service" contracts do not include any reference to the contract price. For example, previously discussed Blizzard Entertainment EULA states: "*Blizzard may revise the pricing for the goods and services offered through the Platform at any time; You acknowledge that Blizzard is not required to refund amount you pay to Blizzard for use of the platform, or for digital purchases made through the platform, for any reason, except as required by applicable law.*"[548]

Thus, in free-to-play video games, the player is bound by the gratuitous contract with a limited scope of consumer protection guarantees by law and as well with no contractual possibility to receive any refunds for digital content for any reason (i.e., destruction on the sole discretion of the developer). The differentiation in the legal approach in relation to free and paid digital content can lead to the "gratuitous" legal framework's applicability to the business model that

[547] CrazyPanda Games EULA, available at: https://crazypandagames.com/en/eula/.
[548] Blizzard Entertainment EULA, note 164.

by the nature is designed focusing on in-game microtransactions. Such a situation requires immediate attention on the Community level in order to protect the rights of consumers in the gaming industry.

As per the study concluded by the European Commission regarding the free trial or free subscription contract, the main problems detected are:

(1) Free subscription or free trial contract requires payment pre-authorization and bank card further automatically charged without consumer's direct acknowledgement;
(2) Contract includes insufficient or unclear information regarding prices and calculation of such prices;
(3) Unclear differentiation between free and paid services prior to the conclusion of such contract;
(4) Unclear conditions for receiving free services – i.e., free but with subscription, free but with personal data transfer, free but with publicity, free but for a certain period etc.;
(5) Consumer cannot terminate the free subscription when conditions change or paid service without prior authorization occur;
(6) Withdrawal or cancellation procedure is paid, complicated or unclear.[549]

The above-mentioned study shows that usually the approach taken by the traders is not necessary directly illegal but opens the room to interpretation and the consumers' confusion. For example, the approach taken by the majority of the game developers can be classified as one located in a "grey zone" when the players are informed about the possibility of having paid content in standard term EULA or Terms of Services, however, the explicit consent for such build-in payment occurrence and explicit description of the price calculation is absent.[550]

The Consumer Rights Directive directly requires the explicit consumer consent prior to contract conclusion, or in case of subscription contracts, prior to the offer placement, in order to agree to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation.[551] In case such prior consent is not obtained, the player should be obliged for remuneration of such payment.[552] However, taking into account the previously explained provisions of the standard term EULAs, the player is not entitled to any remuneration

[549] Misleading « free » trials and subscription traps for consumers in the EU, note 542.
[550] Ibid.
[551] Consumer Rights Directive, note 29.
[552] Ibid.

under contract and no ownership or any other rights for purchasing digital content belonging to the player, nor under the contract provisions, neither as per applicable law.

Moreover, as per the study conducted in 63% of cases, the paid content was processed without the consumer's explicit consent under a free subscription contract.[553] Therefore, in over a half of "free" subscription contract build-payments are processed without the direct consent of the consumer. The detailed examination of issues connected to the player's consent to build-in payments in free-to-play video games is explained in the present chapter.

Considering the above-mentioned, the game developers tend to advertise gaming products as free and do not provide explicit information in relation to the total price of the contract or the manner in which such contract price will be calculated. The gaming access acquisition both in free-to-play and in pay-to-play video games covers the consumer consent for the further build-in payments with limitation of the traders' liability in relation to the further payments. The gaming platforms tend to use price obfuscation mechanisms in order to disguise actual economic consequences resulting from such a contract conclusion. All of the above can be considered as unfair consumer practice, thus, it is important to develop a clear consumer protection framework focusing on build-in payments in free products covering such a hybrid model that is currently widely used in free-to-play video games and mobile applications. Moreover, the price obfuscation mechanisms should be listed in the "grey list" of misleading contractual terms in order to facilitate efficient consumer protection enforcement.

E. Transparency Requirements in Relation to Intellectual Property Transfer

Apart from the mentioned above analysis on transparency principle, it is crucial to underline that the author analysed consumer protection framework following contract law approach, however, certain game developers still cover the players' relationships under the intellectual property protection framework and explain a contract between the player and the developer as a gratuitous licence agreement, not as a gratuitous consumer contract. The extensive analysis of the intellectual property approach can be found in chapter II of the present thesis.

Worth underlining that the intellectual property rights should be governed separately from the consumer contracts and the existence of the intellectual property rights in relation to certain digital products should not lead to the conclusion that the consumer is deprived of rights and

[553] Misleading « free » trials and subscription traps for consumers in the EU, note 542.

obligations arising from the European consumer guarantees and vice versa. While purchasing a digital product that has no element of creativity and has no proper confirmation of the intellectual property rights of the game developer, such a contract should not fall solely under the intellectual property rights framework.

The research concluded prior to the adoption of the Digital Content Directive indicated that in case of digital content supply or digital service provision, the seller should be expected to transfer relevant intellectual property right to use the digital content and, when applicable, transfer the ownership of the tangible medium where digital content is stored, or transfer intellectual property rights if expressly agreed by the parties.[554] While applying the standard form contract, the player has no bargain power to negotiate the ownership of the intellectual property rights not only over the digital content supplied by the game developer and purchased by the trader but also ownership rights on derivative works created by the player within the course of the digital service provision or digital content supply. Taking into account such an intellectual property law approach and analysing standard clauses present in the video game EULAs in relation to the user-created content, particularly clauses on the gratuitous and irrevocable intellectual property right transfer from the player to the developer in free-to-play and pay-to-play video games, such provisions as well should be examined on the subject of unfair term contract under the consumer protection law framework in the scope of the transparency requirements.

Analysing such intellectual property provisions, it can be seen that the nature of the legal relationships corresponds to the digital content supply contract, particularly taking into account that game developers cannot prove or certify the intellectual property rights on separate digital content and virtual items, especially user-created content, as explained in the previous chapter.

For example, Blizzard Entertainment EULA states:

"*You hereby grant Blizzard a perpetual, irrevocable, worldwide, fully paid up, non-exclusive, sub-licensable, right and license to exploit the User Content and all elements thereof, in any and all media, formats and forms, known now or hereafter devised. Blizzard shall have the unlimited right to copy, reproduce, fix, modify, adapt, translate, reformat, prepare derivatives, add to and delete from, rearrange and transpose, manufacture, publish, distribute, sell, license, sublicense, transfer, rent, lease, transmit, publicly display, publicly perform, provide access*

[554] Mańko R., note 382.

to, broadcast, and practice the User Content as well as all modified and derivative works thereof and any and all elements contained therein, and use or incorporate a portion or portions of the User Content or the elements thereof in conjunction with or into any other material."[555]

In the discussed EULA, the game developer included in the standard term gratuitous subscription contract provisions that the player requires to accept in order to access digital content of the free-to-play video game, which cover not only (1) free access to the game, (2) paid digital content, (3) intellectual property rights on the virtual world as a whole, but as well as (4) intellectual property rights for derivative works created by users of such a virtual world. Taking into account minors' involvement and the level of knowledge of an average video game player in relation to the rights and obligation under the intellectual property framework, it should be evaluated whether a player is able to evaluate the economic consequences of such a term arising from the full transfer of intellectual property rights on derivative works.

While requesting access to the virtual world itself, it is not necessary that a certain player would opt-in for paid digital content or would create derivative works, however, all possibilities are covered under one common gratuitous contract, which has a limited consumer protection framework's applicability considering its gratuitous nature. In such subscription contracts, in which certain provisions are going out of the scope of free digital content supply, relevant consumer protection framework should apply to such developer versus user relationships as to the separate type of paid contractual arrangement, outside of the scope of the accepted subscription contract. The modality of contractual arrangements and the players' interface can facilitate transparency, including but not limited to transparency in relation to the intellectual property rights of players and game developers.

The Paris Tribunal particularly accessed EULA clauses for gratuitous transfer of intellectual property rights for the user-generated content in the Facebook case.[556] The clause in the standard "Terms of Services" agreement used by Facebook that stated that the "*non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post*" were considered by the court as unfair due to the vague explanation on the scope of the licence

[555] Blizzard Entertainment EULA, note 164.
[556] TGI de Paris judgment of 9 April 2019, available at, https://www.legalis.net/jurisprudences/tgi-de-paris-jugement-du-9-avril-2019/.

and due to the irrevocability of such a licence.[557] The Paris Tribunal made such a conclusion based on the fact that the digital services provided were not explained in clear and plain language, that mislead consumers regarding the remuneration for such digital services not only with fiat money but also by providing personal data and by offering such a gratuitous derivative content license.[558]

Intellectual property rights transfer for user-created content can be considered as counter-performance for the digital service provision contract and, thus, the consumer should be explicitly informed on the economic consequences resulting from such derivative work rights transfer.[559] Whereas the contract per se will not be considered as gratuitous when the game developer benefits from the network effect and the population of the virtual world of the user-created content, players' stories and avatars, therefore, the relevant consumer protection framework and intellectual property protection framework should be updated in order to evaluate and take into account such counter-performance.

The lack of clarity in relation not only to the overall price of the contract but to the scope of rights and obligation, applicable legal framework, transfer of rights, should be taken into account in relation to the transparency requirements' fulfilment in the developer versus player legal relationships. As can be seen from above, following the general practice, standard term EULAs or "Terms of Service" agreements include various vague terms that do not allow standard users to evaluate the scope of the obligations and to see the full picture of economic consequences of the contract.

Worth underlining that the European Parliament agreed with the decision of the Paris Tribunal stipulating that such hidden terms in gratuitous subscription contract do not provide a clear overview on the subject of the contract to the consumer, and the consumer, knowing explicitly the economic consequences of such gratuitous contract would not agree to such terms during the individual negotiations.[560] The European Parliament recommended classifying such terms under the "grey list" or a list of possibly unfair consumer terms that would require individual,

[557] Ibid.
[558] Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, Update the Unfair Contract Terms directive for digital services, Study requested by the JURI committee, PE 676.006 – February 2021, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pdf
[559] Loos M., Luzak J., note 383.
[560] Update the Unfair Contract Terms directive for digital services, note 558.

separate and explicit consumer consent to be considered as fair contractual practice.[561] Therefore, before proceeding with derivative work creation, which can be considered even a personalized avatar creation, as explained in chapter II of the present research, the player needs to be explicitly informed on the legal rights and obligations arising from such derivative work and to be provided with a possibility to revoke the licence granted if such licence is expected in order to enjoy virtual world.

Certain game developers took into account the above-discussed transparency requirements and, indeed, provide players with opportunities to revoke the right for derivative works. For example, the "Epic Games" EULA (the "Fast and Furious" video game) state:

"*Epic may permit you to use the Services to create, develop, upload, submit, transmit, or otherwise make available to Epic and other users additions, enhancements, modifications, or other user generated content for certain video games ("Mods") as permitted by the developer or publisher of such video games ("Rightsholder")...By submitting Mods to Epic, you hereby grant to Epic a non-exclusive, fully-paid, royalty-free, and revocable license to use, copy, modify, distribute, publicly perform, and publicly display your Mods for the purpose of enabling end users to install and use the Mods*."[562]

Notwithstanding the revocability of the derivative licence in such games, as provided in the above example, players are not explicitly informed on economic consequences triggered by the standard term EULA acceptance while accessing the video game. And a certain number of consumers is unable to understand such economic impact due to the limited legal capacity (minor's involvement, for example).

Considering the above-mentioned, apart from the personal data transfer or build-in payments availability, game developers in virtual worlds tend to expect exclusive intellectual property rights transfer from the players. Such creative works or derivative works of players populate the virtual world and attract more consumers to such gaming platforms benefiting from the network effect. In cases, when the intellectual property rights transfer is expected as the consumers' counter-performance the relevant consumer protection framework should be applied. The terms on the exclusive irrevocable transfer of the intellectual property rights from players

[561] Ibid.
[562] Epic Games EULA, available at: https://www.epicgames.com/store/en-US/eula.

to game developers should be recognized as unfair commercial practice on the Community level and relevant consumer protection guarantees applied.

F. Transparency Requirements in Relation to Applicable Law

The traders in digital mass click-wrap contracts, especially, in the gaming industry, tend to abuse the absence of the bargaining power of the consumer and to cover the consumer contract under (1) the intellectual property law framework (2) the gratuitous contract framework, that significantly increases misbalance between parties. Apart from the limited compliance with the transparency principle in relation to the price of the contract and consumers' counter-performance, when a "free" subscription contract is used to cover paid digital content supply provisions, the game developers, in general, try to avoid the application of the European consumer protection framework by selecting the governing law applicable to relationships as the legal system located outside the European Union.

The game developers tend to select the governing law as the law of the country of the trader's registration, not the consumer's residence. For example, "Crazy Panda Games" (various mobile games) EULA states that all disputes are subject to the law of the Russian Federation and all disputes must be resolved as per the law where the game administrator is located.[563] The "Mad Dog Games" (the "Ghost Busters" video game) selects the law of Florida State as the governing law for the consumer contract.[564] The "WarCave Games" (the "Black Legend" video game) EULA obliges the consumers to comply with the provisions of the law of Belgium, a country where the trader is located.[565] The above shows that game developers select the governing law, as the law of the trader's establishment or permanent office. Such an approach allows manipulation with the scope of the consumer guarantees for the digital content supply contracts as traders are able to select the suitable jurisdiction following the freedom of establishment.

As per the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter referred to as "Rome I"), consumer contracts should be governed by the law of the country of the consumer's residence as well as shall be governed by the law of the country where the consumer has his habit-

[563] CrazyPanda Games EULA, note 547.
[564] Ghost Busters EULA, available at: https://playghostbusters.com/en/eula/.
[565] Black Legend Games EULA, available at: https://www.blacklegendgame.com/eula/.

ual residence in cases when the trader directs its activity to the country of the consumer's residence directly or indirectly.[566] Rome I provides parties the opportunity to agree otherwise and select different governing law, however, such a choice of law should not deprive consumers of the protection granted in the country of the consumer's residence following the standard choice of law rules.[567]

In the Amazon EU case, CJEU came to the conclusion that a governing law clause where the general rule on the consumer's residence is disregarded and the law of the trader's establishment is selected can be considered as unfair practice in consumer contracts.[568] The selection of such choice of law can be triggered by the violation of pre-contractual obligations on information regarding substantial grounds of the future legal relationships and transparency requirements, as the consumer cannot be fully informed relation all costs connected to the judicial proceeding,[569] for example, in the United States or Russian Federation following the clauses of the contract, especially in cases where the law of such countries provide fewer consumer guarantees compared to the European legal framework.

The same was confirmed in Ingmar GB Ltd versus Eaton Leonard Technologies Inc. case. The court stipulated that the mandatory regime of the European law should supersede contractual provisions, even when the parties reside overseas.[570] The choice of law prescribed in the standard term EULA, which indicated that any disputes would be re-directed to the overseas courts would facilitate consumer's exclusion from the legal actions against the developers.[571] Moreover, the lack of transparency regarding the mandatory consumer protection requirements and applicable law can discourage consumer from proceeding with legal action in consumer's home country as well.[572]

The game developers' selection of the choice of law in consumer contracts as a law of trader's establishment might lead to the deprivation of the consumer protection guarantees for players, especially in cases when a consumer is located in the European Union and the governing law

[566] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, p. 6–16, art. 6
[567] Ibid.
[568] Case C-191/15, note 461.
[569] Sitnik P., note 506.
[570] Case C-381/98, Ingmar GB Ltd v Eaton Leonard Technologies Inc., Judgment of the Court (Fifth Chamber) of 9 November 2000.
[571] Loos M., Luzak J., note 383.
[572] Ibid.

selected is the jurisdiction located outside of the EU. A so-called "*qualified effects test*" should be applied in order to determine applicable law - if the contract has an immediate and substantial effect in the European Union, the European regulatory framework should be applied.[573] The target rules, similar to the rules on the applicability of the Digital Market Act should be established on the Community level in order to stipulate clear norms in relation to cross-border service provision in the gaming industry. As per the Digital Markets Act, the respective regulatory provisions are applied to services providers that offer digital services to users or the end users established or located in the European Union, irrespective of the place of establishment or residence of such digital platform and irrespective of the law otherwise applicable to the provision of the digital service.[574] Thus, when a gaming company established overseas targets a significant amount of the European players, the EU consumer guarantees should prevail

Considering the above-mentioned, in order to facilitate the transparency in the gaming industry and to ensure that the consumers of the European Union are protected, it is important to determine how gaming companies are directing their services to the EU consumers and to establish clear rules of the applicability of the EU law. The approach taken by the EU in order to regulate cross-border digital services on core platforms or gatekeepers can be taken as an example of possible regulation to the gaming platforms. Unfortunately, gaming platforms cannot be classified as gatekeepers or as core platforms, as per the definitions provided in the Digital Market Act,[575] however, the approach taken in the above-described regulation can serve as a base for further regulatory changes in relation to the gaming products and the background of determination of the target rules in the EU in order to protect rights of European consumers and minors in the gaming industry. Simple abolishment of the IP blocking by the gaming companies can be considered as indirect targeting of the EU consumers on the author's opinion and should trigger relevant EU consumer protection framework applicability in relation to the consumer contracts.

I. Intermediate Conclusions

In free-to-play video games, the game developers use a hybrid business model by allowing gratuitous access to the gaming platform per se, however, including build-in payments in such

[573] Case C-413/14 P, Intel Corp. v European Commission, Judgment of the Court (Grand Chamber) of 6 September 2017.
[574] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.
[575] Ibid.

a "free" digital product. Such payment can be done both through direct fiat money transfer and through various indirect payment models with the involvement of the virtual currency or in-game tokens exchange. Moreover, the players can be expected to allow personal data usage in commercial purposes or transfer exclusive non-revocable intellectual property rights for the user-created content as consumers' counter-performance under such a hybrid contract.

Freemium business model, indeed, can serve both interests of traders by providing revenue for the additional digital content, as well as the interests of the consumers by abolishing constant advertisement during the free digital service provision and facilitating better quality of services for an insignificant cost. However, such a business model should be subject to particular consumer protection guarantees and transparency requirements in order to enable consumers' evaluation of the actual economic consequences of participation in the above-discussed business model and to minimize unfair consumer practices in the gaming industry.

The present part examined transparency obligations established on the EU level to protect the interests of consumers when bargain power is significantly reduced and to facilitate fair treatment in online and offline business. In modern realities with various business models application and the usage of hybrid products, the transparency principle plays an important role while the average consumer might not be fully aware of the technological solution (for example, in relation to the payment with data, with in-game tokens or crypto-currency) or the legal status of such innovative technological solution.

Free-to-play EULAs are gratuitous contracts covering free access to the video game, if any of the additional significant provisions are added to such EULA that is going out of the scope of free virtual world access provision, for example, build-in payments, virtual currency exchange, virtual items purchase, user-content creation and loot boxes availability, the different legal regime would be applicable to such a transaction and, therefore, a separate explicit knowledge and acknowledgement of the consumer is required. For example, when purchasing virtual items or topping up a virtual in-game wallet with virtual currency or in-game tokens, the player needs to be explicitly informed on economic consequences, rights and obligations arising from such a transaction and to give explicit consent in relation to such a transaction. In order to facilitate consumer consent as well as transparency in relation to the complex contractual arrangements, the modality of standard term contracts and the gaming interface adjustment to such modality should be available in the gaming industry.

As per the analysis concluded, it can be seen that in the standard term contracts used by the game developer (1) do not provide clarity on the total price of the contract and the way in which such price is calculated, (2) do not request explicit player's consent for the transactions that are going out of the scope of the free platform access provision, (3) contractually deprive consumers of possibility to decide upon intellectual property rights for user-created content and (4) tend to abuse the dominant position at the market and determine the applicable law in violation of the European judicial norms.

Standard term EULAs and "Terms of Service" contracts of the popular video games show that the game developers tend to use, apart from the intellectual property framework application to the digital service provision consumer contracts, terms that are introduced not in the clear, plain and intelligible language. The game developers do not provide transparent pre-contractual information in relation to the terms of future possible payments, applicable law and subscription obligations (for example, automatic payments for in-game virtual items from the consumer's e-wallets).

All of the above can be considered as unfair consumer practices that affect the enforceability of the consumer protection requirements due to the hybrid nature of contractual arrangements and widespread usage of price obfuscation mechanisms. Therefore, it is important to ensure transparency during pre-contractual and contractual relationships between the parties as well as explicit consent provision in order to avoid misbalance in legal relationships, judicial costs differentiation, damages to the business reputation and ensure competitive quality service provision in the European market. For that purpose, the "black list" and the "grey list" of unfair consumer practices with the indication of including but not limited to the price obfuscation mechanisms should be updated in order to facilitate enforceability and transparency in the gaming industry on the EU level.

Considering significant minor's involvement and scalability of the gaming industry on the European level, taking into account the cross-border nature of the digital service provision and availability of the games provided by the traders established outside of the European Union, the relevant regulation establishing clarity on the status and liability in the consumer protection guarantees and introducing certain information and transparency obligations on non-EU based traders as well should be adopted on the Community level. The European consumer protection framework should establish specific targeting rules that would define the service provision

as taking place in the EU and targeting the EU consumers, which would automatically result in the EU consumer protection framework application notwithstanding the provisions of the standard term contracts.

3. Conformity of Goods in Virtual Environment

A large market share of e-commerce activity is based on "free" or "freemium" business models, driven by personal data collection, advertising or other sources of revenue.[576] The fact that the consumers do not pay for such services in a traditional sense with fiat money transfer does not mean that such services have no economic value,[577] and, thus, should not be included in the relevant regulatory framework. As was mentioned above, free-to-play video games are downloaded/accessed by the player free of charge, however, the economic interest of the trader is represented in further microtransactions (supply of separate digital content),[578] derivative works transfer or personal data collection for the commercial purposes.[579]

The hybrid business model used by the developers is managed by the gratuitous contract that covers both free access to the gaming product and paid digital content. Such a hybrid contract, in connection with transparency issues explained in the previous part regarding the price of the contract and conditions of build-in payments, can mislead the consumer on the actual economic consequences of the legal relationships, can lead to manipulations with the applicable legal framework and facilitate unfair treatment. In cases when the legal relationships are positioned as gratuitous, however, the economical investment through fiat money, virtual currencies, personal data transfer or in-game token circulation is expected from the consumer as counter-performance, the contract should be subject to the consumer protection guarantees.

Apart from the transparency issues related to the nature of the contract on the digital content supply, the conformity of digital goods can be considered as one of the consumer protection guarantees affected in the gaming industry. Taking into account the new emerging technologies applicable to the gaming industry, for example, such as metaverses or a virtual reality universe,

[576] Duch-Brown N., Martens B., note 47.
[577] Ibid.
[578] Davidovichi-Nora, note 6.
[579] Narciso M., note 70; Digital Content Directive, note 74.

like Axie Infinity video game,[580] widespread of the NFTs purchases in various gaming platforms,[581] and the existence of third-party virtual items trading platforms, like DMarket,[582] the facilitation of the consumer protection in the digital environment became a widely discussed topic. Particularly, virtual items trading should be investigated for the subject of conformity of such digital content in order to meet the consumers' expectations in an online environment.

Even though the majority of game providers use the microtransaction business model in order to gain revenue, however, certain transactions do not bear insignificant character. For example, in the "Entropia Universe" video game, a virtual item, "Club Neverdie", was sold for 635,000 U.S. dollars, in the "Second life" game, a virtual city of Amsterdam was sold for 50,000 U.S. dollars.[583] While purchasing such virtual items for a significant amount of money the consumer expects that the actual gaming code that represents the virtual item will work on the particular gaming platform, that the cybersecurity and the integrity of the virtual item are secured by the developer. The present part will focus on the issues of the conformity of the digital goods in the gaming industry and will analyse the existing European legal framework in order to determine whether the applicable regulations are able to meet consumers' expectations and to protect the rights and interests of the consumers in the gaming industry.

The first attempts to address the consumer protection issues of gratuitous digital contracts in relation to the conformity can be traced back to the Common European Sales Law (hereinafter referred to as "CESL").[584] Particularly, as per the provisions of the CESL, in legal relationships on the digital content that is not supplied in exchange for the payment of a price, the consumer may only claim damages for loss of such digital content or damage caused by the lack of conformity of the supplied digital content.[585] Particularly lack of suitability of the digital content when applied to the consumer's property, hardware, software and data, except for any gain of which the consumer has been deprived by that damage.[586] Such an approach can be considered

[580] Information on Axie Infinity, note 60.

[581] News Report, 'Welcome to the metaverse, The metaverse, a virtual reality-powered version of the internet, is Silicon Valley's new obsession. Could it change the world?', the Week, 2021, available at: https://www.theweek.co.uk/news/technology/954463/welcome-to-the-metaverse.

[582] Information on Dmarket, available at: https://dmarket.com/.

[583] News Report, 'Top 10 Most Expensive Virtual Items In Game Ever Sold', GadgetRoyal, 2018, available at: https://www.gadgetroyal.com/top-10-most-expensive-virtual-items-in-game-ever-sold.

[584] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final - 2011/0284.

[585] Ibid.

[586] Ibid.

as innovative, as such provisions established first conformity rules and the remuneration rules for digital products.

With the adoption of the Digital Content and the Digital Goods Directive the regulatory status of the requirements on conformity in relation to the digital services, digital content and digital goods has changed in order to established harmonized rules in digital consumer contracts. As per the Digital Content Directive, the trader should be liable for the supply of the digital content or digital service that does not correspond to the latest version, description, functionality, compatibility, quantity, quality, security and continuity of such digital content or digital service.[587] The digital service of digital content provided should fit a particular purpose and the description provided to the consumer prior to the contract conclusion.[588] Apart from that, the digital content or digital service should be in conformity with features of similar digital services and digital products, technical standards and industry-wide specifications.[589]

As per the Digital Content Directive, the digital content shall "*be of the description, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract; be fit for any particular purpose for which the consumer requires it…be supplied with all accessories, instructions, including on installation, and customer assistance as required by the contract; and be updated as stipulated by the contract".*[590]

Moreover, according to the Digital Content Directive, digital content is supposed to be in conformity with technical standards existing in the industry, to be supplied with the necessary updates, including but not limited to the security update, to be in conformity with the most recent version of the digital content.[591] Mentioned requirements are focused on the technical efficiency of the digital content and might be complicated to apply in the virtual world, especially requirements on the latest version of the digital content.

The Digital Content Directive states that mentioned rules on the conformity of digital content should be applied in cases where the character and purpose of such content allow to do so.[592] Virtual items in video games can be considered as a specific type of digital content and, in

[587] Digital Content Directive, note 74.
[588] Ibid.
[589] Ibid.
[590] Ibid.
[591] Ibid.
[592] Ibid.

order to access whether a particular virtual item is in conformity to the requirement, a specific context is supposed to be analysed. In order to access the conformity of digital content in the gaming industry, two different approaches can be applied – to look at virtual items in video games as a particular virtual product (virtual estate, virtual apparel, virtual property) or as program code.

The Digital Content Directive and the Digital Goods Directive separate the conformity requirement into an objective and subjective set of requirements.[593] Such classification is taking the roots from the CESL, which established the rules for the digital product to be in conformity with what the consumer could reasonably expect on the basis of the pre-contractual information provided by the trader.[594] The difference between subjective and objective conformity requirements lies in the source of such conformity – whether the source of conformity is determined in the nature of the relationship between the consumer and the trader (subjective requirements) or in the nature of elements that are part of the agreement because they are reasonably expected by the consumer based on the industry-wide standards, security standards and the newest technological developments (objective requirements).[595]

Important to underline that the conformity of digital content and a digital service supplied directly depends on the contract and conditions specified therein (or subjective conformity requirements), as the conformity of the digital content or digital service is determined in the scope of the trader's "promise" and conditions of supply (for example, description, quality and quantity of particular virtual item) of such a digital service or digital content.[596] The practical application of such conformity pre-requirements in the gaming industry can be complicated, considering the hybrid nature of the consumer contract and the transparency issues described above. As the player is bound with the gratuitous EULA contracts, the description of paid content is usually absent in such a consumer contract or "Terms of Service" agreement, however, the limited description can be present on the gaming platform or virtual marketplace when the player de facto purchases paid digital content.

[593] Carvalho M.J., 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771', 2019, available at: https://ssrn.com/abstract=3428550.
[594] Loos M., Mak Ch., et al.,' Digital Content Contracts for Consumers', Amsterdam Law School Research Paper No. 2012-66, Journal of Consumer Policy, Forthcoming, Centre for the Study of European Contract Law Working Paper Series No. 2012-05, available at: https://ssrn.com/abstract=2081918.
[595] Carvalho M.J., note 593.
[596] Ibid.

In order to prove non-conformity of the digital content purchased by the player on a specific platform, the burden of proof de facto would lie on the player to record the description of the virtual item on the date of purchase, as described in Froukje Faber versus Autobedrijf Hazet Ochten BV case.[597] Otherwise, the consumer would be able to claim only non-conformity with the industry wide-standard, latest technological developments or technical security (or objective conformity requirements). Moreover, the demo version of a free-to-play video game or a public statement made by a game developer or virtual marketplace can serve as a "promise" on conformity and the proof of an agreement with an unlimited number of consumers on the conformity of the particular digital product.[598]

In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of the digital content. The notion of functionality should refer to the ways in which digital content can be used, for instance, for the tracking of consumer behaviour, it should also refer to the absence or presence of any technical restrictions such as protection via the Digital Rights Management or region coding.[599] The notion of the relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for example, the operating system, the necessary version and certain hardware features.

The proper level of pre-contractual information and pre-purchase information under the gratuitous subscription contract in hybrid business models can shape subjective consumers' expectations regarding the digital product and facilitate fair commercial practice.[600] Unfortunately, up-to current date, there is no clear benchmark or clearly formed consumer-oriented industry-wide standards to establish consumers' reasonable expectations in the gaming industry, therefore, the general approach regarding the conformity of digital content and digital service should be applied as legal analogy.

Worth underlining, that the conformity requirements stipulated in the Digital Content Directive and the Digital Goods directive as well cover the notion of the legal conformity indicating the provisions which the contract on the digital content supply or digital service should include.[601]

[597] Case C-497/13, Froukje Faber v Autobedrijf Hazet Ochten BV, Judgment of the Court (First Chamber) of 4 June 2015.
[598] Carvalho M.J., note 593.
[599] Ibid.
[600] Loos M., Mak Ch., et al., note 594.
[601] Carvalho M.J., note 593.

Thus, in contracts covering such hybrid business models as free-to-play video games, both access to the gaming software and paid digital content should be described in detail for the consumer to access the conformity of such digital content.

As explained in the previous chapters, the game developers use the intellectual property rights approach in order to regulate relationships on the game acquisition and in-game transactions. Objective requirements on conformity or the conformity of the digital product with the industry wide-standard (i.e., what the consumer can reasonably expect from similar products available on the market) can conflict or, in the end, override the intellectual property law approach applied by the traders in the gaming industry.[602] In case, a large number of consumers of the gaming industry would expect to receive a refund for purchased termination of gaming access, such an approach can be considered as in the scope of the conformity test application and would prevail over the intellectual property claims of traders in relation to the virtual items.

The conformity of a particular software, or a virtual world as a separate digital product (gratuitous digital service provision or subscription contract in free-to-play video games), would be different from the conformity of particular virtual item or a computer code supplied separately and requiring separate consumer consent (paid digital content supply). However, it can be seen that the provisions of the Digital Content Directive on the conformity are focused on the gaming software as a whole and are hard to be applied to particular parts of the player vs gaming company relationships, for example on virtual item supplies.

When applied to the video game as a unique digital product, the above-mentioned objective and subjective conformity requirements make sense and provide a high level of consumer protection in the digital environment, as game developers are liable to guarantee that the video game has functionality as advertised, compatible with the stated device, gaming software is supplied with the procedure for installation and instructions for usage to the player and relevant updates are installed during the validity of the non-exclusive licence granted. However, as explained above, in free-to-play video games the hybrid business model is applied and the gratuitous contract covers the legal relationships for free and paid content de jure, while de facto any further paid content supply would require separate explicit consent from the player and, therefore, a separate agreement between parties.

[602] Loos M., Mak Ch., et al., note 594.

The nature of counter-performance provided by the consumer do not affect the expectations of the consumer regarding the conformity of the digital products and, therefore, should not affect the level of the consumer guarantees applicable.[603] The consumer should be able to obtain specific remedies for non-conformity of the digital content or digital service notwithstanding the representation of the monetary value of the contract: whether consumer transferred fiat money, virtual currency, personal data, derivative works or agreed for adverting exposure, the requirements on conformity should be applied equally.

Looking into the above-mentioned provisions of the Digital Content Directive, objective and subjective conformity requirements in the scope of the virtual items trade, a few important concepts to consider can be underlined:

(1) When purchasing a virtual item or digital content on third-party platforms, the trader, or virtual items marketplace should be liable for conformity of such a code or virtual items' conformity with the gaming platform to which it is expected to be applied;
(2) Gaming platforms should ensure the integrity and security of such a virtual item from third-party intervention, errors in the code and any technical breaches that might impact virtual items' availability to the player on a particular gaming platform;
(3) Virtual item should correspond the functionality, description quality and quantity provided to the player before the player consents to pay for particular digital content supply;
(4) Virtual items or codes purchased from a marketplace, or a game developer should correspond to the latest version available in the market and be updated when applied to the game together with the gaming software.

Moreover, technical conformity requirements and practical conformity requirements focused on the purpose of digital content supply should be distinguished. The practical applicability of the conformity requirements to the digital content as virtual item (users' expectations and purpose of the contract) or as computer code (technical conformity expectations) virtual world can be explained in a few examples as follows (not an exclusive list):

Characteristics of conformity	*Digital content as a virtual item*	*Digital content as program code*

[603] Mańko R., note 382.

Compatibility of digital content	The virtual item should be compatible with other virtual items (for example, a virtual avatar of the player supposed to be able to use virtual weapon purchased)	Program code is supposed to be suitable to be used in particular online platform or gaming software in a way
Functionality and purpose of digital content	The virtual item should have functions and the purpose advertised by the gaming company – for example, a virtual weapon should be giving a possibility to kill a particular virtual creature or to accomplish the mission	Program code should become a virtual weapon of a particular kind when applied to a particular virtual world as advertised by the gaming company
Specific instructions for installation and usage of the digital content	The virtual item should be accompanied with instructions on how to apply this virtual item towards other virtual items (for example, how to apply virtual weapon or skin to the avatar or how to use it on gaming platform)	Program code should be accompanied by instructions needed for the installation to the gaming platform (particularly, if computer code was purchased on an external platform)
Assistance regarding digital content	The gaming company should provide assistance to the player, therefore, to provide the contact information and valid email address[604] to which the player can address all queries, including ones considering the exploitation and instructions towards particular digital content (both virtual item usage and program code application)	

[604] Common Position on "in-app purchases", note 11; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376.

The latest version of digital content	The player can claim the latest version of virtual skin or virtual item (the latest level of the avatar's ammunition, for example) unless the gaming company directly states before virtual item purchase that this particular virtual item is not of the latest version	The consumer can claim the program code to be updated to the latest version relatively to the technical possibilities of coding language

Notwithstanding the above-provided analysis on the conformity of the digital content stipulated on the EU level, the game developers use a self-regulatory approach and establish contractually own rules on conformity interpreting the Community requirements as ones applicable to the gaming software as a whole product due to the lack of the legal clarity. Analysing the popular EULAs of video games available on the market it can be seen that the virtual items purchased by the player can be demolished, confiscated or seized anytime by the game developer.

For example, the "KalypsoMedia" game developer states in the standard term EULA: "*We reserve the right to supply patches or updates to the game at any time, for example to effect improvements, to remedy software bugs or other problems, to balance out the game or to add, remove, or modify functions. The EULA does not establish any right to have such changes made nor any right to the unchanged continued existence of the original game… As software is, by its nature, complex, we do not guarantee that the game will meet your expectations and will be available with no limitations in all circumstances and without interruptions… The purchase of Virtual Goods grants you a non-transferable and non-sub-licensable right, tied to your Kalypso Account, to use the corresponding function or service, as was offered or described to you in the game. Virtual goods may, depending on their description, be time limited or be bound by a limited number of uses*."[605] The above-explained EULA provisions show that the trader contractually has sole right to decide on conformity of the supplied digital content,

[605] Kalypso Media EULA, available at: https://www.kalypsomedia.com/eu/eula.

to refuse to supply any updates to the digital content, to seize, to change value or quantity of virtual items purchased by the player.

The "SEGA Corporation" (the "Steam" platform) establish in EULA that "*The product, information and related graphics published a part of the product may include technical inaccuracies or typographical errors. You understand and agree that temporary interruptions of the product may occur as normal events. You further understand and agree that we have no control over third-party networks you may access in the course of the use of the product, and therefore, delays and disruption of other network transmissions are completely beyond SEGA's control*."[606] Thus, in the above-described EULA consumers agree that the product might not be compliant with technical standards in the industry and might not work as expected.

Moreover, the same EULA states that the player is solely responsible for all damages that the gaming software can cause to the player's personal computer or electronic device, particularly, the trader informs consumers that "*the use of the product or the downloading or other acquisition of any materials through or in connection with product is done at your own discretion and risk and with your agreement that you will be solely responsible for any damage to your computer system or loss of data that results from such activities*."[607] Therefore, the usage of a particular digital service supplied by the trader, including but not limited to the acquisition of virtual items on the gaming platforms or external marketplaces is done at the sole discretion of the consumer and is free from the trader's liability in case any non-conformity claims and damages to physical or digital goods owned by the player that caused by such a digital content supply or digital service provision.

In the same way, the "Big Picture Games" (the "Rise of Agon" video game) states: "*The game and the world are provided "As is" and Big Picture Games does not warrant that the game or the world will be uninterrupted or error-free, that defects will be corrected, or that the game or the world are free of viruses or other harmful components. Big Picture Games disclaims all warranties, express or implied, including without any implied warranties or merchantability or fitness for any particular purpose or use or non-infringement. Big Picture Games does not warrant that the game or the world will continue to be provided in its present form or in any form*."[608] In the above-provided EULA provisions, the consumer de facto withdraws from any

[606] Information on Steam platform, note 263.
[607] Ibid.
[608] Rise of Agon EULA, available at: https://www.riseofagon.com/legal-info/tos-eula/.

rights in relation to the conformity requirements and accepts that the gaming software and any paid digital content purchased can be provided in non-compliance to the industry-wide technical standards, relevant errors in the code will not be fixed even when reported, and the access to gratuitous or paid digital content can be terminated any time without notice.

The "EnableGames" EULA, on the other hand, provides constant updates to the gaming software, however, contractually lifts any liability to the destruction of the paid digital content from the players' accounts. The above-mentioned EULA states: "*From time to time, without prior notice, EnableGames may in its sole discretion add new features to the Sites, remove existing features from the Sites, provide patches, updates or otherwise modify the Sites. We may provide updates that must be install on your computer or gaming system in order for you to access and use the Game Software. You hereby consent to EnableGames remotely installing updates to the Game Software on your computer or gaming system, without further notice*".[609] Thus, under the gratuitous contract, the game developer can without notice delete or remove digital content that was acquired by the player in exchange for a price. The above shows that while complying with the conformity rules for the video game as a whole product, the traders disregard conformity requirements for paid digital content acquired within the course of the service provision.

It is self-explanatory that software updates are required in order to comply with the latest technological developments, security standards and to provide a better user experience. The requirement to provide software updates to the supplied digital content or digital service is also included in the concept of conformity under the Digital Content Directive and Digital Goods Directive, however, it is underlined that such updates are part of the agreement between the consumer and the trader.[610] The conformity of the digital content or digital service is assessed in relation to whether the digital content or service is updated in the manner that has been stipulated in the agreement, given mutual responsibility of the consumer to install the updates (otherwise deprived of non-conformity claims if non-conformity could have been avoided with such updates) and of the trader to provide the software updates in order to satisfy the newest technological and security industry-wide standard (otherwise responsible for non-conformity of the digital product).[611] In the above-provided EULA examples, it can be seen that the player

[609] Enable Games EULA, available at: https://www.enablegames.com/eula/.
[610] Digital Content Directive, note 74.
[611] Ibid.

is deprived of the right to choose whether to install such software updates even when the trader cannot guarantee the integrity of a digital product and goods of consumer used for the software after such updates, which creates significant misbalance in legal rights and obligations between parties.

The digital services are expected to be provided without interruptions and any contractual clauses that claim otherwise should be considered unfair following the French Tribunal de Grande Instance of Paris decision on the Google case.[612] In order to secure a proper level of consumer protection in such cases, any modifications to the digital service provided or digital content supplied should be communicated to the consumer in advance, the consumer should be communicated with the valid reason for such a modification and an opportunity to terminate the contract keeping the digital content supplied so far or obtaining remedies in case of termination.[613]

The Digital Content Directive establishes that any lack of conformity of the digital product that resulted from the incorrect integration of the digital content or digital service into the consumer's digital environment shall be regarded as the lack of conformity of the digital content or digital service only if such updates were installed by the trader or by the consumer under the trader's direct instructions.[614] Taking into account the above-explained EULA provisions, the game developers undertake sole responsibility for providing software updates without the consumer's consent and, therefore, should be responsible for any of the integrity breaches whether this results in the damage to the consumer's physical goods, digital items purchased or integrity of the software. Defective or incomplete updates should always be considered a lack of conformity of the digital product, taking into account the conditions stipulated in the contract.[615] However, when the contract itself has a lack of legal conformity and violates consumer protection regulations, the software updates that are concluded in violation of the integrity should be considered as ones in a breach of the consumer protection guarantees.

[612] Loos M., Luzak J., note 378.
[613] Ibid.
[614] Digital Content Directive, note 74.
[615] Ibid.

It can be seen from the Digital Content Directive and Digital Goods Directive that legal defects are included in the scope of the definition of conformity.[616] For example, article 10 of the Digital Content Directive states that in cases, where certain restrictions triggered by third-party rights violations (for example, intellectual property law restrictions) impacts the use of the digital content supplied or digital service provided, the consumer should be entitled to the remedies for lack of conformity.[617] Applying such provisions to the gaming industry where, as explained in the previous chapter, the trader versus consumer legal relationships are covered under the intellectual property rights framework, would mean that the consumers are entitled to remedies in cases when the game developer would seize the virtual item purchases as well as in cases when a player terminates the account, as such virtual item cannot be transferred to another platform. The above-mentioned article of the Digital Content Directive provides a possibility for national laws to regulate otherwise,[618] that can lead to the manipulations by the gaming companies in the selection of the applicable law and the country of establishment when applied.

As explained above based on the actual EULA examples, game developers tend to deprive players of the conformity claims contractually. However, notwithstanding the contractual provisions the consumer protection standard stipulated in the Digital Content Directive and Digital Goods Directive should apply to contracts with Europe-based consumers. Moreover, the game developer is subject to liability for any non-conformities that arose at the time of particular supply during the whole duration of the subscription contract.[619] The game developer that allows in-game transactions are liable for the conformity of the digital content supply, thus, both game as a whole (gratuitous digital content in free-to-play video games) and a particular virtual item (paid digital content under hybrid contract) during the duration of the contract. According to the European Commission research, European consumers have suffered a loss in the range of 9 - 11 billion Euros as a result of not being able to receive the remedies after the digital content supply transactions.[620] Therefore, the availability of effective remedies for the lack of

[616] Carvalho M.J., note 593.
[617] Digital Content Directive, note 74.
[618] Ibid.
[619] Ibid.
[620] Digital Contract Rules. Proposals Aiming to Harmonise Rules for the Sale of Digital Content and Online Purchases for all 28 EU countries. Facts and Figures, available at: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en.

conformity, taking into account the cross-border and online nature of the business, should be a priority to ensure consumer protection on the Community level.

As a general rule applied to the remedies for the lack of conformity, priority should be given to the trader to adjust the digital product in order to satisfy the conformity requirements.[621] The trader cannot refuse in implementing changes to the digital product as an answer to the request to supply such digital content in compliance with the conformity requirements on the grounds of disproportionate costs to the trader.[622] For example, the game developer cannot refuse to provide software updates ensuring the integrity of the product, when the elimination of security breaches would result in significant costs spent for the relevant development on the trader's side. In case the adjustment of conformity cannot be feasibly done, the consumer can request the reduction of the price or the refund.[623]

In the gaming industry, players are usually not in a position to demand the conformity of particular virtual items or even gaming software as a whole, as they are deprived contractually of any non-conformity claims under the standard term EULA in violation of the consumer protection guarantees. Notwithstanding the above, if a gaming company, for example, cannot eliminate damages to the hardware or players' virtual items that resulted from any gaming software updates, security breaches or termination of the contract, such virtual items should be refunded by evaluating consumers' counter-performance during the contract.

If the contract is terminated based on non-conformity (when the non-conformity is not a minor one), the parties should be entitled to specific remedies or restitution of rights that the game developer and the player had prior to the moment when non-conformity arose.[624] The rules prescribed by the Digital Content Directive explain directly the remedies for the paid subscription contract – the consumer would be entitled to a refund for the digital content supplied in non-conformity proportionally to already supplied digital content.[625] Taking into account the pay-to-play business model with no further build-in payments, that rule can be applied with no doubt. For example, in cases, when the gaming software leads to the damage of the player's

[621] Digital Content Directive, note 74.
[622] Case C-65/09, Gebr. Weber GmbH v Jürgen Wittmer (C-65/09) and Ingrid Putz v Medianess Electronics GmbH (C-87/09), Judgment of the Court (First Chamber) of 16 June 2011.
[623] Digital Content Directive, note 74.
[624] Ibid.
[625] Ibid.

hardware as a result of a security breach, or recently performed updates – a player would be subject for a refund.

When applied to the free-to-play hybrid business model, on the other hand, such refund rules' application can become problematic. As the contract is positioned as gratuitous, the termination of the access itself will not result in a refund for such termination of access, as no subscription fee was reduced from the player's account. However, accessing the situation on the higher level and following the principles described in Quelle AG versus Bundesverband der Verbraucherzentralen und Verbraucherverbände case (the consumer should not be liable to pay for the use of the product that lacked conformity concluded prior to replacement of such product),[626] the player should have the right to the remedies regarding all purchased virtual items that the player was in possession under the registered account within the gaming platform. When the gaming platform is not terminated, but the non-conformity arose only in relation to the one specific digital product, the agreement on the supply of that particular virtual item should be terminated with the respective restitution of rights and subsequent refund of the paid price or restoration of rights prior to the consumers' counter-performance.

Important to mention, that the Digital Content Directive provides specific rules for the user-created content usage after the termination of the contract based on the non-conformity of the digital product. Particularly, as per the Digital Content Directive, the trader is not obliged to delete user-created content when the contract is terminated if such digital content has no utility outside of the platform.[627] As explained above, in virtual worlds the users add additional value to the gaming platform by the user-generated content. Thus, after the termination of the contract the game developer would still be able to use players' avatars and user-generated content to facilitate the attractiveness and integrity of the particular virtual world (refer to the above-explained example of the "Neverdie" club and character from the "Entropia Universe" video game).

Moreover, the issue of conformity of goods with the digital elements is regulated separately and the specific conformity requirements do not align within the Digital Content Directive and

[626] Case C-404/06, Case C-65/09, Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände, Judgment of the Court (First Chamber) of 17 April 2008.
[627] Digital Content Directive, note 74.

the Digital Goods Directive.[628] For example, if the software would violate the consumer's privacy, that can be considered as a lack of conformity, however, if a digital good violates the privacy of a consumer, that does not necessary lead to the violation of the conformity requirements.[629] In the same way, different rules are applied towards the limitation of liability and software updates.[630] For example, if a video game is sold as software, that would be considered as a digital service or digital content, and respectively the rules of maximum harmonization under the Digital Content Directive would be applied, however, if the same video game is sold in virtual reality version with a virtual reality set, such a game can be considered as a digital good, and respectively the Digital Goods Directive allows the deviation in the national legislation in relation to the specific conformity requirements applied (i.e., limitation of liability on second-hand digital goods).[631] Such a difference in approach can lead to disproportional market manipulation and discriminatory approach towards various consumers regarding similar products.

Notwithstanding the fact that the vast majority of digital products available on the market are "free", or require an alternative to payment, such as personal data, in-game tokens or virtual currency, the provisions of the European directives on consumer conformity provide a higher level of consumer guarantees for paying consumers, thus, for paid digital content in a traditional sense with fiat money transfer.[632] That has a significant impact on the gaming industry where the contract has gratuitous character, however, the player purchases virtual items in exchange for fiat money, in-game currency or virtual currency. Such a difference in approach to paid and gratuitous products creates a significant misbalance between parties and does not meet the consumers' expectations on the digital market.[633]

Together with the adoption of the Digital Content Directive, the regulatory framework on consumer protection was expanded to cover as well gratuitous contracts for digital content supply, where the consumer is expected to transfer data in exchange for counter-performance.[634] However, other types of contract, including contracts on free or open-source software, where the

[628] Sein K., note 96.
[629] Ibid.
[630] Ibid.
[631] Ibid.
[632] Narciso M., note 70.
[633] Ibid.
[634] Digital Content Directive, note 74.

consumer transfers personal data to the trader solely to fulfil the trader's obligations prescribed by the law, contracts where the player transfers derivative works as a counter-performance, contracts with indirect payments, such contracts would fall out of the scope of the Digital Content Directive.[635] Notwithstanding the above, the consumer protection requirements should be fulfilled despite the price of the contract paid as a counter-performance,[636] and notwithstanding whether the contract is gratuitous or personal data transfer is expected.

Considering the above mentioned, it can be concluded that the conformity requirements available in the harmonized European consumer protection and e-commerce framework provide limited consumer protection mechanisms in relation to the digital content supply. The majority of the conformity requirements cannot be applied to specific types of digital content due to the price obfuscation mechanisms and lack of regulatory framework. Moreover, due to the lack of efficient protective mechanisms in relation to the digital content conformity, the difference in framework applicable to "free" and paid content, self-regulatory approach dictated contractually by the game developers, the consumers do not have the possibility to enforce the conformity rights violations respectively. Therefore, the relevant changes on the Community level are required in order to add gratuitous contracts under the scope of the existing consumer protection legal framework as well as to create new regulations focused on hybrid business models, in-game transactions on virtual items and alternative payment methods. The conformity of digital content and digital services in both free, paid and hybrid contracts should be ensured and the consumer should be entitled to respective remedies and refund for money invested in case of legal non-conformity, subjective or objective non-conformity of the digital product.

4. Transactions with Loot Boxes in Video Games. Consumer Protection Rules versus Gambling Regulations

The previous parts of the present research were focusing on the transactions with virtual items and consumer protection issues arising from the availability of build-in payments in free-to-play video games. The present part will focus on consumer protection and, particularly, minors' protection, in transactions with the involvement of the randomized digital content, or so-called loot boxes.

[635] Ibid.

[636] Carvalho M.J., note 593; Narciso M., '«Gratuitous» Digital Content Contracts in EU Consumer Law', 2017, 5 EuCML 198.

Loot boxes are virtual items (virtual boxes), which contain a random virtual item or a set of items, such as boxes with random content.[637] Loot boxes can be:

(1) acquired during the gameplay;

(2) purchased in exchange for fiat money;[638]

(3) purchased in exchange for money value item (i.e., in-game token, crypto-currency);

(4) acquired during gameplay but a "key" to open purchased for fiat money or money value item.[639]

Loot boxes can contain functional virtual items, in-game currency, decorative virtual items, which as well can provide players with an advantage over others to compete in the video game. For example, in the "Star Wars: Battlefront 2" video game it is possible to purchase loot boxes containing in-game currency, functional items, and cosmetic items (skins) in exchange for in-game virtual tokens, which, on the other hand, are exchanged in advance for fiat money.[640] In the "FIFA" video game it is possible to purchase loot boxes containing a random set of players.[641]

Such characteristics of look boxes as the involvement of chance, availability of randomized content, possibility to purchase and trade such randomised items caused discussions in doctrine and raised awareness in various countries. According to the Belgium Gaming Commission's decision, transactions with loot boxes violate gambling legislation when loot boxes can be purchased for fiat money.[642] According to the Netherlands Gaming Authority, transferable loot

[637] Zendle D., Cairns P., 'Correction: Video game loot boxes are linked to problem gambling: Results of a large-scale survey', Plos One 14/3, 2019, available at: https://doi.org/10.1371/journal.pone.0214167.

[638] Ibid.

[639] Close J., Lloyd J., 'Lifting the Lid on Loot-Boxes, Chance-Based Purchases in Video Games and the Convergence of Gaming and Gambling', Gambleaware, 2021, available at: https://www.begambleaware.org/sites/default/files/2021-03/Gaming_and_Gambling_Report_Final.pdf.

[640] Gilbert B., 'The latest major 'Star Wars' game finally dropped its most controversial aspect — but it may be too', Business Insider, 2018, available at: https://www.businessinsider.com/star-wars-battlefront-2-drops-loot-boxes-2018-3?IR=T.

[641] Kleinman Z., 'The kids emptied our bank account playing Fifa', BBC News, 2019, available at: https://www.bbc.com/news/technology-48908766.

[642] News Report, 'Video game loot boxes declared illegal under Belgium gambling laws', BBC News, 2018, available at: https://www.bbc.com/news/technology-43906306.

boxes, which can be traded between players, fall under the gambling regulation and are regulated on the territory of the Netherland.[643] According to the UK Gambling Commission, loot boxes, which do not allow the player to receive compensation in fiat money outside of the video game (to cash-out money), do not fall under the gambling regulation.[644] According to the French legislation, loot boxes are not considered as ones falling under the gambling regulation as they do not represent monetary value in the 'real-life' world.[645] In China, it is required to disclose odds associated with the random content available in the loot boxes.[646]

The above-discussed regulatory attempts show that the matter of minors' protection, consumer protection and public policy regulation triggered interests of various regulatory authorities to the 'grey' area of loot boxes trade and the virtual world itself lying up the base for the European regulation on the gaming industry. Following the Netherlands Gaming Authority decision, the "FIFA" game developer EA Games was fined for loot boxes usage without an appropriate gaming licence.[647] Even though such fine was overturned further by the court, however, the court reasoning was justified by the absence of the authorized loot boxes trading market and availability of loot boxes in the majority for "free".[648]

Not only authorities worldwide started to pay attention to issues connected with loot boxes, but also academicians. There is an ongoing discussion in the doctrine on psychological harm causing addiction from loot boxes,[649] which might have a direct connection to the necessity of regulating a loot boxes issue on the legislation level. According to the survey held by David Zendle and Paul Cairns among video game players on the subject of the connection of gaming

[643] Press Release, 'A Study by the Netherlands Gaming Authority Has Shown: Certain Loot Boxes Contravene Gaming Laws', The Netherlands Gaming Authority, 2018, available at: https://dutchgamesassociation.nl/wp-content/uploads/2018/04/Press-release-Certain-loot-boxes-contravene-gaming-laws.pdf.

[644] News Report, 'Loot boxes within video games, the UK Gambling Commission', 2017, available at: https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx.

[645] Calvin A., 'French regulators say loot boxes aren't gambling but still require further investigation', PCGamesInsider.biz, 2018, available at: https://www.pcgamesinsider.biz/news/67392/french-regulators-say-loot-boxes-arent-gambling-but-still-require-further-investigation/.

[646] Tang T., 'China: A Middle-Ground Approach: How China Regulates Loot Boxes And Gambling Features In Online Games', 2018, available at: https://www.mondaq.com/china/gaming/672860/a-middle-ground-approach-how-china-regulates-loot-boxes-and-gambling-features-in-online-games.

[647] News Report, 'Penalty sum wrongly imposed: 'loot boxes' in computer game FIFA22 are not a game of chance', Raad Van State, 2022, available at: https://www.raadvanstate.nl/actueel/nieuws/@130206/dwangsom-onterecht-opgelegd-loot-boxes/.

[648] Ibid.

[649] Zendle D., Cairns P., note 637.

problem index to the amount spent by players on the loot boxes in a video game, the strong connection between gambling problem and loot boxes was discovered.[650] Similar research was concluded on the request of GambleAware stating that disproportional amount of revenue obtained from loot boxes trade shows a concentration of high spenders that show signs of the gaming addiction.[651]

Notwithstanding mentioned above, representatives of gaming companies claim that loot boxes are similar to collectable items, such as toys, baseball cards or even Kinder Surprise.[652] Moreover, the players always get something as a result of the loot box acquisition, therefore, there is no chance of having an empty loot box, only the virtual item can be not what the player wanted exactly.[653] For example, in the "FIFA" video game it is possible to purchase a loot box with a random set of virtual football players, where the player and its value determines by a chance.[654]

Despite the ongoing discussion on the legality of loot boxes, companies providing access to video games containing loot boxes started to take precautions in order to protect revenue from governmental fines. For example, Google and Apple put obligations on the developers, who want their product to be available on Google Play or Apple Store, to disclose the odds of loot boxes available in the game.[655]

Considering the above-mentioned, it can be seen that there is no common approach to the subject of legal regulation of loot boxes' trade in the gaming industry, which has a direct connection to determining the legal status of in-game currency, virtual currency and virtual property.

[650] Ibid.

[651] Close J., Lloyd J., note 639.

[652] News Report, 'EA games: Loot Boxes Aren't Gambling, They're Just Like a Kinder Egg', BBC News, (2019), available at: https://www.bbc.com/news/newsbeat-48701962.

[653] Birch N., 'Loot Boxes Aren't Considered Gambling By the ESRB', 2017, available at: https://wccftech.com/esrb-clarifies-stance-loot-boxes/; Þorsteinsson G., Júlíusson R.F., 'A Case Study on Loot Boxes in Two Video Games. A comparison between Overwatch and Star Wars Battlefront 2', 2018, available at: https://skemman.is/bitstream/1946/30791/1/BSc_thesis_A_Case_Study_on_Loot_Boxes_in_Two_Video_Games_GTh_RFJ.pdf.

[654] Cuthbertson A., 'Fifa, PUBG and Overwatch loot boxes 'not gambling', despite fears children could become addicted', Independent, 2019, available at: https://www.independent.co.uk/life-style/gadgets-and-tech/news/fifa-19-loot-boxes-prizes-gambling-addiction-children-a9017271.html.

[655] Roston B.A., 'Google now requires Play Store games to include loot box odds', SlashGear, 2019, available at: https://www.slashgear.com/google-now-requires-play-store-games-to-include-loot-box-odds-29578492/; Apple App store review guidelines, available at: https://developer.apple.com/app-store/review/guidelines/; Google Monetisation and ads, available at: https://play.google.com/about/monetization-ads/.

Moreover, as the loot boxes' topic in the majority is associated with the gambling regulation, worth underlining that there is no common European gambling regulation, as this topic is addressed by the national public policy of the specific Member state.[656]

The national regulations apply gambling legislation differently. For example, in Malta, fiat money input is required in order for transactions or activities to qualify as gambling.[657] Thus, when loot boxes are acquired during gameplay for free, even when the "key" to open is purchased separately, this will not be classified as gambling. The same approach is applied in Belgium.[658] In the Netherlands, on the other hand, free or fermium games with the involvement of chance are considered as gambling, thus, monetary input is not required to be qualified as gambling.[659] Whereas there is the difference in the approach in relation to the status of loot boxes and the legal framework applicable, thus, the present part will focus on consumer protection in the gaming industry with the respect to the loot boxes. Particularly the author will focus on minors' protection, players' protection and transparency requirements fulfilment associated with the above in aspect of the gambling addiction possibilities.

The present part will analyse the definition of online gambling widely accepted in the European Union and will discuss whether operations with loot boxes can fall under the scope of gambling regulations or digital content regulations focusing on the notion of the monetary value of such loot boxes. This research will stress that transactions with loot boxes in free-to-play video games should be regulated on the Community level, where the monetary steak (crypto-currency, in-game tokens or fiat money per se) at the end of the transaction chain with a loot box as a subject is present.

Whereas there is an ongoing discussion considering the status of loot boxes both on academic and legislation level, therefore, first of all, as will be examined further, in order to determine possible legal frames, consumer protection regulations and e-commerce rules for the transactions with loot boxes, it is important:

[656] Information page, Online gambling in the EU, European Commission, available at: https://ec.europa.eu/growth/sectors/online-gambling_en; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of he Regions Towards a comprehensive European framework for online gambling, COM/2012/0596 final.

[657] Malta Gaming Act, note 452.

[658] News Report, 'Video game loot boxes declared illegal under Belgium gambling laws', BBC News, 2018, available at: https://www.bbc.com/news/technology-43906306.

[659] Betting and Gaming Act of the Netherlands, available at: https://wetten.overheid.nl/BWBR0002469/2021-10-01.

(1) to investigate the schemes used by the developer to issue and trade such loot boxes,
(2) to determine whether there is an existing interface to trade virtual items outside of the game (marketplace online platforms),
(3) to define the source of the payment for the transactions with loot boxes (in-game token or 'real-life' money),
(4) to determine the legal status of the in-game tokens.

Taking into account the national level of gambling regulations, in order to determine the status of loot boxes, first of all, the online gambling definition per se should be examined in detail to define whether operations with loot boxes can be considered as gambling, second, the legal status of in-game tokens and crypto-currency should be examined to claim that particular transaction with loot boxes does not include monetary stake, and the last, the definition of online platform and its status should be investigated to determine the liability for gambling activity and subjects falling under the scope of a licensing procedure.

The present part will focus only on the definition of online gambling accepted in the European Union and, therefore, will provide an overview and leading points for further investigations on the status of loot boxes, in-game tokens, and online platforms. Gambling and gaming activity in the EU is defined on the European level, however, the power to access the regulatory status of gambling is left to the Member states.[660] According to the EU legal framework, online gambling services are determined as services that involve wagering a stake with pecuniary value in games of chance provided by electronic means or any other technology for facilitating communication at a distance, and upon the individual request of a recipient of services.[661] Such a definition can be considered as a minimum level definition of gambling activity on the community level, while national laws of the Member state define the scope of each notion included in such a definition and widen the scope of its applicability. For example, Member states can widen the scope of the definition of stake to include free-to-play transactions, crypto-currencies transactions or peer-to-peer transactions, or to widen the scope of the definition of games of

[660] Schwertmann M.A., 'Gambling Licenses in the EU', European Union Law Working Papers No. 14,, Stanford–Vienna, Transatlantic Technology Law Forum, 2015, available at: http://law.stanford.edu/wp-content/uploads/2015/04/schwertmann_eulawwp14.pdf.

[661] Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, OJ L 214, 2014/478/EU; Directive 2006/123, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. L 376 36 EC.

chance and include games of skill with elements of chance under the framework of gambling regulation and request respective licencing.

It can be observed that the main area of the deviations in gaming definitions within the EU states locates in the monetary value or monetary stake input in gaming transaction, similar to the issues in gaming per se, as explained above in relation to the consumer protection scope and legal norms' applicability to paid transactions in free-to-play video games. Additionally, as will be explained below, deviations can be observed in the level of the skill involved during the gameplay.

As a common rule, in order to determine whether the loot boxes transactions can constitute online gambling activity, the below-mentioned minimum set of characteristics should be met:

(1) Service should be provided at a distance through an electronic platform;

(2) Service should involve a game of chance;

(3) Service should involve an interest with monetary value or pecuniary stake.

According to the EU legal framework, following the analysis provided in chapter I of the present thesis, services provided at a distance can be explained as services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of any means which may be used for the conclusion of a contract between those parties without the simultaneous physical presence of the supplier and the consumer.[662] A video game is per se an online platform managed by the developer or third parties. In a video game, users have to create avatars in order to access the game content. Whereas the user and the developer are not present in the same place while the contract on service provision or purchase is concluded, therefore, the first condition of online gambling definition on providing gaming service though electronic means at a distance is met.

The common European definition indicating what can be considered as a game of chance is absent, therefore, while referring to this condition, the national legal framework of the particular Member state should be analysed.[663] Malta, the Netherlands and Germany have regulated

[662] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144.

[663] Schwertmann M.A., note 660.

online gaming markets, which means that there is an extensive network on gaming regulations present and, therefore, the legal interpretation of various gaming definitions is possible. In non-regulated markets, as a general rule, gambling activity is prohibited due to the Member-state public policy. For the above-mentioned reason, regulated markets were taken as examples for the present research.

In gambling-friendly Maltese jurisdiction game of chance is defined as "*an activity the outcome of which is determined by chance alone or predominantly by chance, and includes but is not limited to activities the outcome of which is determined depending on the occurrence or outcome of one or more future events"*.[664] In strictly-regulated Federal Republic of Germany, a game of chance is defined as a game, where "*a fee is charged in exchange for acquiring a chance of winning a prize, and if the decision on winning or losing depends entirely or predominantly on chance; the decision on winning or losing is always considered to be dependent on chance if the decisive factor is the uncertain occurrence or outcome of future events*."[665] Thus, randomized content that is determined by chance, or predominantly by a chance, would constitute gambling activity and would be subject to regulatory authorization in both Malta and Germany.

On the other hand, in the Netherlands, a game can be considered a game of chance when the following elements are present: (1) an opportunity is provided for participants to compete for prizes and (2) the winners of these prizes or premiums are designated through a means over which the participants are generally unable to exercise a dominant influence.[666] Thus, in the Netherlands game of chance is considered a game where a player can exercise a certain amount of influence, thus, apply a skill, however, the outcome is predominantly determined by a change or random outcome.

A loot box per se is a virtual box with randomized content.[667] The user is not aware of a particular content included in the box, and the outcome (items, which a user will get after opening a loot box in a virtual environment) is connected to a random occasion or chance. Even though the video game itself can be considered as a game of skill, meaning that players proceed in the

[664] Gaming Act XVI of 2018 as amended by Legal Notice 204 of 2018 and 418 of 2018 and ACT XLI of 2018, available at: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12832&l=1.
[665] German Federal Interstate Treaty on Gambling, note 278.
[666] Betting and Gaming Act of the Netherlands, note 659.
[667] Zendle D., Cairns P., note 637.

game by using their own skill, however, in the transactions with loot boxes element of chance takes place as well.

In the video games that include loot boxes' transactions, a different approach might be applied depending on the legal perspective and the status of the consumer protection approach taken, as discussed in the previous chapters of the present research. If to look at the video game as a sole product (for example, pay-to-play video game), such a game can be considered as a game of skill, however, if pay-to-play video game includes loot boxes, there will be an element of the chance present. If to look at the video game as a subscription contract (for example, free-to-play video game under free subscription contract with paid content, as discussed in the previous chapters), then the transactions with loot boxes should be considered as a game of chance falling out of the scope of the gratuitous subscription contract.

In the gambling regulations around the European Union, at the current date in Malta, only the hybrid model of the game of skill together with the game of chance is taken into account in the national gambling regulations. Malta Gaming Authority introduced such a new category of games as "controlled skill game", which is defined as "*a contest offered by means of distance communications, wherein players commit a consideration of monetary value, whether in the form of a stake, periodic subscription or the purchase of in-game items which provide an advantage to the player, to compete against other players for the possibility to win a prize of money or money's worth*".[668] Controlled skill games, thus, games with elements of skill and elements of chance, are subject to regulatory approval in Malta.[669] Notwithstanding the fact that in Malta the above-discussed hybrid model is applied to fantasy sports games and competitions, such an approach can be applicable to video games with the inclusion of loot boxes where both games of skill and game of chance is present.

Considering the above-mentioned, due to the randomized content available in loot boxes that is determined by a random number generator (content is generated by chance or predominantly by chance), a sole transaction with loot boxes can be considered as a game of chance and, thus, would meet the second minimum characteristic of the gambling activity. The element of chance is the main characteristic of loot boxes, that differs from any other virtual items' transactions

[668] Controlled Skill Games Rulling, Malta Gaming Authority, 2018, available at: https://www.mga.org.mt/wp-content/uploads/Controlled-Skill-Games-Ruling-Fantasy-Sports.pdf.
[669] Ibid.

in the gaming industry.[670] However, this approach is valid only if the transaction with loot box is a separate contract going out of the scope of the main subscription contract, or if the loot boxes trade is available during the gameplay. If to look at the loot boxes' transactions as part of the gameplay and part of the gaming product, it can be considered as a hybrid model of the game of skill and game of chance. Again, as mentioned above, due to the public policy considerations, there is no harmonized approach in relation to the game of chance versus game of skill classification on the EU level and such hybrid products are taken into account in Malta only on the current date.

The third characteristic of the online gambling definition, or a monetary stake, is a vague point and a reason for ongoing discussion on the legality of loot boxes. As examined above, gambling is under the scope of the public policy of the Member states and the scope of the monetary stake is determined based on the public policy, for example, in Netherlands monetary input is not required[671] (free-to-play games can be considered as gambling if other characteristics are present), however, in Germany a fee is required to be charged for a random content for it to be classified as gambling.[672] Therefore, in order to obtain clarity on the legal nature of loot box transactions in a particular jurisdiction, it is important to determine whether the transaction can involve peculiar value or monetary interest (on the stage of input or output) in order to understand if such a loot box mechanism can be considered as a gambling activity under the national law of specific Member state.

The determination of the monetary value of the loot box is based on the game mechanics used by a particular game developer. There are two main approaches used by developers in the gaming industry: Closed Loop Mechanics and Cashing-in Mechanics.[673] Following the Closed Loop Mechanics approach, items obtained from loot boxes are 'closed' in the virtual world or a gaming platform and cannot be cashed out or traded by users.[674] On the other hand, following the Cashing-in Mechanics approach, the gaming platform can allow virtual items obtained from

[670] Cerulli-Harms A., et al., 'Loot boxes in online games and their effect on consumers, in particular young consumers', Study Requested by the IMCO committee, European Parliament, PE 652.727 - July 2020, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652727/IPOL_STU(2020)652727_EN.pdf.

[671] Betting and Gaming Act of the Netherlands, note 659.

[672] German Federal Interstate Treaty on Gambling, note 278.

[673] Arvidsson Ch., 'The Gambling Act 2005 and Loot Box Mechanics in Video Games', 2019, available at: https://ssrn.com/abstract=3374311.

[674] Ibid.

loot boxes, or loot boxes per se, to be exchanged or purchased for fiat money or money worth items (including but not limited to in-game tokens and crypto-currency).[675] The two above-discussed game mechanics would determine the legal status of the loot boxes and the transactions with such virtual items in the jurisdiction applicable.

In video games that apply Cashing-in mechanism, where virtual items would have a monetary value that can be withdrawn by a player, for example, when a loot box can be sold on a gaming platform or online marketplace for fiat money, such a transaction would have a monetary value or monetary stake included. However, in order to determine whether such a transaction would constitute online gambling and would require regulatory authorization, gambling regulations of a particular country should be examined on the subject of a fee-input requirement. For example, as explained above, in Germany fee input is required and in Netherland gratuitous contracts can also be considered gambling. Thus, the legal status of loot boxes would depend on whether the loot box is purchased for fiat money directly. De jure such a fee requirement can be overridden by the gaming platform with a standard price obfuscation approach applied to the in-game transactions under free-to-play subscription contract – topping up the in-game wallet with in-game tokens that are purchased in advance for fiat money or money value items (i.e., crypto-currency). In the author's opinion notwithstanding the representation, if the monetary stake is present (on the stage of input or output), transactions with loot boxes would constitute a hybrid gaming activity with the inclusion of elements of skill and chance.

However, the situation with Closed Loop Mechanics is not so straightforward, as not only the legal set-up stipulated in standard term EULA or Terms of Service, but as well as the actual gaming interface should be examined in order to determine whether there are elements of the game of chance or gambling activity are present. For example, according to the EULA of the "Blizzard Entertainment" (video games "Warcraft", "Diablo", etc.), the player is prohibited from "*gathering in-game currency, items, or resources for sale outside of the platform or the game(s)*".[676] According to the "Ring of Elysium" video game EULA, the player is advised to retain from selling, leasing, licensing, distributing, or otherwise transferring "*the services, game or any content, including, without limitation, virtual goods or game currency, including participating in or operating so-called 'secondary markets' for Virtual Goods, Game Currency*

[675] Ibid.
[676] Blizzard Entertainment EULA, note 164.

or content".[677] The above-listed contract terms correspond to the Closed Loop Mechanics approach.

Notwithstanding the above, certain gaming platforms tend to secure the legal position through explaining Closed Loop Mechanics in EULA, however, de facto the gaming interface can include characteristics of Cashing-in Mechanics. If cashing-out of virtual items from loot boxes or loot boxes trade only forbidden de jure, but according to the existing mechanism inside the game transaction with loot boxes and virtual items' trade is de facto possible between users and on third-party platforms, such video games can be classified as a hybrid gambling activity and the relevant player protection mechanisms applied.

There is no difference in how fiat money enter the game (virtual items directly purchased by players, in-game tokens purchased by players and exchanged for virtual items or crypto-currency purchased by players to be exchanged for in-game tokens and further to be exchanged for virtual items), as there is a trace of a peculiar stake in all those transactions and both in-game tokens and crypto-currency can be considered as an interest with monetary value or a commodity with a corresponding monetary value.

In spite of the formal status of loot boxes, its relation to the gambling regulation in the EU and the national public policy, various research materials, for example, research concluded by David Zendle and Paul Cairns[678] or James Close and Joanne Lloyd[679] determine loot boxes as ones that can cause gaming addiction. The study concluded by David Zendle and Paul Cairns can provide an overview of the numerical and quotative data supporting the above statement. The research was based on the responses provided by over 7000 players, among which 78% confirmed that they have purchased loot a box in a game at least once, 87% of questioned players has bought another virtual item, 48% were young adults in the age between 18 and 24.[680] The authors analysed both spending on loot boxes and spending on other micro-transactions in video games (i.e., virtual items purchases) and determined that there is a strong dependency between money spent on loot boxes and problematic gambling – the more severe the gambling problem was the more such participant was spending for loot boxes purchase.[681]

[677] Rings of Elysium, EULA, available at: https://www.ringofelysiumonline.com/webterms.htm.
[678] Zendle D., Cairns P., note 637.
[679] Close J., Lloyd J., note 639.
[680] Zendle D., Cairns P., note 637.
[681] Ibid.

On the other hand, the study concluded by James Close and Joanne Lloyd for GambleAware shows that the game developers are often facilitating further loot boxes purchase and, thus, possible gaming addiction, by various psychological techniques such as making 'free' loot boxes available, however, charging for its opening, provision of limited-time offers for loot boxes purchases, price anchoring and cost obfuscation (as discussed in previous chapters – provision of virtual items in exchange for crypto-currency or in-game tokens).[682] The research stipulates that out of approximately 8000 questioned loot box purchasers, 5% were generating over 50% of the industry loot boxes revenue and 1/3 of high spenders were problem gamblers as per the Problem Gambling Severity Index.[683]

Annette Cerulli-Harms in the research concluded for the European Parliament, analyses various loot boxes' mechanics and establishes that not all loot boxes' transactions constitute problems from the gambling perspective, only ones that are focused on the behaviour associated with the immediate pleasure, reward and are repeated.[684] The author of the above-discussed research determined the following pricing strategies that are considered problematic from the gambling addiction perspective and the psychological harm:

1) Baiting offers, in which the player is put under pressure to continue and to purchase particular content (i.e., introductory offers, trial offers, premium content offers etc.);
2) Limited-time offers, in which player is put under pressure to pursue virtual content transaction due to the single opportunity limited time offers;
3) Virtual currencies offers, in which player cannot evaluate the actual economic consequences of the offer (i.e., payment is done through in-game currency, crypto-currency, pre-paid virtual wallet etc.);
4) Bundle offers, in which player is offered a package (i.e., loot box is purchased together with virtual currency or another virtual item) with no determination of a single item value;
5) Social offers, in which players are influenced by streaming of loot boxes opening in various media channels and trade of loot boxes is possible on in-game or external marketplaces for the virtual items' exchange;

[682] Close J., Lloyd J., note 639.
[683] Ibid.
[684] Cerulli-Harms A., et al., note 670.

6) Key offer, in which loot boxes are obtained for free, however, a player is expected to purchase a key in order to open such a loot box.[685]

The above-provided research data shows that the various mechanisms available in the video games in relation to the loot boxes transactions significantly differ from the standard virtual items' transactions in relation to the psychological impact to the player due to the element of chance. The issue of loot boxes and their regulatory status has been brought up on several occasions. In the Unlighted Kingdom with new upcoming changes to the gambling legislation the status of loot boxes is as well on the table.[686] In Netherlands, Belgium and Slovakia the gambling regulations introduce a full ban for loot boxes usage.[687] Spain is also considering regulating loot boxes status on the national level.[688]

In the United States, the court was unable to decide a case opened against Apple due to the minors' involvement in the loot boxes purchased in the video game sold on the Apple platform due to the lack of the legal definition of the loot boxes status.[689] Thus, the lack of legal clarity results in the impossibility of enforcement in order to protect the rights of minors and consumers in the gaming industry. According to the above-mentioned, regulatory changes are required in order to ensure the balance between the parties and legal protection during the loot boxes transactions.

Following to the analysis provided above, it can be seen, that free-to-play video games allowing loot boxes transactions could fall under specific gambling regulations based on the public policy and the national law of a particular country in relation to the determination of the game of chance and gambling activity per se. Even though the status of loot boxes as a gambling activity is questionable and should be determined on a case-by-case basis, however, the following common feature of loot boxes can be observed:

(1) Loot boxes contain the element of chance;

[685] Ibid.
[686] Close J., Lloyd J., note 639.
[687] Cerulli-Harms A., et al., note 670.
[688] News Report, 'Spain looks to tweak gambling law to include NFTs and loot boxes', EGR Global, 2022, available at: https://egr.global/intel/news/spain-looks-to-tweak-gambling-law-to-include-nfts-and-loot-boxes/.
[689] News Report, 'Apple Sheds Loot Box Video Game Gambling Suit, For Now', 2021, Bloomberg Law, available at: https://news.bloomberglaw.com/litigation/apple-sheds-loot-box-video-game-gambling-suit-for-now?context=article-related.

(2) Price obfuscation mechanisms used by the game developers can cause significant psychological harm and cause gaming addiction on a higher scale in transactions with loot boxes compared to transactions with other types of virtual items.

Therefore, notwithstanding the status of the gambling activity in a particular country, the regulations on price obfuscation mechanisms on the EU level should be adopted in order to eliminate the risk of gaming addiction and psychological harm to players, apart from the facilitation of the transparency requirements. Moreover, taking into account the above-provided research data in relation to gaming addiction development, specific age restrictions and classification should be applied in order to protect minors from psychological harm during the gameplay.

Currently, industry-adopted age classification that was developed by the voluntary organization Pan European Game Information (hereafter referred to as – "PEGI")[690] and implemented by various European policymakers is applied to gaming products.[691] PEGI classification is focused on such elements of adult content as violence or explicit visual content. For example, according to the PEGI classification, games with a rating of 18+ are games that show violence to defenceless characters, promote illegal drugs and explicit sexual activity.[692] Whereas, the monetization of the video games, loot boxes availability, the significance of possible transactions and the legal capacity of players is not taken into account in such video games' differentiation, thus, it is possible that monetized video games contain loot boxes can be available for minors.

In the EU minimum legal age for gambling activity is 18 years old (for example, in Belgium it is 21 years old with limited access for 18 years old,[693] in the UK,[694] Netherland[695] the consumer should have reached 18 years old). Therefore, video games including loot boxes or requiring monetary payments should take respective age group classification in relation to the gambling and legal capacity prescribed for the contract conclusion. Considering the fact that, loot boxes

[690] PEGI classification, note 345.

[691] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of consumers, in particular minors, in respect of the use of video games, COM/2008/0207 final.

[692] PEGI classification, note 345.

[693] European Casinos information, available at http://www.europeancasinoassociation.org/country-by-country-report/.

[694] Ibid.

[695] Ibid.

transactions in EU constitute 34% of all microtransactions revenue,[696] there is an urgent need to regulate the status of loot boxes on the Community level and ensure that price obfuscation mechanisms are not applied in the gaming industry.

As per the study commissioned by the European Parliament, it can be concluded that minors are more vulnerable to the problematic game designed, especially ones involving psychological manipulations in order to facilitate loot boxes purchase, due to the lack of established self-control and ability to define economic consequences and probabilities.[697] The above-mentioned study underlines that due to the market fragmentation and difference in the gambling regulations, the legal framework on consumer protection should be amended in order to provide harmonized legal regulations in relation to loot boxes and to facilitate consumer and minors protection in alignment with the Digital Single Market strategy.[698]

Indeed, due to the public policy considerations and differences in the definition of gambling available in the various Member states, the regulation of loot boxes, notwithstanding the presence of the element of chance, should be addressed on the European level in the scope of the consumer protection framework. The European policymakers should ensure price transparency, impose specific information and contractual obligations on the gaming platform, facilitate age restrictions and age classification in order to ensure the balance between parties and the enforceability of the legal norms. The above-listed measure will reduce psychological harm due to the transparency of mechanisms and will ensure that the possibility of gambling addiction is tracked through specific limits and effective measures.

Considering the above-mentioned, even though various Member states define gambling activity in respect to the monetary stake on the input (loot boxes purchase) or on the output (possibility to cash-out), loot boxes are not different in that from the other in-game microtransactions with the virtual items. The main difference between virtual items' transactions and loot boxes' transactions is, indeed, the element of chance, which, in conclusion to the psychological tools used in the gaming industry in order to facilitate loot boxes revenue, has significant influence and the direct connection to the development of the gaming addiction. Various mechanics is used by the gaming platforms in order to disguise the real value of the virtual items, including

[696] Key Facts on 2018 trends and data citing sources from Newzoo 2018 Global Games Market and own data, SFE, 2019.
[697] Cerulli-Harms A., et al., note 670.
[698] Ibid.

but not limited to loot boxes, however, this indicates only the lack of transparency in player versus developer legal relationships and stresses out the need in the wider legal regulations in the gaming industry focusing on the transparency requirements and the consumer rights protection. Therefore, the status of loot boxes needs to be clarified on the EU level or, due to the public policy considerations, on the national level in Member states under the umbrella of the consumer protection legal framework.

5. Intermediate Conclusions on the Legal Challenges in the Gaming Industry

In the present part, the author focused on the hybrid nature of the digital content supply relationships in the gaming industry. Particularly, the present part investigated various borderline cases related to the multi-level and multi-party legal framework applicability within one complex gaming product – i.e., gratuitous contract with the availability of build-in payments, loot boxes transactions, online marketplaces for virtual items. The author examined various price obfuscation mechanisms applied both to virtual items transactions and to loot boxes acquisition in the scope of the consumer protection requirements and e-commerce regulations with using "real-life" EULAs examples from the popular video games.

Based on the analysis provided, it can be seen that the game developers tend to disregard the transparency requirements, use price obfuscation mechanisms and deprive a player of intellectual property rights and rights for effective remedies contractually. On the other hand, the current European consumer protection and e-commerce framework do not provide clarity in relation to the various types of digital products, hybrid business models and indirect payments, which facilitates the contractual establishment of the self-regulatory approach dictated by the game developers.

The author analysed the alternative payment models available in the gaming market, particularly, counter-performance with personal data, intellectual property transfer, crypto-currency and in-game tokens, which are used by the game developers in order to disguise the actual economic consequences of the game participation, facilitate network effect and benefit from the legal gaps. It was discovered that depending on the players' counter-performance different levels of the consumer protection guarantees applied. For example, under the Digital Content Directive, if the player uses personal data as counter-performance in "free" contracts, specific

mechanisms are applied in order to ensure data protection, transparency and consumer protection in such contract. However, in contracts where the player is required to top-up a virtual wallet, purchase virtual content or transfer intellectual property rights as a counter-performance, such players have minimum legal protection, as such a contract de jure is considered as free. Therefore, there is a difference in consumer protection framework's application between offline and online services in the same way as between online services paid in the traditional sense with fiat money and online services provided with involvement of alternative payment models.

Examining popular video games available on the market it can be seen that the following mechanics in relation to the virtual items' transaction is applied by the game developers:

1) Virtual items purchased or traded by players directly in the game or on the third-party platforms (supported, approved or managed by the developer) from the developer, third parties or other players in exchange for:
    a. fiat money;
    b. crypto-currencies;
    c. in-game tokens;
    d. virtual items;
2) Virtual items acquired by the player can be purchased or traded by such player directly in the game or on the third-party platforms (supported, approved or managed by the developer) from the developer, third parties or other players in exchange for:
    a. fiat money;
    b. crypto-currencies;
    c. in-game tokens;
    d. virtual items;
3) Virtual items obtained by players in a game as a result of a particular accomplishment and EULA forbids any transactions with such virtual items, however, gaming interface indirectly provides a room for purchase or virtual items' trade (in a game or on third-party platforms authorized or non-authorized by the developer) in exchange for:
    a. fiat money;
    b. crypto-currencies;
    c. in-game tokens;

d. virtual items.

Considering the above-mentioned, it can be seen that various indirect payment methods are used by the game developer in order to disguise the actual price of the contract. Moreover, apart from the financial contribution or monetary value of virtual items, game developers require personal data and exclusive intellectual property rights transfer from the players as counter-performance under the contract. The above created a significant misbalance between the parties and can be considered as unfair consumer practice.

Analysing the "real-life" EULAs, the author determined that, in general, the transparency requirements in relation to the total price of the contract, the way in which such a price will be determined, the purpose of data collection and data transfer, intellectual property rights of players, governing law and the enforcement mechanisms available are not fulfilled. Due to the legal gaps in the EU regulatory framework in relation to the digital content supply, the gaming platforms apply an artificial quasi-regulatory system contractually that contradicts principles of consumer protection and data subject protection accepted on the EU level. The business model applied misleads consumers in relation to the nature of legal relationships as is advertised as "free", however, de facto depriving consumers not only of financial resources through direct or indirect remuneration but as well of privacy and intellectual property.

Notwithstanding the type of transaction, its monetary representation or expected consumer's counter-performance, in-game transactions with the virtual item should be considered as paid digital service consumer contracts and should guarantee the same level of consumer protection as contracts with the provision of direct fiat money transfer. Unfortunately, at the current date, the European e-commerce and consumer protection framework applies a discriminative approach disregarding innovative and hybrid business models and applying a historically outdated approach established in relation to the open-source software.

The freemium business model, indeed, can serve both interests of traders and players by creating an optional revenue model for the additional digital content together with open access and abolishment of constant advertisement during the gameplay. However, such a business model should be subject to particular consumer protection guarantees and transparency requirements in order to enable consumers' evaluation of the actual economic consequences resulting from the game participation in order to minimize unfair consumer practices in the gaming industry.

As per the analysis concluded, it can be seen that standard term EULAs and "Terms of Service" contracts of the popular video games show that the game developers tend to use, apart from the intellectual property framework application to the digital service provision consumer contracts, terms that are introduced not in the clear, plain and intelligible language. The game developers do not provide transparent pre-contractual information in relation to the terms of future possible payments, applicable law and subscription obligations (for example, automatic payments for in-game virtual items from the consumer's e-wallets).

Important to underline that, indeed, the player can play for free (if no hidden commercial personal data transfer and intellectual property transfer takes place and if the gaming interface does not require mandatory payments as per the game scenario), the participation in further additional digital content supply or loot boxes transactions is optional. However, such an optional paid digital content supply going out of the scope of the main gratuitous contract and, therefore, the separate explicit consent (through transaction password valid for a certain period of time, for example,) and separate contractual arrangements should take place.

The game developers tend to cover all possible scenarios in one standard EULA or "Terms of Service" agreement limiting rights for derivative works of players that have not yet created such works or depriving of enforcement rights and any refund claims in relation to the paid digital content before such a content purchase. Such an approach only adds complexity to the relationships between the parties and created a lack of transparency. In order to facilitate consumer consent as well as transparency in relation to the complex contractual arrangements, the modality of standard term contracts and the gaming interface adjustment to such modality should be provided by the game developers.

From the perspective of the conformity requirements in relation to the digital content, it can be concluded that the majority of the conformity requirements cannot be applied to specific types of digital content due to the above-discussed price obfuscation mechanisms applied by the game developers and lack of regulatory framework. Moreover, the difference in framework applicable to "free" and paid content, self-regulatory approach dictated contractually by the game developers, deprive the consumers of the possibility to enforce the conformity rights violations respectively. Thus, the conformity of digital content and digital services in both free, paid and hybrid contracts should be ensured and the consumer should be entitled to respective

remedies and refund for money invested in case of legal non-conformity, subjective or objective non-conformity of the digital product.

All of the above can be considered as an unfair consumer practice that affect the enforceability of the consumer protection requirements due to the hybrid nature of contractual arrangements and widespread usage of price obfuscation mechanisms. Therefore, it is important to ensure transparency during pre-contractual and contractual relationships between the parties as well as explicit consent provision in order to avoid misbalance in legal relationships, judicial costs differentiation, damages to the business reputation and ensure competitive quality service provision in the European market. For that purpose, the "black list" and the "grey list" of unfair consumer practices with the indication of including but not limited to the price obfuscation mechanisms should be updated in order to facilitate enforceability and transparency in the gaming industry on the EU level.

Considering significant minor's involvement and scalability of the gaming industry on the European level, taking into account the cross-border nature of the digital service provision and availability of the games provided by the traders established outside of the European Union, the relevant regulation establishing clarity on the status and liability in the consumer protection guarantees, implementing the game labelling and age classification of video games and introducing certain benchmarks for transparency obligations, usage of indirect payment methods, loot boxes involvement, conformity of digital products and pre-contractual information on non-EU based traders as well should be adopted on the Community level. The European consumer protection framework should establish specific targeting rules that would define the service provision as taking place in the EU and targeting the EU consumers, which would automatically result in the EU consumer protection framework application notwithstanding the provisions of the standard term contracts.

CONCLUSIONS

The present research examined existing European e-commerce and consumer protection regulatory framework in the scope of the specifications of the gaming industry, particularly, the commoditization of virtual items' exchange in free-to-play video games. The author examined existing contractual arrangements between players and gaming platforms, the nature of the legal relationships between parties, the status of virtual items transactions and the approach taken in relation to the free or freemium digital products under the framework of the supranational regulatory provisions as well as national frameworks of the European member states and has answered the proposed research questions as explained below.

1. Research Question 1

The first research question examined within the course of the present research was: "*Can the existing consumer protection and electronic commerce legal framework efficiently protect consumers from unfair treatment and ensure the balance between the parties considering the standard contract terms usage in the gaming industry?*"

For the purpose of the present research video games were classified as pay-to-play (where the revenue is collected from purchased or licenced access to the gaming platform as a sole product) and free-to-play (where the consumer uses digital service on access to a video game for free, however, gaming platform generates revenue from various in-game activities, which can result in commercial usage of players' personal data, players' intellectual property transfer,

monetization of the in-game transactions and mandatory for view advertisement). The author analysed the characteristics of free-to-play and pay-to-play video games and discovered that notwithstanding the subject matter of the contract, characteristics of the particular video games, legal status of the parties and nature of legal relationships between parties, in the gaming industry rights and obligations between parties are covered under the self-established quasi-regulatory framework through standard term End User Licence Agreements due to the lack of the legal certainly in relation to the innovative business models in the European e-commerce and consumer protection regulations.

From the analysis concluded it can be determined that due to the specifics of the gaming industry (i.e., usage of hybrid business models with paid digital content supply under the framework of gratuitous contract, availability of online marketplaces for virtual items and indirect payment models), not all regulatory acts available in the European Union in relation to consumer protection and e-commerce regulations, as well as separate provisions of those acts, can be applicable.

In particular, the author examined inter alia the following regulatory acts on the EU level in the scope of the specifics of the gaming industry, in-game transactions and alternative payment models used in the video games:

(1) Digital Single Market Strategy;
(2) Consumer Rights Directive;
(3) New Deal for Consumers;
(4) E-Commerce Directive;
(5) Digital Goods Directive;
(6) Digital Content Directive;
(7) Digital Service Act;
(8) Digital Market Act.

Taking into account the definitions and scope of the application of the above-mentioned harmonized framework, it can be concluded that video games per se can be defined in various legal concepts, for example, as a digital service subscription contract, digital content supply or digital goods provision agreement. Such differentiation in concepts applicable is resulting from the lack of legal clarity in relation to the hybrid business models in existing e-commerce and

consumer protection framework and its focus on distribution channels (sole services are provided through one platform based on one contract) and the representation of the product (tangible medium, intangible medium or a combination of both). Moreover, the applicable framework does not provide a clear distinguishing between the above-provided notions (i.e., digital content supply versus digital service provision) and implements various exclusions on the stage of the practical application of the harmonized norms. If the business modes stand out from the standard form of business conclusion (i.e., single level digital product with direct payment in fiat money transfer, or online marketplace for offline goods), the lack of legal certainty regarding applicable harmonized regulations prevails on the Community level, which facilitates difference in interpretation and, therefore, self-regulation through law analogy dictated by the trader through standard term contracts.

Moreover, the author analysed valid standard term contracts of the popular video games, which showed that the gaming platforms tend to:

(1) Establish rules on conduct within the virtual platform and create a horizontal quasi-regulatory system and regulate contractually relationships between players, while such players are not connected through any legal relationships between each other;
(2) Facilitate the element of users' creativity on the gaming platform in order to benefit from the network effect and populate the virtual world with creative elements generated by users, while the contract concluded with players before such creative elements were generated transfers exclusive non-revocable intellectual property rights for all user-generated content during the game participation to the traders;
(3) Use price obfuscation mechanisms, such as in-game tokens usage, crypto-currencies usage, pre-paid fiat money transfer for further purchases, which do not allow players to evaluate the actual economic consequences of the gameplay while such game is advertised as "free" and contractual provisions do not allow to estimate the final price of the contract or the way in which such price is calculated;
(4) Use the player's consent given prior to the game participation under the "free" subscription contract for further in-game payments;
(5) Contractually abolish conformity requirements, including but not limited to the conformity with the gaming software updates and traders' liability for any damage to players' property (physical as well as virtual property) that such update can cause;

(6) Disregard European norms on the legal enforcement and choice of jurisdiction in consumer contracts, which deprives consumers of effective remedies against traders' liability and efficient enforcement of the consumer protection requirements in the EU.

All of the above can be considered as an abuse of the traders' position and the unfair treatment of consumers, which requires to be addressed on the Community level taking into account the scalability of the gaming industry in the EU and minors' involvement. Due to the significant misbalance in the bargaining power and lack of negotiation between parties in standard term contracts, the specifics of the gaming industry and the hybrid nature of digital products should be taken into account in the European consumer protection and e-commerce framework in order to secure mandatory contractual provisions, consent and information requirements in consumer contracts during games participation.

Considering the above-mentioned, the present research shows that the existing consumer protection and electronic commerce legal framework cannot efficiently protect consumers from unfair treatment and ensure the balance between the parties considering the standard contract terms usage in the gaming industry due to the lack of legal certainty in relation to the hybrid digital products and specific consumer protection mechanisms applicable to indirect payment models and innovative digital products.

A. Research Sub-question A

The first research sub-question examined within the course of the present research was: "*Which provisions can be applied to the gaming platform versus user legal relationships from the scope of the European consumer protection framework taking into account specifics of the electronic commerce activities in the gaming industry?*"

The author examined existing consumer protection and e-commerce framework on the EU level in the scope of the game products specifics. Particularly, the present research differentiate the approach in relation to the non-commoditized pay-to-play video games, where the consumer is informed of the total price of the contract on the stage of contract conclusion or paid subscription, and the approach in relation to commoditized free-to-play video games, where the consumer is expected to transfer fiat money, personal data or intellectual property rights as a counter-performance while the contract is advertised as "free".

From the analysis concluded, it can be seen that the EU regulatory framework focuses on sole unique nature products is not adapted to hybrid digital products, alternative payment models and indirect payment mechanisms. The majority of gaming platforms use various methods, to disguise the actual price of game participation under gratuitous contracts. Even though the clarifications regarding paid content covered by the gratuitous subscription contract is present on the Community level, game developers use in-game tokens and crypto-currencies in order to avoid direct fiat money payments and eliminate the possibility for consumers to evaluate the economic consequences of such a contract. For example, the player is required to top up the in-game wallet with in-game tokens, that are previously purchased by fiat money from the gaming platform, and further in-game transactions are "paid" with such virtual money. Thus, players subscribe to "free" game that is out of the scope of the relevant consumer protection provisions stipulated, for example, in the Digital Content Directive, transfer fiat money for in-game tokens and pay for "free" virtual items with such virtual tokens that are not means of payment in the EU but other virtual items.

The European e-commerce and consumer protection framework takes into account the customers' counter-performance during the determination of the level of the consumer protection imposed on the Community level. Particularly, Digital Content Directive, a harmonized act that focuses on the digital content per se, excludes gratuitous digital service provision and digital content supply from its scope of the application – only contracts with direct fiat money transfer or commercial personal data collection are under the framework established by the Digital Content Directive. On the other hand, the Consumer Rights Directive does not establish direct fiat money remuneration as a mandatory condition for its application, however, it imposes certain exceptions that are directly stated in the directive (for example, gambling) or in the national laws of the Member states (for example, the Member states can stipulate financial threshold for consumer contracts that would fall under the Consumer Rights Directive requirements). The New Deal for Consumers clarified that the Consumer Rights Directive should not be applied to gratuitous contracts, where the consumers are exposed to advertisements. Such a difference in approach in relation to the contracts with the counter-performance in personal data and in fiat money contrary to all various means of payment does not meet the consumer expectations and excludes a significant number of digital services from the harmonized consumer-protection framework facilitating the abuse of the market.

Both the Consumer Rights Directive and E-Commerce Directive establish information requirements and mandatory provisions for consumer contracts concluded through electronic means that are not contradicting but complement one another. However, specific provisions of those normative acts cannot be applied to digital content, for example, the withdrawal right under gratuitous digital content supply contracts. The Digital Goods Directive established certain rules and mandatory requirements for contracts with tangible movable items only, which fall under the digital good definition or definition of goods with the digital element, thus, to pay-to-play video games that are represented on a tangible medium. However, in relation to the hybrid products, such as a physical access key that provides authorization for online video games, or a virtual reality set required for augmented reality video game both Digital Goods Directive and Digital Content Directive will be applicable.

The place of free-to-play video games in the EU consumer protection framework is not certain due to the lack of legal clarity in relation to the gaming software and the dependencies on the direct remuneration mechanisms prescribed in the legal acts. Looking at the nature of the legal relationships between parties, it can be concluded that the access to the gaming platform itself can be considered a gratuitous digital content supply contract, however, any further relationships that are not related to the gaming platform access are out of scope of such a gratuitous digital service provision and, therefore, should be treated as paid digital content supply. Players indeed can participate in gaming for free (unless any additional counter-performance is expected). For example, a player signs up for free access to the gaming platform and is not required to be engaged with paid digital content, however, once such a player transfers fiat money or any monetary value (i.e., in-game tokens or crypto-currency) on behalf of the trader, the legal status in relation to the whole platform, including but not limited to access to gaming account, transparency, remuneration, consent and conformity requirements, changes and becomes a subject to the specific mandatory contractual provisions, liability and enforcement.

Video game as sole product or in-game transactions on the intangible virtual items exchange is represented on gaming online platforms, which can be acting as service online platforms (free-to-play video games themselves or online marketplaces for virtual items purchase) or as intermediation service online platforms (online platforms for collaborative gaming). The EU level regulatory framework is applicable only to intermediary services, which again triggers a lack of legal certainty in relation to cross-border service platforms for digital products. In addition

to that, various gaming platforms are established oversees in compliance with e-commerce and consumer protection standard that are not compatible with the EU ones, or the platform itself can be hosted by a private individual or third-party service provider, which would change the approach towards mandatory contractual rules and liability of parties.

Worth to underline that gaming platforms tend to abuse freedom of establishment and manipulate legal gaps in the European consumer protection framework in order to create a most favourable business position in the market at a lower cost by establishing imbalanced relationships and a dominant position with consumers. Video games that do not allow commoditization of virtual items (pay-to-play video games) can fall under the existing consumer protection framework while using the same legal approach to commoditized free-to-play video games can be considered as violation of consumer rights. As gaming platforms mostly offer unique virtual worlds that have no alternative due to the creation story, the game developers use the "take-it-or-leave-it" approach, which significantly impacts consumers in the gaming industry in a negative way when applied together with the lack of regulation.

The rules established in the Digital Service Act and Digital Market Act introduce a new approach towards the definition and regulation of online platforms focusing on the digital features as hosting and data processing service of online platforms, which would cover both service platforms and intermediation platforms including various types of gaming platforms. Even though the above-mentioned acts provide an innovative approach and tackle overseas establishment for cross-border service provision, it focuses on the high scale gatekeepers and excludes smaller service platforms. Therefore, Digital Service Act and Digital Market Act per se cannot fill the legal gaps in consumer protection in the gaming industry but can serve as an example for further gaming-related specialized regulations on the Community level.

Considering the above-mentioned, the provisions of the European e-commerce and consumer protection framework can be applied to the non-commoditized pay-to-play gaming platforms, while the free-to-play gaming platforms are covered only partially depending on the consumers' counter performance.

B. Research Sub-question B

The second research sub-question examined within the course of the present research was: "*What are the legal gaps in the existing legal framework on consumer protection and electronic commerce in relation to the gaming industry in the European Union*?"

The author differentiated the two types of the business transactions in the gaming industry for the purpose of the present thesis, particularly: (1) transactions on the granting access to the video game, (2) in-game intangible virtual items purchase, and analysed the respective applicable European regulatory framework in the scope of the players' protection principle. In the author's opinion, the commoditization of in-game transactions under open software access to the gaming platform allows law manipulation and facilitates unfair treatment due to the legal collisions in the harmonized consumer protection framework and focus of the EU on the standard historically outdated business models: i.e., online marketplaces for offline physical items and remuneration in fiat money transfer.

In a hybrid business model applied within the gaming industry, one set of provisions can cover both (1) access to the gaming software, (2) intellectual property rights of players and developers, (3) derivative works creation, (4) build-in payments, (5) online marketplaces, (6) peer-to-peer exchanges, (7) good conduct regulations, (8) privacy and even (9) anti-money laundering requirements. Such complexity leads to the unfairness of terms applied and a lack of the proper consequences evaluations from the consumers' side in the pre-contractual stage. The existing harmonized framework does not provide any indications in relation to unfair commercial practices within the digital service provisions, which results in difficulties in the enforceability and difference in consumers' treatment as the decision is done on a case-by-case basis and, taking into account, jurisdiction and choice of law clauses in standard term contracts used in the industry, cannot grant efficient rights restoration and enforcement.

Due to the complexity of gaming transactions available on online platforms and the difference in status between gratuitous contracts and service provision for remuneration from the consumer protection perspective, various legal collisions arising from the application of a high-level standard approach in regulations to the free-to-play games. In commoditized video games, contractual relationships between players and gaming platform would include (1) licence agreement characteristics on the stage of the game access, (2) gratuitous digital service

contract, (3) consumer contract on the digital content supply on the stage of the in-game transaction, while in pay-to-play video games contractual relationships are limited to (1) licence agreement characteristics on the stage of the game access, (2) consumer contract on the digital content supply on the stage of contract execution.

Open-source gaming platforms benefit from software distribution in various ways. The traders are interested in monetizing the product developed, and such a monetization can be expressed as follows (while the access remains de jure free of charge):

(1) Digital content is purchased in exchange for direct or indirect payment,
(2) Digital content is free, a consumer is expected to provide personal data in exchange for free digital service,
(3) Digital content is free in order to widen the consumer database, however, advertisement placement in such a free product brings the main revenue (or so-called payment with data business model),
(4) Digital content is, in general, free, however, consumers are offered build-in payments.

Game developers use various models for consumers' counter-performance while the European consumer protection and e-commerce framework are applicable only to sole products, direct fiat money payments and personal data transfer for commercial purposes. At the same time, taking into account the complexity of transactions and various aspects of the business and the relationships between parties, the standard terms contract model does not provide clarity or transparency in relation to such a remuneration model or consumers' counter-performance.

The present research determined that standard term contracts in the gaming industry expect the following counter-performance from the consumers:

(1) Fiat money transfer;
(2) Intellectual property rights transfer;
(3) Personal data transfer;
(4) Virtual currencies transfer;
(5) In-game tokens transfer.

The author analysed the alternative payment models available in the gaming market, which are used by the game developers in order to disguise the actual economic consequences of the game participation, facilitate network effect and benefit from the legal gaps. It was discovered

that depending on the players' counter-performance different levels of the consumer protection guarantees applied. For example, under the Digital Content Directive, if the player uses personal data as counter-performance in "free" contracts, specific mechanisms are applied in order to ensure data protection, transparency and consumer protection in such contract. However, in contracts where the player is required to top-up a virtual wallet, purchase virtual content or transfer intellectual property rights as a counter-performance, such players have minimum legal protection, as such a contract de jure is considered free. Thus, at the current date, the European e-commerce and consumer protection framework applies a discriminative approach disregarding innovative and hybrid business models and applying a historically outdated approach established in relation to the open-source software.

From the perspective of the conformity requirements in relation to the digital content, it can be concluded that the majority of the conformity requirements cannot be applied to specific types of digital content due to the above-discussed price obfuscation mechanisms applied by the game developers and lack of regulatory framework. Moreover, the difference in framework applicable to "free" and paid content, self-regulatory approach dictated contractually by the game developers, deprive the consumers of the possibility to enforce the conformity rights violations respectively. Thus, the conformity of digital content and digital services in both free, paid and hybrid contracts should be ensured and the consumer should be entitled to respective remedies and refund for money invested in case of legal non-conformity, subjective or objective non-conformity of the digital product.

Based on the analysis of the existing contractual arrangements between players and gaming platforms, it can be seen that the game developers tend to disregard the transparency and conformity requirements, use price obfuscation mechanisms and deprive a player of intellectual property rights and rights for effective remedies contractually. On the other hand, the current European consumer protection and e-commerce framework do not provide clarity in relation to the various types of digital products, hybrid business models and indirect payments, which facilitates the contractual establishment of the self-regulatory approach dictated by the game developers and allows manipulation with existing norms focused on the sole unique service products with the standard means of counter-performance.

The European regulations connected to e-commerce and digital content focus on traditional means of e-commerce, such as buying tangible things online (online shopping platform) and

supply of intangible content, which can be distributed on a tangible medium (software, e-books, music), however, other means of e-commerce connected to the purchase of intangible items, particularly in the gaming industry, transaction based on virtual currency, Internet of Things, augmented reality platforms, NFTs etc. left behind the scope of the existing regulation. Therefore, there is an urgent need in adopting European regulations for technological progress in order to protect consumer rights, secure the free movement of digital goods and Digital Single Market strategy in the EU.

Taking into account significant minor's involvement and scalability of the gaming industry on the European level, the cross-border nature of the digital service provision and availability of the games provided by the traders established outside of the European Union, the relevant regulation establishing clarity on the status and liability in the consumer protection guarantees, implementing the game labelling and age classification of video games and introducing certain benchmarks for transparency obligations, usage of indirect payment methods, loot boxes involvement, conformity of digital products and pre-contractual information on non-EU based traders as well should be adopted on the Community level. The European consumer protection framework should establish specific targeting rules that would define the service provision as taking place in the EU and targeting the EU consumers, which would automatically result in the EU consumer protection framework application notwithstanding the provisions of the standard term contracts.

Considering the above-mentioned, among various legal gaps arising from applying the existing consumer protection framework to the innovative business models used in the gaming industry:

(1) Lack of the indicative "black" and "grey" list of unfair commercial practices in relation to the digital products that facilitate widespread price obfuscation mechanisms in the gaming industry and influence differences in enforcement;

(2) The difference in the legal protection status, mandatory contractual and pre-contractual requirements in relation to paid and "free" digital products when the revenue is gained by the trader from alternative consumer counter-performance (i.e., intellectual property transfer) that excludes from the consumer protection framework consumers using freemium products;

(3) *Lack of clarity in relation to the status of hybrid products, especially, products covered under the open software access that include build-in payments or alternative consumers' counter-performance including but not limited to personal data provision in commercial purposes, that allows contractual self-regulation system established by the trader and creates misbalance between parties taking into account standard term usage;*

(4) *Lack of clarity in relation to the traders' obligations for cross-border service platforms or online marketplaces for intangible virtual items targeting European consumers that enables manipulation with the freedom of establishment in order to avoid EU consumer protection guarantees;*

(5) *Lack of minors' protection and proper consumer due diligence mechanisms in the gaming industry that in conjunction with the price obfuscation approach and the presence of elements of chance can create psychological harm and facilitate gaming action development with minors.*

2. Research Question 2

The second research question examined within the course of the present research was: "*Can the existing regulatory approach applied to the gaming industry ensure the balance between the rights and lawful interests of the parties and facilitate the equal level of consumer guarantees between traditional and innovative ways of business conclusion used in the gaming industry?*"

The author discovered that gaming platforms apply intellectual property approach in order to regulate relationships with players following the historical approach that was established together with the first open-source software due to the lack of the legal framework applicable. Notwithstanding the fact that gaming platform cannot prove the intellectual property rights on particular virtual products and such products in majority lack the element of creativity, the relationships between game developers and players are up to date regulated based on quasi-intellectual property governance system stipulated only contractually.

Due to the complexity of transactions within virtual worlds and lack of legal clarity in relation to the status of virtual currency, in-game tokens or virtual items, standard term EULAs expand the scope of self-established intellectual property rights to all kinds of relationships within the

gaming platforms and introduce horizontal self-regulation for players behaviour, virtual property and liability between third parties. Moreover, due to the collaborative nature of the virtual world and multiparty relationships, the intellectual property framework regulations of one EULA (i.e., game developer) can conflict with one another (i.e., gaming platform) creating legal collision for players' obligations, liabilities and licencing regime of intellectual property rights or user-content.

Analysing the "real-life" EULAs, the author determined that, in general, the transparency requirements in relation to the total price of the contract, the way in which such a price will be determined, the purpose of data collection and data transfer, intellectual property rights of players, governing law and the enforcement mechanisms available are not fulfilled. Due to the legal gaps in the EU regulatory framework in relation to the digital content supply, the gaming platforms apply an artificial quasi-regulatory system contractually that contradicts principles of consumer protection and data subject protection accepted on the EU level. The business model applied misleads consumers in relation to the nature of legal relationships as is advertised as "free", however, de facto depriving consumers not only of financial resources through direct or indirect remuneration but as well of privacy and intellectual property.

Notwithstanding the type of transaction, its monetary representation or expected consumer's counter-performance, in-game transactions with the virtual items are going out of the scope of the existing gratuitous contractual arrangements under the licencing agreement, and, therefore, should be considered as paid digital service consumer contracts and should guarantee the same level of consumer protection as contracts with the provision of direct fiat money transfer. Unfortunately, up to the current date, the European e-commerce and consumer protection framework applies a discriminative approach disregarding innovative and hybrid business models and applying a historically outdated approach established in relation to the open-source software.

As per the analysis concluded, it can be seen that standard term EULAs and "Terms of Service" contracts of the popular video games show that the game developers tend to use, apart from the intellectual property framework application to the digital service provision consumer contracts, terms that are introduced not in the clear, plain and intelligible language, attract player by "play for free" or "buy virtual item" slogans while the game participation is neither free nor de facto

covered under the property law. The game developers do not provide transparent pre-contractual information in relation to the terms of future possible payments, applicable law and subscription obligations (for example, automatic payments for in-game virtual items from the consumer's e-wallets).

Considering the complexity, collaborative nature and monetisation of the majority of virtual worlds, the intellectual property approach towards gaming company versus consumer relationships cannot fit all parties' needs and cannot effectively manage all spectrum of gaming industry-specific legal relationships. Therefore, the intellectual property approach can be applied solely to the pay-to-play video games with no further commoditization, in cases when the contract is executed at the moment of gaming platform purchase. For any other types of business relationships, hybrid approach of the contractual relationships should be taken into account: the creative element and the access to virtual world is regulated under intellectual property framework, digital content supply – as consumer contract.

The author analysed the nature of the relationships between players and the gaming platforms and concluded that notwithstanding the presence of the intellectual property law elements during the game access acquisition, the main subject of the contract is digital service provision or digital content supply. Depending on the consumers' counter-performance the regulatory provisions of the contract and the following transactions under the subscription contract should be determined. For example, in free-to-play video games, the contract by its nature is the hybrid licencing agreement with the gratuitous digital service provisions, thus, all subsequent in-game transactions would fall out of the scope of such an agreement due to the differences in nature (paid digital content supply with no element of creativity), and, therefore, separate player consent and separate contractual arrangements should take place.

Notwithstanding the above-mentioned, the game developers use the legal gaps in the current consumer protection, digital service provision and e-commerce framework, disregard the nature of the relationships, property rights of the players over avatars, purchased in-game tokens, virtual items, maintain unilateral control over all transactions, interactions and activity within gaming platform by introducing the horizontal quasi-regulatory system, disregard mandatory contractual and pre-contractual provisions for the consumer contracts by hiding behind intellectual property protection framework that is established only contractually without prior assessment of the creativity and originality. All of the above together with the usage of price

obfuscation mechanisms, taking into account the scalability of the gaming transactions, significant minors' involvement and cross-border nature of the business facilitates unfair treatment, misbalance between parties and disables the possibility of the remedies or efficient judicial protection for the consumers in the EU.

Considering the above-mentioned, the present study examined existing approach to the regulation of the business relationships between players and game developers and concluded that the existing regulatory approach applied to the gaming industry cannot ensure the balance between the rights and lawful interests of the parties and facilitate the equal level of consumer guarantees between traditional and innovative ways of business conclusion used in the gaming industry.

A. Research Sub-question A

The third research sub-question examined within the course of the present research was: "*What is the existing legal and regulatory approach used in the gaming industry?"*

The author analysed existing contractual arrangements between players and gaming platforms as well as applicable framework and the historical background and concluded that due to the historical issues in 1980s connected to the lack of the intellectual property rights certification on open-source software, the developers started using contractually established intellectual property provisions in order to facilitate fair usage of free software and protect authorship and distribution rights. However, since that time both free products became commoditized, and the intellectual property protection framework does allow certification of software as a creative product if the element of creativity is present.

Notwithstanding the changes in the regulatory environment and business practices, up to the current date, standard term EULAs produced by the game developers still regulate business relationships under the intellectual property protection framework, including but not limited to (1) intellectual property rights for the gaming software as sole product, (2) intellectual property rights for in-game virtual items, (3) rights for derivative works and the user-created content. Moreover, such "licencing agreements" often regulate as well as (4) good conduct within the gaming platform, (5) relationships between players, (6) rights for virtual items and players' avatars, and even (7) performance under anti-money laundering regulations. Thus, standard

term EULAs represent the tendency to contractual overregulation and the creation of a horizontal quasi-regulatory framework, which by its nature cannot have legally binding character regarding all members of the virtual community as there is no horizontal enforcement possible and can only create legal collision.

Important to underline, that for the digital product to be protected under the intellectual protection framework the element of creativity and originality should be present. Video game as a sole product can represent audio-visual creative work as the virtual world can have its own creative story and design, however, the element of creativity or originality of separate digital items of such a virtual world (i.e., in-game tokens or digital products) is questionable. Each element of the video game, particularly: (1) audio-visual elements (animation, images, sound recordings), (2) computer code (source code, ancillary code, plug-ins) should be accessed in order to determine the actual scope of the intellectual property rights of the gaming company.

While assessing audio-visual or graphical content on a subject of creativity can be an easier case due to the distinctive nature of visual or audio representation based on the originality, however, with computer codes or software, the abstraction-filtration-comparison approach should be applied. However, none of the above-mentioned exercises is executed prior to the signing of the licencing agreement with the player, the intellectual property rights framework is selected automatically notwithstanding the originality of the digital product. Worth to mention that gaming platforms usually cannot evidence the ownership of such intellectual property rights (please refer to the FIFA case) over separate digital items that are offered for "purchase" to players and such intellectual property rights are only stipulated contractually under standard term EULA created by the game developer.

Even though the text of the standard term EULAs used in the gaming industry underlines that the relationships between players and gaming platforms are regulated by the intellectual property protection framework, however, analysing the nature of the contractual provisions it becomes clear that the rights and obligations prescribed are neither purely in rem (rights against a particular object or against everyone – nature of property rights) nor in personam (rights against a particular person – nature of intellectual property rights), as such provisions both regulate in-game transactions providing limited rights for players to make decisions regarding virtual property owned and, at the same time, abolishing rights of players outside of gaming platform or authorized marketplaces.

The strict differentiation between licencing contract and the service provision contract is absent on the Community level as well as in the national laws of the Member states. The differences in license agreement definitions and law applicable to licencing contracts in the national laws of the Member states significantly reduce the level of legal certainty, facilitate unequal treatment, and unfair terms used in various industries, including but not limited to licensing agreements and EULAs in the gaming industry. Based on the court practice in the EU, it can be noted that in order to qualify a specific agreement as to the contract for service provision, the party of licensing agreement should carry out a particular activity in return for remuneration, however, in contracts where the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration, such an activity cannot be considered a contract for service provision. On the other hand, the developer has to have the intellectual property rights certified for the contract to be considered as a license agreement, not a service contract, however, in the majority of cases, the game developer cannot provide proof of intellectual property rights to particulate intangible items, such as virtual in-game currency or virtual in-game weapon etc.

Solely intellectual property laws should be applied to the EULAs, which regulate the subscription process itself and usage of the licensed intellectual property rights of the developer on the virtual world as a whole sole product. Thus, EULAs used in non-commoditized pay-to-play video games, in case no further in-game transactions are possible, can be considered as licencing contracts. However, due to the fact that in-game purchases require remuneration for digital content supply and relevant licence for such digital content is absent; such in-game economy contracts should be considered as separate contracts falling under the European consumer protection framework. Therefore, the so-called “End User Licence Agreement” between parties can be considered as a hybrid contract with the element of the licencing agreement (if creativity is present) and the digital content supply contract.

Taking into account the hybrid nature, complexity and the multi-level relationships between the parties in the gaming industry, the below-provided sets of norms can be distinguished in mass contract EULAs on a high-level:

(1) Licence contract provisions applicable to the video game as software and virtual world as a sole product;

(2) Consumer contract provisions applied to the digital content supply or digital service provision on the access to the video game as sole product. Such contract can be gratuitous (free-to-play) or with monetary value expressed (pay-to-play);

(3) Consumer contract on digital content supply/purchase, where the player acquires property rights over a particular intangible virtual item existing on a particular platform and controlled by a particular trader. Such contract can be concluded in exchange for remuneration represented in fiat money, crypto-currency or in-game tokens.

Considering the above-mentioned, the legal relationships between players and gaming platforms are covered contractually under the intellectual property protection framework and provisions of the End User Licencing Agreements without any evidence of intellectual property rights ownership and originality of such work, however, the nature of legal relationships per se indicates that the standard term EULA has a hybrid nature of licencing agreement and consumer contract on the digital service provision or digital content supply.

B. Research Sub-question B

The fourth research sub-question examined within the course of the present research was: "*What are the gaps in the existing legal and regulatory approach used in the gaming industry from the perspective of consumer protection in the European Union?*"

The author analysed the existing contractual relationships between players and gaming platforms and concluded that the standard form contract used by the game developers is a self-regulatory framework that de jure refers to the intellectual property regulation, however, de facto is a hybrid consumer contract on digital content supply and digital service provision with the licencing agreement elements. The gaming platforms tend to regulate service provisions as well as virtual property status under the intellectual property protection framework abolishing any players' rights for their avatars, purchased digital content or created virtual elements, while the ownership of such intellectual property rights of game developers for every digital item in the virtual world is stipulated only contractually and cannot be evidenced otherwise. Moreover, creativity as the main element of the intellectual property protection framework application can be absent (never tested or evidenced in advance) in relation to the specific digital content supplied.

Taking into account the collaborative nature of the gaming industry (gaming platforms benefit from the user-created content and network effect), not only intellectual property rights of the game developers should be taken into consideration, however, as well as intellectual property rights of the players in relation to the works created on such gaming platform (if the element of creativity is present and the gaming interface allows so). The scope of the intellectual property rights protection defined in each EULA has a dual nature regulating not only developer to user copyrights transfer but also a user to developer intellectual property rights transfer:

(1) the developer grants non-exclusive intellectual property rights to each player that subscribes to game participation;
(2) each player that creates any derivative work grants exclusive right for such derivative content to a game developer;
(3) in limited scenarios video game interface can allow players to execute their intellectual property rights and grant non-exclusive rights for derivative works created in a virtual world to other users.

Having a look at the EULAs of the popular video games, the author concluded that the scope of the intellectual property rights transfer expected from the consumers is extensive, players are abolished from any rights for the user-created content and purchased digital content. The gaming platforms expect such intellectual property transfer inter alia as a consumer's counter-performance under the licencing contract. The approach is taken currently in the standard term EULAs by granting all exclusive rights for user-created content back to developers, allowing permanent exclusion from the gaming platform and deprivation of access to the creative work of players can be considered unfair. Such an approach violates all principles of intellectual property law and authorship.

Moreover, video games can be hosted on various third-party platforms, virtual items can be traded on external authorized and not authorized marketplaces, gaming platforms can facilitate virtual items creation for further trade or benefiting from the network effect. The above-mentioned adds scalability and complexity to the intellectual property framework application. Such multi-party, multi-platform relationships cannot be solely regulated by various conflicting EULAs notwithstanding the creative input of each party and platform.

In addition to that, EULAs regulate property rights for intangible virtual items under the framework of intellectual property protection, even though the business model per se expects players

to invest "real-life" money in exchange for intangible virtual items or access to such intangible virtual items, facilitates peer-to-peer exchanges and allows online marketplaces for virtual goods. From the property law perspective, video game, which allows the purchase of intangible items online for "real-life" money (commoditized video game), by labour (consumers' counter-performance) or by network effect contribution (collaborative virtual world) bears the character of the contract on the transfer of property. However, due to the lack of legal certainty in relation to the virtual or digital property on the Community level, consumers cannot benefit from the respective protective mechanisms that allow self-regulatory contractual framework application according to the choice of the trader.

Indeed, intellectual property relationships in video games need to be regulated in order to provide the expected level of copyright protection both for developers and for players (in case a gaming interface allows creativity), however, gaming platform versus player relationships cannot be regulated solely under non-exclusive licencing agreement focused on uniform rights of game developers over software. Standard terms EULA created by a game developer should be accepted only in pay-to-play video games with limited gaming interface that does not allow collaborative nature of virtual world creation and cannot be applied to complex virtual environments and monetized free-to-play video games due to the outdated nature.

Intellectual property rights protection framework can be applicable on the stage of video game access acquisition by a player (notwithstanding the medium of representation) regulating third-party gaming platform access, copy creation and other copyrights resulting from access to video games per se, however, further relationships, microtransactions, user content creation cannot be regulated solely under framework licensing agreement. Therefore, a different approach towards virtual property and complex virtual worlds should be taken into account in order to protect the rights of consumers and to secure the European Digital Single Market Strategy.

Considering the above-mentioned, the main gaps in the existing legal and regulatory approach used in the gaming industry from the perspective of consumer protection in the European Union can be defined as:

(1) Lack of legal certainty in relation to the hybrid contracts that enables self-regulation dictated by the traders through mass standard term contracts and the choice of law and regulatory framework;

(2) *Intellectual property protection framework application without proper assessment of the authorship, elements of originality and creativity, including but not limited of the collaborative and hybrid nature, that facilitates unfair treatment;*

(3) *Lack of proper regulatory assessment in relation to alternative payment and business provision models, virtual property and virtual currency status, which allows unilateral decision taking mechanism with no legal responsibility for traders for any monetary, data or rights loses for players.*

C. Research Sub-question C

The firth research sub-question examined within the course of the present research was: "*What is the most suitable legal and regulatory approach from the perspective of consumer protection in the gaming industry taking into account innovative models of electronic commerce used in the gaming industry?*"

Digital activity interacts with reality in various ways, resulting in economic, personal, even administrative and criminal consequences. For example, various video games use alternative payment transactions, such as virtual currencies and in-game tokens, play-to-earn video games allow the creation of digital economies and "real-life" money withdrawals, and augmented reality platforms interact with virtual worlds, NFT-based games and digital elements serve as investments for users. Variety of business models available in the market and the innovative approach to the digital service provision and the cross-border nature of such platforms attracts more users on the annual basis, however, notwithstanding the technological solution or the transaction model, the historically outdated intellectual property approach applied, which results that average consumer is entitled only for money input and has limited protection on the money output.

Apart from the intellectual property approach, the author examined property law, contract law and the "no legal intervention" approach. The present research analysed pro and contras in relation to each of the views presented above while examining whether their application in the prism of the nature of the relationships between players and gaming platforms can efficiently protect consumers in the gaming industry, facilitate the balance between parties as well as enable innovation and business growth.

The scalability of the gaming transactions, availability of innovative business models, minors' involvement, personal data usage as consumers' counter-performance show that the "no legal intervention" approach cannot be applicable to the modern realities in the gaming industry due to the various legal notions being involved in multi-levelled complex transactions. The author examined existing contractual arrangements and noticed that apart from regulating the intellectual property rights of developers, standard term EULAs generally provide virtual world laws regulating in-game actions of players, including but not limited to individual communication between players, censoring comments, advertisement, players' identification and virtual property rights. Indeed, players' communicational behaviour in a video game can be regulated by a particular gaming policy in order to provide the best user experience and to secure virtual space from illegal content. However, such regulations should not violate legal standards and freedoms provided in the "real-life" world and do not create a separate virtual legal system. Thus, the "no legal intervention" approach indeed can be applied partially in cases of excessive contractual overregulation of players' behaviour that would not normally be regulated in a "real-life" world, however, it cannot be applicable as a sole solution to the gaming industry. Thus, the arguments towards the "no legal intervention" approach can be valid only in cases when no monetary interest is involved or no counter-performance (including but not limited to the counter-performance in intellectual property rights transfer or personal data usage for commercial purposes) is expected from the consumer. For any other cases, the level of "legal intervention" required for the developer versus user relationships can be defined by the type of video game and its characteristics.

In the examined standard term contracts used in the gaming industry, the author noticed that certain game developers differentiate the virtual property from other digital content. However, such a virtual property concept is used in the scope of the property protection requirements only when traders would like to use a property protection mechanism against consumers in cases of such "virtual property loss" due to the actions of the players and not vice versa. When the issue is related to the players' property rights over the purchased digital content or even created digital content, the gaming platforms underline the intellectual property rights framework as an applicable one, while the creative value of such a digital product is questionable. Important to underline that the intellectual property rights over a particular virtual item does not exclude virtual property rights over such an item. The game developer could hold intellectual property rights over a particular virtual world as a sole product or over gaming platform,

however, the creativity or each element of the virtual world should be accessed in order to determine whether it can fall under the intellectual property protection framework.

The element of creativity and originality in the digital content per se can serve as a turning point in distinguishing property rights from intellectual property rights over a particular digital product. For example, a particular URL has no creative value, however, it is protected under the property framework. Similar to that, digital products that have no creative value (i.e., in-game tokens), but were purchased by the player directly or indirectly should be protected under the property law in case of loss or damage due to the positive actions of the trader or negligence. The EULA grants non-exclusive license for developer's intellectual property on a particular virtual world as a sole product, thus, right to access such a virtual world as a whole, however, as discussed within the course of the present research, the intellectual property rights on particular virtual items, virtual tokens or user-created content (avatar, for example) are not a priori applicable.

The main argument against the property law application is that the digital products in the gaming industry are available mainly in the gaming platform and cannot be extracted. Considering the fact that the game developer has unilateral control over such virtual platform and virtual items in commoditized video games have monetary value, once the developer decides to close the virtual world, or the player's account as per EULA provisions, all "real-life" value items purchased by the player should be refunded. In video games intangible virtual items purchased for "real-life" money can be treated as a representation of value, similar to tokens in casinos, thus, a player's property. Therefore, the contractual relationships between players and gaming platforms or online marketplaces should include property law provisions in relation to the player's avatars, purchased virtual items, balance leftovers in the in-game tokens or any other monetary value items. In case of the termination of the business relationships between players and platforms, balance leftovers, even if represented in virtual items, should be refunded.

Worth underlining that, the presence of intellectual property rights over a particular digital product does not exclude consumer protection law applicability and the contract law framework application. Typical EULA used by gaming companies has a mixed contract nature and includes characteristics both of license agreement, regulating copies of specific software, and of consumer contract on the digital content supply (game-specific codes or so-called virtual

items). Even though the contractual arrangements refer solely to the intellectual property protection framework application, the players are encouraged to "buy" specific digital content, game developers use various price obfuscation mechanisms, indirect payments, alternative ways of consumer counter-performance, which can be considered as unfair commercial practices focused on the disguise of the actual economic consequences of the game participation. Thus, the presence or absence of elements of creativity does not depend on the consumer protection regulations' applicability and fulfilment of specific mandatory contractual and pre-contractual obligations for traders under the contract law framework. Each of the standard terms EULA should be accessed on the subject of the consumer protection regulations - i.e., rules regulating unfair terms, standard terms, conformity of digital goods, digital service provision and digital content supply. The mandatory consumer protection requirements should be applied to the in-game transactions in the same manner as to the contracts on digital service provisions or digital content supply in exchange for remuneration.

Due to the hybrid nature of the legal relationships in the gaming industry, the applicability of the property law, intellectual property law and contract law to the various aspects of the gaming activity, the specific sets of mandatory contractual provisions need to be considered on the EU level in order to secure harmonization in consumer protection in the gaming industry focusing on unfair terms in standard terms EULAs, transparency of legal relationships between parties, players' consent for non-gratuitous content in free-to-play video games, conformity of digital content and mandatory information requirements in consumer contracts in the gaming industry.

Considering the above mentioned, the most suitable legal and regulatory approach from the perspective of consumer protection in the gaming industry would be the modal hybrid contract law approach – the access to the virtual world is covered under the intellectual property and digital service provision framework, while the purchase of separate digital content on that gaming platform falls out of the scope of main contractual arrangements and should be assessed in the scope of the property law and consumer contract law framework.

3. Recommendations

As a conclusion to the present research the author would like to propose the following recommendations to the amendments of the EU-level regulatory and consumer protection framework as well as to the contractual regulations in the gaming industry:

A. Introduction of modality of the contractual arrangements between players and game developers

The author underlines that due to the establishment of multi-level legal relationships in virtual worlds, a modal approach towards the contractual provisions of EULA should be taken into account by the gaming companies, which would lead to the grouping of different sets of contractual provisions. While applying a modal approach, the gaming platforms would provide players with a possibility to opt-in for certain rights and obligations based on players' interests, which would determine the game interface available to them. Mass contracts used in the gaming industry, as well as the game interface, should differ depending on the players' category based on the legal capacity of the player, player consent and the respective nature of the legal relationships agreed. In such a case, different sets of contractual provisions would be applied to the different groups of players based on the nature of legal relationships and their level of commoditization. With different sets of contractual provisions, the legal capacity of a player and following players' consent, relevant content should be modified as well in order to avoid post factum disputes, consumer rights violations and to facilitate legal transparency in the developer versus user relationships. The grouping of players based on specific categories of players' interests and mandatory contractual requirements expected can be applied in order to enable proper evaluation of the economic consequences of the game participation and disable digital content that is out of the scope of the actual contract or given consent. This will facilitate a better user experience, ensure transparency in consumer contracts and will provide legal certainty and enforcement mechanisms to both parties.

B. Establishment of the targeting rules for cross-border gaming platforms engaging with European consumers

Taking into account the cross-border nature of the gaming business and, as explained above choice of law and choice of court in accordance with the rules of the country of establishment (i.e., Russia, Costa Rica or the United States), which in the majority of cases offer lower consumer protection standards compared to the EU, and enables usage self-regulatory approach towards developer versus player relationships, specific rules to the service gaming platforms are recommended to be introduced on the Community level. The Digital Service Act and the Digital Market Act are no doubt important steps in facilitating consumer rights protection in

the cross-border digital economy including but not limited to ensuring e-commerce rules applicability in the gaming industry. Even though, the above-mentioned regulations cannot be fully applicable to the gaming platforms, however, can serve as an example for further regulatory development on establishing specific targeting rules for overseas gaming platforms targeting European consumers in order to secure consumer protection, transparency and the balance between rights and lawful interests of the players and game developers. The mandatory requirement for foreign online platforms to be subject to the EU consumer protection and e-commerce framework while targeting EU consumers can enable fair treatment and secure balance between parties in the gaming industry, however, only if legal collisions explained in the present thesis are eliminated on the Community level.

C. Update of the "black" and "grey" lists of the unfair consumer in relation to digital products

Analysing existing contractual arrangements between parties in the gaming industry, the author noted a lack of transparency in relation to the consumers' counter-performance, intellectual property transfer, consumers' consent, personal data usage for the commercial purposes, the total price of the contract as well as the choice of law and the court. Certain EULAs were contractually abolishing conformity requirements of the digital product, especially in relation to the damages caused to the consumers' physical and virtual property. The examination of the payment models in the gaming industry showed widespread usage of the price obfuscation mechanisms and indirect transactions (i.e., player is required to top up a virtual in-game wallet with in-game tokens previously exchanged for fiat money or crypto-currency that are further used for in-game virtual items purchase), which do not allow players to evaluate the total price of the game participation and the economic consequences thereto.

All of the above can be considered unfair consumer practices that affect the enforceability of the consumer protection requirements due to the hybrid nature of contractual arrangements and widespread usage of price obfuscation mechanisms. Therefore, it is important to ensure transparency during pre-contractual and contractual relationships between the parties as well as explicit consent provision in order to avoid misbalance in legal relationships, judicial costs differentiation, damages to the business reputation and ensure competitive quality service provision in the European market. For that purpose, the "black list" and the "grey list" of unfair consumer practices with the indication of typologies examined in the present research including

but not limited to the price obfuscation mechanisms are recommended to be updated in order to facilitate enforceability and transparency in the gaming industry on the EU level.

D. Update of the digital content and digital service consumer protection framework in relation to indirect payment models and alternative consumers' counter-performance

The game developers use various price obfuscation mechanisms in order to disguise the economic consequences of the "free" game participation. Such an approach became possible due to the gaps in legal regulations focusing only on standard means of payment – direct payment in fiat money and, since recently, consumers' counter-performance in personal data provision, while gaming platforms use inter alia business models expecting remuneration in virtual currencies, in-game tokens and intellectual property transfer. Therefore, apart from ensuring transparency in contractual arrangements between the parties through a regulatory approach, it is recommended to eliminate discrimination over the paid in a standard sense and "free" models. For that the status of virtual currencies, virtual property, consumers' counter-performance other than fiat money should be determined at the EU level in order to ensure the same level of legal and regulatory protection, consumer guarantees and efficient enforcement hereto in order to provide legal certainty in relation to hybrid payment models, alternative payment mechanisms, facilitate fair treatment, innovation and business growth.

E. Introduction of mandatory consumer due diligence mechanisms

Taking into account the scalability of the gaming industry and minors' involvement in the paid transactions including but not limited to the transactions with the usage of price obfuscation mechanisms, loot boxes, crypto-currencies, the author recommends introducing mandatory consumer due diligence for the game providers in order to ensure age and legal liability verification on the stage of the game participation. Together with the modality of the contractual arrangements the level of consumers' due diligence can be selected appropriately with respect to the consented functionality (for example, simplified due diligence is applicable on registration and general due diligence if the consumer agreed to the commoditization of gaming platform and passes specific financial threshold). Such an approach can also ensure that the gaming platforms are not used for money laundering purposes, especially when withdrawal and peer-to-peer exchange is allowed by the gaming interface. Moreover, for transparency purposes, age

rating and classification are recommended to be updated with respect to the level of legal liability required for the game participation in an addition to the classification in relation to the elements of violence or explicit content as exists currently through PEGI classification.

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