

Bond University

Sports Law and Governance Journal

Volume 1 Issue 1

2024

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THE ROLE OF THE EUROPEAN UNION FOR THE GOVERNANCE OF THE ESPORTS SOCIETY?

TSUBASA SHINOHARA[†]

Esports (“electronic sports” or “competitive video games”) have rapidly developed and become a renowned and popular industry worldwide. Despite this rapid development, the governance of esports society is challenging due to the lack of a unified institution to govern this society, primarily because of the copyrights held by esports publishers. However, in November 2022, the European Parliament adopted a report on esports and video games (2022/2027(INI)). This indicates the European Union’s (EU) intention to regulate esports activities. This is a significant step for the “European” esports society, but the EU should not become an entity that governs the entire esports society. This is because esports have a transnational nature via internet beyond the national borders. Furthermore, esports society is of global nature because it contains not only European countries but also non-European countries, such as China, Japan, South Korea and the United States. Therefore, the EU should consider this aspect when developing normative and legal instruments to govern the esports society. Given this context, a pertinent question is how the EU can contribute to enhancing the governance of esports society. This article will explore the following research questions: (1) How have esports developed in Europe? (2) What can the European Union do?; (3) What impact does the European Parliament’s report have on the esports society?; and (4) How should the EU create normative instruments applicable to the esports society? This research will serve to identify how the EU should govern the European esports society and to clarify its role in improving the governance of the esports society.

1 INTRODUCTION

Esports (‘electronic sports’ or ‘competitive video games’) have gradually developed into an ‘attractive’ economic market.¹ Due to this rapid growth,

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¹ Newzoo, *Global Esports & Live Streaming Market Report 2022* (Report, 19 April 2022) 34.

esports activities have led to various issues, such as doping,² match-fixing³ and sexual abuse and harassment.⁴ However, there is no unified governing body within the esports society to handle these problems under common rules and regulations. This lack of unity, known as the ‘fragmentation of esports society’,⁵ arises because the esports society comprises many stakeholders, including esports publishers (e.g., Valve Corporation, Ubisoft and Riot Games), esports event/league organisers (e.g., ESL FACEIT Group), esports equipment companies (e.g., Logitech and Dell), streaming platform providers (e.g., Twitch, YouTube and Facebook), and video game distributors (e.g., Google Play Store and Apple Store).⁶ As a result, the esports society has been unable to establish common rules and regulations to manage these issues effectively.

Despite the fact that there are no common rules and regulations within the esports society, the European Parliament adopted a resolution on esports and video games on 10 November 2022.⁷ The resolution states that

... the video game ecosystem has become a leading cultural and creative industry (CCI) all over the world, with an estimated European market size of EUR 23.3 billion in 2021 ..., and has great potential for growth innovation, creativity and triggering positive change for the whole sector.⁸

This indicates that the European Union (‘EU’) recognises the esports industry as an important economic market in Europe. Consequently, the EU needs to consider how to regulate potential risks in esports activities within Europe.⁹

² *European Parliament Resolution of 10 November 2022 on Esports and Video Games*, Doc No 2022/2027(INI), 10 November 2022, [12] (‘*European Parliament Resolution*’); Tsubasa Shinohara, ‘The Protection of Esports Players against the Use of Doping Substances and Methods under the European Convention on Human Rights: the Swiss Example’ (2021) 1(1) *International Journal of Esports* 1; Elizabeth Chung, ‘Gotta Catch ‘Em All! The Rise of eSports and the Evolution of its Regulations’ (2019) 22(2) *Science and Technology Law Review* 231, 239-242.

³ *European Parliament Resolution* (n 2) [12].

⁴ *Ibid.*, para. X and para. 25.

⁵ See Tsubasa Shinohara, ‘The Road to a Common Framework for the Esports Society Through the Lens of International Law’ (2023) IV(I) *Journal of Sports Law Policy and Governance*, 1-21.

⁶ See Tsubasa Shinohara, ‘Global Governance in International Esports Society?’ (2023) 27(4) *Gaming Law Review* 1; See also YCPS Marketing & Communication Group, *An Overview of the Esports Ecosystem* (Web Page, September 2021) <<https://ycpsolidiance.com/article/an-overview-of-the-esports-ecosystem>>.

⁷ *European Parliament Resolution* (n 2); See also Jake Nordland, ‘EU Parliament Passes Vote to Recognise and Fund Esports, Video Games in Europe’, *Esports Insider* (Web Page, 10 November 2022) <<https://esportsinsider.com/2022/11/european-union-parliament-esports-funding>>.

⁸ *European Parliament Resolution* (n 2) [A].

⁹ See Deloitte, ‘The European esports market: Let’s Play! 2022’, (Web Article, November 2022) <<https://www2.deloitte.com/de/de/pages/technology-media-and-telecommunications/articles/european-esports-market.html>>.

Against this background, a question that may arise is how the EU can contribute to enhancing the governance of esports society. This article will explore the following research questions: (1) How have esports developed in Europe?; (2) What can the European Union do?; (3) What impact does the European Parliament's report have on the esports society?; and (4) How should the EU create normative instruments applicable to the esports society? This research will serve to identify how the EU should govern the European esports society, and to clarify its role in improving the governance of the esports society.

In light of the foregoing, this article will be divided into the following sections: Section 1 will consider a definition of 'esports' because it is important to know whether 'esports' may fall within the scope of 'sports'. Section 2 will provide an overview of the European esports and video game ecosystem. Section 3 will examine how the EU should address the legal issues arising within the European esports society. Finally, this article will address the main question of how the EU should regulate the European esports and video game ecosystem.

2 THE DEFINITION OF 'ESPORTS'

A *The Definition of 'Sports'*

The definition of 'esports' remains a topic of ongoing debate and has been the subject of numerous academic studies. These studies often reference two prominent theories related to the definition of 'sports' proposed by Allen Guttmann and Bernard Suits. Guttmann defines 'sports' as a "playful physical contests"¹⁰ with seven characteristics: (1) secularism; (2) equality; (3) specialization; (4) rationalization; (5) bureaucracy; (6) qualification; and (7) records.¹¹ In contrast, Suits suggests that 'sport' is a game characterized by four conditions: (1) a game of skill; (2) that this skill is physical; (3) that the game has a large audience; and (4) that this audience reaches a certain level of stability.¹² If these conditions are met, the game in question can be considered 'sports'.

According to these theories on the definition of 'sports', some authors argue that esports are 'sports',¹³ while others disagree.¹⁴ Hilvoorde and Pot, for instance, argue that esports should not be excluded from the 'family of sports'

¹⁰ Allen Guttmann, *From Ritual to Record, The Nature of Modern Sports* (Columbia University Press, updated edition, 2004) 1-14.

¹¹ Ibid 15-55.

¹² Bernard Suits, 'The Elements of Sport' in William J. Morgan (eds), *Ethics in Sport*, (Human Kinetics, 3rd ed, 2018) 38.

¹³ Cem Abanazir, 'E-sport and the EU: the View From the English Bridge Union' (2019) 18(3-4) *The International Sports Law Journal*, 103-105; Kirstin Hallmann and Thomas Giel, 'ESports – Competitive Sports or Recreational Activity?' (2018) 21 *Sport Management Review*, 15-17.

¹⁴ Jim Parry, 'E-sports are Not Sports' (2019) 13(1) *Sport, Ethics and Philosophy*, 3-18.

solely due to the lack of physical activity.¹⁵ However, reaching a consensus on a universally accepted definition of 'esports' proves to be complex. This complexity arises primarily from the political nature of the issue, with some countries categorising esports as part of sports while others qualify them as cultural activities.¹⁶ Consequently, it is challenging to provide a definitive answer to the question of whether esports should be classified as sports.¹⁷

However, it is still feasible to explore how esports could be classified as a form of 'sports'. Traditionally, the term 'sports' signifies physical activity. In this regard, Article 2(1) of the 1992 European Sports Charter (amended in 2001) states that:

For the purpose of this Charter, "sport" means all forms of physical activity which, through casual or organised participation, are aimed at maintaining or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.¹⁸

According to this provision, esports may be deemed to lack the element of physical activity, given that esports players primarily utilize electronic devices. Based on this interpretation, 'esports' cannot be classified as 'sports'.¹⁹

However, does the definition of 'sports' in the European Sports Charter include all types of sports? How should 'mind sport' and 'motor sport' be interpreted? Do they fall within the scope of the definition of 'sports'? Why can non-physical activities be excluded from the definition of 'sports'? To address these questions, the concept of 'sports' should be divided into two categories: namely, 'sports in the narrow sense' and 'sports in the broad sense'. This is because the scope of 'sports' is repeatedly considered although it is unclear and ambiguous. Further, the sports society has often considered whether new activities should be included within the scope of 'sports', but there was no discussion of how to categorise new activities within the framework of 'sports', regardless of whether such activities may fall within the scope. Therefore, this consideration will serve to understand an emergence of a new activities.

¹⁵ Ivo van Hilvoorde and Nick Pot, 'Embodiment and Fundamental Motor Skills in eSports' (2016) 10(1) *Sport, Ethics and Philosophy*, 15.

¹⁶ For instance, Switzerland does not recognise esports as 'sports'. See Le Conseil fédéral, *Les Jeux Vidéo. Un Domaine de la Création Culturelle en Développement : Rapport du Conseil Fédéral en Réponse au Postulat 15.3114 Jacqueline Febr du 12.03.2015* (Le Conseil fédéral, le 21 mars 2018) 3-27.

¹⁷ John T Holden et al, 'The Future Is Now: Esports Policy Considerations and Potential Litigation' (2017) 27(1) *Journal of Legal Aspects of Sport*, 48-58; See also Seth E Jenny et al, 'Virtual(ly) Athletes: Where eSports Fit Within the Definition of "Sport"' (2017) 69(1) *Quest*, 4-15.

¹⁸ *The European Sports Charter* (entered into force 13 October 2021).

¹⁹ Parry (n 14) 18.

B *The Definition of ‘Sports’ in the Narrow and Broad Sense*

On one hand, ‘sports in the narrow sense’ refers to physical activities in the real world with a competitive aspect, such as Olympic sports.²⁰ On the other hand, ‘sports in the broad sense’ encompasses all activities with a competitive element, including not only physical movement but also intellectual activity. Parry considered the meaning of the term ‘sports’ by referencing the notion of ‘Olympic sports’ to elucidate the concept.²¹ Based on this, he identifies six elements in this concept: “institutionalised, rule-governed contests of human physical skills”.²² The criteria are cumulative²³ and can be considered the definition of ‘sports in the narrow sense’, as they solely apply to Olympic sports. According to the criteria, non-physical activities like ‘motor sport’ and ‘mind sport’ do not qualify as ‘sports’.²⁴ However, this determination depends on the interpretation of the concept of ‘physical activity’, making it challenging to definitively classify activities like ‘motor sport’ and ‘mind sport’ as ‘sports’.

However, is the presence of physical activity an absolute prerequisite for an activity to be classified as ‘sports’?²⁵ The International Olympic Committee (‘IOC’) has acknowledged chess²⁶ and bridge²⁷ as ‘sports’, despite their intellectual activity.²⁸ In this context, the IOC indicates the conditions required

²⁰ Ibid 7-11.

²¹ Ibid.

²² Ibid.

²³ Ibid 11.

²⁴ Ibid 8-9.

²⁵ Hilvoorde and Pot, (n 15) 15-19; Jenny et al, (n 16) 8-9.

²⁶ Michel Boudot and Marianne Faure-Abbad, ‘La Qualification Juridique de l’e-sport’ in Gaylor Rabu et al (eds), *Les Enjeux Juridiques de l’E-sport* (Presses Universitaires d’Aix-Marseille, 2017), 28-29.

²⁷ In the case of Bridge, the UK High Court of Justice had to decide whether Bridge qualified as a sport under Article 2(1) of the European Sports Charter. The English Bridge Union had argued that Sport England had misunderstood the scope of its objectives as set out in its Royal Charter and should follow the example of other organisations such as the IOC, which had recognised bridge as a sport. However, it rejected an appeal brought by the English Bridge Union against the adoption of the policy by Sport England which effectively excluded bridge from ‘mind sport’. Therefore, Sport England and other organisations would correctly use the European Sports Charter’s definition of sport as “any form of physical activity” and, as such, bridge did not meet the physical activity requirement. See *The Queen English Bridge Union v The English Sports Council and Others* [2015] EWHC 2875 (Admin) (15 October 2015); The Court of Justice of the European Union decided that bridge card game is not a ‘sport’ for the purpose of the VAT Directive. See Case C-90/16 *English Bridge Union Ltd v Commissioners for Her Majesty’s Revenue & Custom*, Judgement of 26 October 2017 (Forth Chamber), CJEU, [14]-[29]; Concerning the summary, see EUR-Lex, ‘CJEU Rules Bridge Card Game is Not a Sport for the Purposes of the VAT Directive’, (Web Page) <https://eur-lex.europa.eu/content/news/CJ_bridge.html>.

²⁸ The IOC has accepted that chess can be considered as sport. See Parry (n 14) 15; The World Chess Federation has been recognised as the international sporting federation by the IOC. See

for a sport to be recognised by the IOC.²⁹ According to this, a sport must be governed by an International Federation ('IF') and respect the Rules of Olympic Charter, the World-Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions.³⁰ Therefore, it does not clearly require for a sport with an element of physical activity.

In this context, another example is 'motor sport' (e.g., Formula 1) that can be classified as 'sports'.³¹ While it may not entail direct physical activity due to the use of a racing car,³² F1 drivers must effectively utilize their bodies to operate the vehicle and endure the considerable forces exerted by high-speed racing. Hence, 'motor sports' can be acknowledged as a form of 'sports' in the broad sense, even though the IOC has not designated it as an 'Olympic sport' as of yet.³³

In light of the above discussion, it becomes apparent that a more flexible definition of 'sports' should be embraced, taking into account innovation and new forms of sports. Currently, it proves challenging to definitively categorise esports within existing frameworks. Therefore, it is necessary to understand the concept of 'sports' as encompassing multiple meanings, including sports in both the broad and narrow senses.

C Can Esports Be Considered as 'Sports' in the Broad Sense?

Based on the previous subsections, it can be argued that there exist two forms of 'sports': (1) sports involving physical activity in the real world, such as 'traditional sports' (e.g., tennis, football and horse riding); and (2) sports involving intellectual (e.g., chess and bridge) and mechanical activity in the real world (e.g., F1 racing). Under the narrow definition of 'sports', only the first category can be recognised as sports, while the second category is excluded due to the absence of physical movement. Conversely, according to the definition of 'sports in the broad sense', both categories may be considered as falling within the scope of 'sports', as physical movement is not an absolute prerequisite for qualification as 'sports'.

International Olympic Committee, 'Recognized Sports', (Web Page) <<https://olympics.com/cio/sports-reconnus>>.

²⁹ International Olympic Committee, 'Frequently Asked Questions: Sports, Programme and Results', (Web Page) <<https://olympics.com/ioc/faq/sports-programme-and-results/what-are-the-conditions-required-for-a-sport-to-be-recognised-by-the-ioc>>.

³⁰ Ibid.

³¹ Ibid 8.

³² Ben Auty, 'Formula 1: Are F1 Drivers considered Athletes?', *Bleacher Report* (Blog Post, 19 June 2008) <<https://bleacherreport.com/articles/30864-formula-1-are-f1-drivers-considered-athletes>>.

³³ However, the IOC recognises horse riding as an Olympic sport because handling the horse is a human direction, so horse riding is considered a sport in narrow sense. Parry, (n 14) 8.

On the basis of this understanding, how can ‘esports’ be understood? Can esports be classified as ‘sports’? According to Parry, esports cannot be considered ‘sports’ because they do not satisfy the cumulative conditions of ‘institutionalised, rule-governed contests of human physical skills’.³⁴ However, as previously discussed, this definition aligns with ‘sports in the narrow sense’, which leads to the exclusion of esports from the classification of ‘sports’.

In this situation, this article will provisionally define the concept of ‘esports’. First of all, it is important to note that esports lack an element of physical activity. The mechanical activity mainly takes place in the digital world through electronic devices with software installed and internet connection. To play esports, esports players have to use their hands and brains to correctly manipulate the controllers on the devices corresponding to the digital movement. In this sense, this article defines ‘esports’ as a digital activity that combines both physical and intellectual elements, involving competitive gameplay of video games. In this sense, it can be said that ‘esports’ represent a new form of ‘sports’, that is ‘digital sports’.³⁵

In conclusion, esports can be regarded as a new form of sports involving the use of electronic devices. In this sense, esports may fall within the scope of ‘sports in the broad sense’. However, traditional international and national frameworks governing sports, such as the European Sports Charter, typically adhere to a narrower definition of ‘sports’. Accordingly, this new form of ‘sports’ does not currently fall within the traditional definition of ‘sports’.

3 THE EUROPEAN ESPORTS AND VIDEO GAME ECOSYSTEM

Esports activities are a global phenomenon that transcends national borders, leading to frequent changes in the structure of the esports industry due to company mergers. For instance, the Electronic Sports League (ESL) Gaming (‘ESL Gaming’), an esports event and league organiser based in Cologne, Germany, hosts several tournaments, including the Intel Extreme Masters, ESL Pro Tour, and ESL Challenger League.³⁶ In 2022, the Savvy Games Group (‘SGG’), a holding company owned by Saudi Arabia’s Public Investment Fund, acquired both ESL Gaming and the esports platform FACEIT.³⁷ Following this acquisition, ESL Gaming and FACEIT merged to form the ESL FACEIT Group, which also includes DreamHack and DreamHack Sports Games, and organises esports tournaments worldwide.

³⁴ Ibid 16.

³⁵ See Hallmann and Giel (n 13) 15-17.

³⁶ See official website, <<https://esl.com/>>.

³⁷ Ivan Šimić, ‘ESL Gaming and FACEIT Merge, Companies Bought by Saudi-Backed Group for \$1.5bn’, *Esports Insider* (Web Page, 24 January 2022) <<https://esportsinsider.com/2022/01/esl-faceit-group-bought-saudi-1-5bn>>.

Additionally, Ubisoft, a prominent esports company, is based in Montreuil, France.³⁸ However, the headquarters of many esports publishers and esports event/league organisers are typically located in the United States and Japan. Consequently, the European esports and video game ecosystem is less developed compared to the American and Japanese markets. Despite this, it is important to recognise that esports publishers and organisers operate as multinational enterprises, meaning esports activities are not confined to any specific geographical region.

However, there are two organisations in Europe governing European esports activities: (1) The Interactive Software Federation of Europe (ISFE) Europe ('ISFE Europe') and (2) The Esports Europe (or the European Esports Federation ('EEF')). The ISFE was launched in August 2019 to promote esports and represent its European stakeholders.³⁹ The purposes of the ISFE Europe are to: (1) 'Bring together esports stakeholders to discuss and find common ground on issues affecting the sector'; (2) 'Coordinate and articulate the voice of esports at the highest levels'; (3) 'Raise awareness of esports and of the opportunities it offers amongst policy makers and other stakeholders'; (4) 'Encourage the exchange of views and intelligence, and the development of best practices'; and (5) 'Identify challenges to the growth and development of the esports sector'.⁴⁰ Despite these stated objectives, it is unclear what role the ISFE Esports plays in the governance of European esports, as it does not publish any detailed information on its website.

Furthermore, the Esports Europe is 'a non-profit organization established in the European Parliament in Brussels in February 2020 by 26 national Esports associations and Federations from all over Europe'.⁴¹ Article I(B)(1) of the EEF Statutes (2021) stipulates that:

The Federation is an international not-for-profit association and pursues the following disinterested purpose of international utility: (a) serving as a united public representation of its members and the Esports movement in Europe and of European esports interest in the world; (b) serve as a platform for its international members to develop and foster esports activities.⁴²

To pursue this objective, in particular, the EEF is '[t]o develop and promote a unified structure of esports in Europe and serve as a platform of transparent

³⁸ See Ubisoft, 'Ubisoft WorldWide HQ', (Web Page) <<https://www.ubisoft.com/en-us/company/careers/locations/paris-area/ubisoft-worldwide-hq>>.

³⁹ See ISFE, (Web Site) <<https://www.isfe.eu/isfe-esports/>>.

⁴⁰ Ibid.

⁴¹ See EEF, 'About Esports Europe', (Web Page) <<https://eef.gg/about/>>.

⁴² Esports Europe, 'EEF Statutes' (Web Document, 21 February 2020) <<https://eef.gg/wp-content/uploads/2022/08/EEF-Statutes-as-of-November-18-2021-re-formatted-3.pdf>>.

and democratic exchange'.⁴³ However, it does not play a crucial role in the governance of European esports society at this moment.

In conclusion, the European esports and video game ecosystem is relatively small. Most well-known esports publishers are based in the U.S. and Japan. However, esports activities have a global nature that transcends national borders, as esports companies operate as multinational enterprises with numerous branches worldwide (e.g., Riot Games, Ubisoft, Valve Corporation, and Epic Games). In this context, organisations such as ISFE Esports and the EEF have taken initiatives to govern the European esports society. Despite the ecosystem's size, the EU may still play a significant role in regulating esports activities in Europe under EU law. The next section will explore how the EU should regulate esports activities under EU law.

4 HOW CAN THE EUROPEAN UNION HANDLE ESPORTS ACTIVITIES UNDER THE EU LAW?

A *The EU Competence to Regulate Esports*

The EU has competence to regulate sports under Articles 6 and 165 of the Treaty on the Functioning of the European Union ("TFEU"). Article 6 of the TFEU stipulates that:

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (b) industry; ... (c) culture; ... (e) education, vocational training, youth and sport ...

Furthermore, Article 165 of the TFEU stipulates that:

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

However, European instruments typically assume that the term 'sports' entails a physical activity component. Therefore, 'esports' cannot be classified as 'sports in the narrow sense', and consequently, they do not fall within the scope of 'sports' under European instruments. In contrast, it is important to note that EU competition law (Articles 101 and 102 of the TFEU) and consumer protection law (especially, Article 169 TFEU) may apply to European esports and video game industry.⁴⁴

⁴³ Article I(B)(2)(o) of the EEF Statutes.

⁴⁴ This article cannot deeply consider these specific issues and, thus, these will be examined in future research. See Nicolas Rocher, 'Challenges and Developments in the European Esport Sector', *Lighthouse Europe* (Web Page, 19 October 2022) <<https://www.lighthouseeurope.com/european-esport-sector>>.

In this situation, the European Parliament adopted a resolution on esports and video games on 10 November 2022. The European Parliament takes an own-initiative procedure ('INI') that requires the European Commission to put forward a legislative proposal on this matter.⁴⁵ Under this procedure, a parliamentary committee proposes a resolution and a report on esports and video games, deemed essential for potential new EU legislation. Subsequently, the European Parliament votes for this motion and formally adopts the resolution and report. Following this adoption, the European Commission is required to inform the European Parliament of its intention to submit a legislative proposal based on the adopted resolution.⁴⁶

Regarding the content of this resolution, it serves as a crucial instrument for understanding the EU's stance on esports and video games in Europe.⁴⁷ It clarifies that esports and traditional sports are distinct sectors, as esports publishers retain the right to their esports titles under their intellectual property rights.⁴⁸ However, certain European countries, such as France and Germany, have opted to officially recognise esports as a sport.⁴⁹ This has led to differing perspectives between the European Parliament and some EU member states regarding the status of 'esports'. If esports are not classified as sports, the EU cannot apply regulations and directives pertaining to 'sports' to the field of 'esports'. Despite this, the EU has yet to establish regulations and directives specifically tailored to address issues within the European esports society.

Based on this resolution, the European Parliament initiated a pilot project 'Understanding the value of a European Video Games Society', which was launched in January 2022.⁵⁰ The purpose of this project is 'to assist the European Commission in developing a better understanding of the video game sector, of its impact on a range of policy areas, and of how the EU should play a targeted

⁴⁵ *Rules of Procedure of the European Parliament*, rule 46.

⁴⁶ See Europa Nu, 'Own-Initiative Procedure', *EU Monitor* (Web Page) <<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vhxak2045gym>>.

⁴⁷ See Tiago Bessa and Beatriz Assunção Ribeiro, 'The New European Resolution on Esports and Video Games: A New Approach to the Sector?' *Vieira De Almeida* (Web Page, 16 December 2022) <<https://www.vda.pt/pt/publicacoes/insights/the-new-european-resolution-on-esports-and-video-games-a-new-approach-to-the-sector/25491/>>.

⁴⁸ *European Parliament Resolution* (n 2) [R], [28].

⁴⁹ Janek Speight, 'Germany to Recognize eSports as an Official Sport' *Deutsche Welle* (Web Page, 2 August 2018) <<https://www.dw.com/en/germany-to-recognize-esports-as-an-official-sport/a-42509285>>; Esports Insider, 'Esports Around The World : Germany' (Web Page, 11 August 2023) <<https://esportsinsider.com/2023/08/esports-around-the-world-germany>>; In France, see Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (1) [Law No 2016-1321 of October 7, 2016 for a digital Republic (1)] (France) JO, 8 October 2016.

⁵⁰ European Commission, *Understanding the Value of a European Games Society* (Report, 17 January 2023).

and active role in supporting the sector's development through specific policy approaches and objectives'.⁵¹

To sum up, the EU holds the authority to regulate the esports and video game industry in the EU. Specifically, it can refer to Articles 101 and 102 of the TFEU pertaining to competition law, as well as Article 169 of the TFEU regarding consumer protection law, to regulate this industry. The recent European Parliament Resolution underscores the need for this industry to be governed by a unified framework, potentially harmonising national legislation across EU member states. The following subsection will examine three examples to illustrate how the EU could govern and regulate esports-related activities under EU law.

B *The Governance of Esports-Related Activities under the EU Law*

As had been mentioned above, the European Parliament has not classified esports as sports, consequently subjecting esports activities in Europe to different regulations and directives. In this scenario, the pertinent question arises: what competences does the EU possess to regulate esports activities under EU law? To address this question, this subsection will consider the following two issues: (1) copyrights of esports publishers; (2) Schengen visa⁵² and working authorisation for esports players; and (3) protection of esports players (or gamers) against physical, mental and social problems.

1 Copyrights of Esports Publishers in Europe

The primary issue within the esports and video game industry revolves around copyright management. Copyright law adds complexity to understanding the esports ecosystem from a legal standpoint.⁵³ Video game companies have encountered numerous litigations in national courts regarding the infringement of intellectual property rights. The graphic design in video games is copyrightable.⁵⁴ A license for using the esports publishers' copyrighted works

⁵¹ Ibid.

⁵² According to European Commission, 'Schengen visa is an entry permit for non-EU nationals to make a short, temporary visit of up to 90 days in any 180-day period to a country in the Schengen area'. See European Commission, 'Applying for a Schengen Visa', *European Union* (Web Page, 29 May 2024) <https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-policy/applying-schengen-visa_en>.

⁵³ Shinohara, (n 6) 1-11; See also Noah Smith, 'Academics want to preserve video games. Copyright laws make it complicated.', *The Washington Post* (Web Article, 12 January 2022) <<https://www.washingtonpost.com/video-games/2022/01/12/video-game-preservation-emulation/>>.

⁵⁴ Christopher Zheng, 'Updates from the Video Game World: The Copyright Issues of Realistic Gameplay', *Center for Art Law* (Web Page, 22 June 2020) <<https://itsartlaw.org/2020/06/22/updates-from-the-video-game-world-the-copyright-issues-of-realistic-gameplay/>>.

within online video game streaming (e.g., Twitch and YouTube) and esports tournaments presents challenges.⁵⁵ Copyright infringement occurs when esports streamers distribute the copyrighted works to generate revenue from their streams without obtaining a license agreement from esports publishers.⁵⁶ Furthermore, esports event/league organisers must conclude a license agreement with esports publishers to use their esports titles to avoid copyright infringements.⁵⁷ Therefore, esports publishers conclude the license contract with users to allow them to use their copyrighted works within the scope of the license contract.⁵⁸

The European Parliament resolution points out that video games highlight that video games are acknowledged as ‘complex creative works with a unique and creative value’,⁵⁹ protected under Directive 2009/24/EC concerning the legal protection of computer programs⁶⁰ and Directive 2001/29/EC on copyright.⁶¹ Specifically, a video game represents intellectual property, particularly within the realm of copyright, comprised of various elements such as design, artistic creation, digital technology, music, publishing, distribution, and localisation.⁶² Thus, it ‘creates new legal challenges for streamers, developers, publishers and third-party content holders.’⁶³ This unique feature renders the governance of esports society complex and challenging to understand.⁶⁴ However, in accordance with the principle of territoriality, the EU member states have their

⁵⁵ Bennett Herbert, ‘Game Over: Copyright Issues in the Modern Video Game Landscape’, *University of Cincinnati Law Review* (Blog Post, 16 April 2021) <<https://uclawreview.org/2021/04/16/game-over-copyright-issues-in-the-modern-video-game-landscape/>>.

⁵⁶ Nicholas Robinson, ‘From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming’ (2018) 20(2) *North Carolina Journal of Law & Technology*, 304-307; Ball considers whether video game streams are copyrightable under the U.S. Copyright Act. See Madeleine A Ball, ‘Nerf This: Copyright Highly Creative Video Game Streams as Sports Broadcasts’, (2019-20) 61(1) *William & Mary Law Review* 253.

⁵⁷ Alexander Tu, ‘Pausing the Game: Esports Developers’ Copyright Claims to Prevent or Restrict Tournament Play’ (2021) 24(1) *Vanderbilt Journal of Entertainment & Technology Law*, 201-205.

⁵⁸ Daniel Schnapp and Samuel Cohen, ‘Intellectual Property Rights and Esports — Sheppard Mullin’, *Esports Insider* (Web Page, 18 March 2022) <<https://esportsinsider.com/2022/03/ip-rights-esports-sheppard-mullin>>.

⁵⁹ *European Parliament Resolution* (n 2) [D].

⁶⁰ *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs* [2009] OJ L 111, 16-22; See also C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, Judgment of the Court (Fourth Chamber), 23 January 2014.

⁶¹ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, OJ L 167, 22.6.2001, 10-19.

⁶² *European Parliament Resolution* (n 2) [H].

⁶³ *Ibid* [H]; See also Chung (n 2) 242-246.

⁶⁴ *Ibid*.

own national copyright law.⁶⁵ This implies that the EU's role involves harmonising national legislation on copyright applicable to the video game industry in each member state.⁶⁶ Consequently, while a unified legal framework for copyright does not exist at the EU level, efforts are made to standardise national legislation across EU member states.⁶⁷

2 *Schengen Visa and Working Authorisation for Esports Players*

At the EU level, there is currently no designated visa category specifically tailored for esports players. However, traditional sports athletes have the option to acquire a 'Schengen Sports Visa' to facilitate their travel within the Schengen Area. Regarding this matter, the European Parliament states that:

Calls on the Member States and the Commission to consider the creation of a visa for esports personnel based on the Schengen cultural and sports visas, applicable to all personnel involved in running and participating in esports competitions, and to consider measures to facilitate visa procedures to enable video game workers to come to the EU;⁶⁸

In other words, the EU should take an action to establish a distinct visa framework for esports players and personnel, drawing upon the existing visa system designed for cultural and sporting activities outlined in EU legislation.

In essence, the 'Schengen Sports Visa' permits sports athletes to compete in specific sporting events for up to 90 days, provided their visa request is deemed reasonable and appropriate.⁶⁹ Athletes from third countries with visa-free agreements with the European Union may be exempt from obtaining this visa to enter Europe. However, this visa scheme has never been extended to esports players and personnel participating in esports competitions in Europe. Consequently, Germany has taken the initiative to introduce special visas for esports players and their support staff under German Employment Regulations. This decision stemmed from the significant occurrence of major esports events, such as the League of Legends European Championship ('LEC') and Dreamhack

⁶⁵ F Wille Groshide et al, 'Intellectual Property Protection for Video Games: A View from the European Union' (2014) 9(1) *Journal of International Commercial Law and Technology*, 4.

⁶⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, OJ L 167, 22.6.2001, 10-19.

⁶⁷ Regarding the relationship between esports industry and U.S copyright law, see Dave Gravely, 'Discovering the Governing Forces of eSports, an Intellectual Property Gold Mine' (2023) 54(2) *St. Mary's Law Journal*, 574-600.

⁶⁸ *European Parliament Resolution* (n 2) [32].

⁶⁹ SchengenVisaInfo, 'Schengen Visa For Cultural / Sports / Religious Event And Film Crews' (Web Page) <<https://www.schengenvisa.info.com/cultural-sports-religious-event-film-crews/>>.

(Hannover), within Germany.⁷⁰ Therefore, while there is not a dedicated visa regime for esports players and personnel at the EU level, individual member states have the discretion to implement special visas for esports activities, as demonstrated by Germany.⁷¹

In contrast to the visa system in the EU, visa applications from esports players and personnel have been gradually accepted in the United States.⁷² Typically, the U.S. authorities grant the 'P-1A visa' to internationally recognised athletes on a case-by-case basis.⁷³ This visa category enables both amateur and professional esports players to temporarily participate in esports competitions held in the U.S. The first individual to obtain a P-1A visa was Danny 'Shiphtur' Le, a Canadian professional League of Legends player.⁷⁴

Furthermore, there is potential for the P-1A visa to be extended to include coaches and other support personnel, especially considering that major esports events like the Overwatch League are hosted in the U.S.⁷⁵ However, William 'Leffen' Hjelte, a Swedish professional Super Smash Bros Melee player, encountered difficulties when his visa request was initially rejected by U.S. authorities to participate in the major U.S. tournament 'The Big House 5' in October 2015. This rejection stemmed from Super Smash Bros Melee not being recognised as one of the legitimate esports titles like League of Legends and Counter-Strike: Global Offensive ('CS:GO').⁷⁶ However, he eventually received the P-1A visa as an internationally recognised athlete in October 2016.⁷⁷ Therefore, the U.S. immigration authorities utilise the existing visa framework to determine whether esports players and personnel qualify for the P-1A visa to participate in esports tournaments held in the U.S.⁷⁸

⁷⁰ The German Games Industry Association, 'Esports visa', *Game* (Web Page) <<https://www.game.de/en/esport/esports-visa/>>.

⁷¹ Alexander H Asawa, 'Esports in the Global Arena: An Established Industry Deserves a New Visa Path' (2022) 31(1) *Transnational Law & Contemporary Problems*, 167-170.

⁷² Maryanne Kline and Elizabeth C Egan, 'The Thrill of a Visa, the Agony of Denial: Visa Challenges for the Esports Athlete', *Mintz* (Web Page, 22 February 2019) <<https://www.mintz.com/insights-center/viewpoints/2806/2019-02-22-thrill-visa-agony-denial-visa-challenges-esports-athlete#Endnotes>>.

⁷³ See Asawa (n 74) 157-164.

⁷⁴ Paresh Dave, 'Online Game League of Legends Star Gets U.S. Visa as Pro Athlete', *Los Angeles Times* (Web Article, 7 August 2013) <<https://www.latimes.com/business/la-xpm-2013-aug-07-la-fi-online-gamers-20130808-story.html>>.

⁷⁵ *Ibid.*

⁷⁶ See Ryan Burden, 'Super Smash Bros. Player Leffen Denied Visa', *CGMagazine* (Web Page, 29 April 2016) <<https://www.cgmagonline.com/news/super-smash-bros-player-leffen-denied-visa/>>.

⁷⁷ Jacob Wolf, 'Leffen Receives Athlete Visa, Approved to Compete in the US', *ESPN* (Web Page, 3 October 2016) <https://www.espn.com/esports/story/_/id/17705825/leffen-receives-visa-allowed-return-usa-compete-smash-tournaments>.

⁷⁸ See also Chung (n 2) 235-239.

In short, both the European and U.S. visa systems for esports players are not yet well-established. The visa issues surrounding esports create significant obstacles for the growth of the esports economy market. Of particular concern is the European Parliament's Resolution of 10 November 2022, which highlighted the absence of a specific legal framework or guidelines within the EU to address visa problems for esports players. Consequently, it is necessary for the EU to address this issue promptly to prevent the loss of potential economic growth opportunities.

3 *The Protection of Young Esports Players (or Gamers) Against Physical, Mental and Social Problems*

Protecting young esports players (or gamers) from physical, mental, and social issues is a significant concern within the EU. The European Parliament Resolution underscores 'the need to protect young players, especially minors' within the video game sector.⁷⁹ To address this, the ISFE has taken steps to develop a unified European system called the Pan-European Game Information ('PEGI') for providing age recommendations and content descriptors. While this framework does not carry legal binding, more than 35 countries have adopted the PEGI, replacing their national age rating systems.⁸⁰ As a result, the PEGI serves as a recognised common framework for age rating systems, aimed at safeguarding young gamers across Europe.

On 18 January 2023, during a plenary session at the European Parliament, a report titled 'Protecting gamers and encouraging growth in the video games sector' was adopted. This report called 'for gamers to be better protected from addiction and other manipulative practices, while emphasising the potential of this innovative sector.'⁸¹ More importantly, it highlighted the necessity of harmonising EU rules on consumer protection for young gamers to mitigate the risk of physical, mental, and social problems caused by video games.

In a nutshell, the EU will play an essential role in establishing a unified regulation for the protection of young people in the esports and video game industry throughout Europe.⁸² The objective of this regulation is to standardise

⁷⁹ *European Parliament Resolution* (n 2) [11].

⁸⁰ See Pan-European Game Information, 'The PEGI Organisation', (Web Page) <<https://pegi.info/page/pegi-organisation>>.

⁸¹ European Parliament, 'Protecting Gamers and Encouraging Growth in the Video Games Sector', (Web Page, 18 January 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230113IPR66646/protecting-gamers-and-encouraging-growth-in-the-video-games-sector>>.

⁸² The European Parliament Committee on Internal Market and Consumer Protection requested research on loot boxes in online game and their effect on consumers because of potential risks of illegal gambling and crimes. It seems that this issue can be considered under consumer protection law. See Annette Cerulli-Harms et al, *Loot Boxes in Online Games and Their Effect on Consumers, in Particular Young Consumers* (Study, 16 July 2020).

national rules to safeguard young gamers from encountering physical, mental, and social issues during esports and video game activities in Europe, akin to the principles outlined in the PEGI framework.⁸³

5 CONCLUSION

The esports society should move away from debating whether esports qualify as traditional sports, as this debate can hinder the establishment of a dedicated esports-centric regulatory framework essential for further development. As highlighted in this article, issues such as intellectual property rights and visa regulations within the esports industry require distinct approaches compared to those in traditional sports. Consequently, the EU should take proactive steps to oversee the legal aspects of the European esports and video game ecosystem, recognising its unique characteristics and needs.

The adoption of a resolution by the European Parliament regarding the esports industry marks a significant milestone for the European esports and video game ecosystem. This resolution underscores several critical issues that require attention from the EU. In this context, the EU could potentially regulate esports-related activities under Articles 101 and 102 of the TFEU, which pertain to competition law, as well as Article 169 of the TFEU, which concerns consumer protection law.

Using these legal bases, this article examines three examples of esports-related activities under EU law: (1) the copyrights of esports publishers; (2) Schengen visa and work authorisation for esports players; and (3) the protection of esports players (or gamers) against physical, mental, and social problems. To address these issues effectively, the EU may play a vital role in harmonising national legislation across EU member states.

However, it is important to note that the EU should not seek to govern the entire international esports ecosystem, as esports extends far beyond Europe's borders. Instead, the EU should focus on establishing guidelines for how esports can align with European values. These values may not necessarily be applicable to the global esports industry, but they can serve as a model for governing the esports ecosystem within Europe. By setting an example of effective governance, the EU can potentially influence and inspire other continental regions to adopt similar approaches.

⁸³ This issue will be examined in more detailed in future research because this includes a lot of issues related to protection of minors in esports. For instance, Swiss parliament is still deliberating a Draft Law on Youth Protection for Film and Video Games ('LYPFV') on 11 September 2020. See Tsubasa Shinohara, 'Brief Overview of The New Youth Protection Law and Esports in Switzerland' (2024) 28(1) *Gaming Law Review*, 2-7.