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**LEGAL REGULATION OF THE EMPLOYMENT RELATIONSHIP  
OF A PROFESSIONAL ESPORTS ATHLETE**

Master's thesis

Programme HAJM, specialization Law and Technology

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Tallinn 2021

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 19527 words from the introduction to the end of conclusion.

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## **ABSTRACT**

The aim of this work is to find the answer to the question whether the professional esports athlete is an employee and are his/her rights protected by the Estonian Employment Contracts Act. The author explores the employment qualification of a professional esports athlete and whether the lack of specific regulations may create a situation for professionals engaged in esports, similar to the traditional athletes in the past, where athletes rights were violated.

The author of this work also analyzed the similarities of esports and traditional sports in order to legally qualify the employment relationship of esports athletes, in order to find out whether the introduction of special regulation for esports is necessary considering the similarity of esports to traditional team sports.

As a result of this study, the author concluded that given the relationship of subordination between athletes and esports teams, where the interests of the athlete are more subordinate to the common interests of the esports team, the legal relationship between the athlete and the esports team can be classified as a relationship of subordination. The relationship of subordination is the main basis for classification as an employee under the Estonian Employment Contracts Act, considering that the employment contract is distinguished from other civil law contracts by the higher degree of dependency of the employee and the employer.

Keywords: Esports, traditional team sports, labor law, gambling, Estonian legislation.

## INTRODUCTION

The development of technology has given one of the biggest impetus to our daily lives, changing our daily habits and practices. This, in turn has affected the intergenerational understanding of work, employment and career opportunities. New business models in the entertainment and sports landscape are increasingly encouraging the spread of unconventional forms of work and employment status. However, until a few years ago, the debate over the relationship between technology and law was predominantly a question of how technological developments affect the application of existing law in different sectors.

Technological developments have had a significant impact on the global development and commercialization of esports. The development of esports as a field began with the emergence of the video game industry in the 1970s when nearly ten thousand participants gathered for the first esports competition.<sup>1</sup> In general, the popularization of video games as a pastime has greatly contributed to the development of esports field. On the one hand, esports is an entertainment and hobby for a wide range of people, and on the other hand, it is a large-scale business whose economic scale is surpassing various major events in traditional sports. An example is the 2018 esports League of Legends (LoL) Mid-Season Invitational event in Europe, which was watched online by 60 million people and attended by 7,000 people on site.<sup>2</sup> Such spectator numbers can be compared to major events in traditional sports, such as the American Football Final the Super Bowl or the Olympic games events.<sup>3</sup>

The major development of esports as an independent field both in Europe and in Estonia has inevitably led to the need to find a solution to the legal regulation of esports as a profession. Many groups of unrelated persons who are far from esports and are not involved in the field still believe that esports is simply playing computer games for entertainment purposes or leisure, excluding esports due to its

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<sup>1</sup> Kane, D., Spradley, B. D. (2017). Recognizing ESports as a sport." *Sport Journal*, 20, 1-9. p. 1.

<sup>2</sup> Cox, S. (2020). Largest eSports Attendances And Most Viewed eSports Events. Retrieved from <https://www.888sport.com/blog/e-sports/biggest-esports-attendances-and-most-viewed-esports-events> , 01. February 2021.

<sup>3</sup> Holden, J.T., Kaburakis, A., Rodenberg, R. (2017). The future is now: Esports policy considerations and potential litigation. *Journal of Legal Aspects Sport*, 27, 46-78. p. 51-52.

playful nature as an opportunity for an area of activity, ie to participate in esports as a profession. Considering the development of the field both in Europe and in Estonia, the regulation of esports and policy-making should not wait for the occurrence of possible bottlenecks in the applicable legislation. Namely, at the level of the European Union, attention has been drawn in the past to esports as an area that has no legal framework.<sup>4</sup> Nevertheless, the European Union has not paid additional attention to legal analysis and regulation in this field. As a result, EU Member States have independently taken various national initiatives to regulate this area.

Given that the field of esports is characterized by rapid development, instability in employment, which is characterized by the temporary nature of esports contractual relationships due to intense competition, short career opportunities and occupational health problems,<sup>5</sup> it is therefore important to analyze the need for protection of the rights of individuals who want to engage in esports professionally.

The aim of this master's thesis is to explore more generally the employment qualification of a professional esports athlete and whether the lack of specific regulations may create a situation for professionals engaged in esports, similar to the traditional athletes in the past, where athletes rights were violated. In view of the global nature and rapid development of esports, this is a situation where there is no autonomous and legitimate governing body or organization within the field and, on the other hand, there are no agreements on the qualification of the employment status of esports athletes. This master's thesis contains an analysis of the aforementioned problems and answers to the most important employment status problems of esports. Based on the above, it can be concluded that the topic of this master's thesis is topical and creates new knowledge.

The master 's thesis is based primarily on a qualitative research method, as the main object of analysis is the theoretical source material for conducting a substantive theoretical analysis of the phenomenon of esports, which includes a legal analysis of the nature and qualification of employment status. Different methods of legal interpretation are used in the interpretation of legal norms, in particular

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<sup>4</sup> Bogusch, M. (2017). eSports coming to the fore for policymakers in Europe, Retrieved from <https://www.whitecase.com/publications/article/esports-coming-fore-policymakers-europe> , 03.February 2021.

<sup>5</sup> Smithies, T. D., Toth, A. J., Conroy, J., Ramsbottom, N., Kowal, M., Campbell, M. J. (2020). Life after esports: a grand field challenge. *Frontiers in Psychology*, 11 (883). p. 1-2.

teleological interpretations. On the other hand, the author analyzes the theoretical possible similarities in the nature of the employment of an esports athlete to the employment of traditional team sport athletes and the special norms applicable to this legal relationship in order to analyze whether it is necessary for the legislator to lay down special norms for esports employment relationship.

The research question this master's thesis aspires to answer is the following:

Is a professional esports athlete an employee and are his or her rights protected under the Estonian Employment Contracts Act?

The structure of this master's thesis is based on the principle that a comprehensive analysis of the qualification of the employment relationship of a professional esports athlete should be easily observable and systematic. First, the author gives an overview of the term esports and the circle of subjects related to the field, which is a prerequisite for defining the nature of an esports athletes employment status and the law applicable to the employment relationship, and which shows the theoretical basis for qualifying an esports athlete employment relationship. Secondly, the work deals with the nature and qualification of the employment relationship of professional esports athlete. The chapter analyzes the possible parties to the employment relationship and the qualification of the employment relationship depending on the nature of the employment relationship and the subordination relationship. Third, the paper deals with the differences of the employment relationship of a professional esports athlete compared to traditional worker. An important part is also the practice of different countries in regulating esports, ie to point out the national differences of countries in order to ensure the protection of the employment relationship of esports athletes similarly to traditional workers.

# **1. THE CONCEPT AND NATURE OF ESPORTS AND ITS STRUCTURE**

When talking about esports and the legal regulation of the employment relationship, it is important to first analyze the concept of esports and also the structure of esports in order to understand the employment status of professional esports athlete. In other words, it is important to determine whether the employment relationship between an esports athlete qualifies as a relationship under the law of obligations and to distinguish in which case the professional athlete as an employee is subject to employment law and in which case the law of obligations applies. The aim of the first part of the thesis is to give an overview of esports as a phenomenon, the circle of subjects and the structure of the field.

## **1.1 Definition of esports and applicable law**

Esports as a term does not have a legal definition and, in addition, there is no industry-agreed common definition of the term, as a result of which several different definitions are used. Nevertheless, esports can be defined as organized competitive video gaming among professional players for spectators, either in a physical or virtual environment.<sup>6</sup> As can be seen from the previous definition of the term esports, the activity of esports is subject to organized competition between professional players in the form of video games for spectators. Consequently, a distinction should be made between the concept of a professional, that is to say, a person pursuing a particular profession or a source of subsistence. Consequently, a distinction should be made between the concept of professional, ie a person pursuing a specific activity as a professional or source of livelihood.<sup>7</sup> In the context of esports, a professional athlete should be considered to be a person who plays video games in a competitive format as a profession. An esports athlete is a person for whom the main activity is playing video games competitively, which includes taking part in esports competitions as well as participating in training.

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<sup>6</sup> Hallmann, K., Giel, T. (2018). eSports–Competitive sports or recreational activity?. *Sport management review*, 21 (1), 14-20. p. 15-16.

<sup>7</sup> Explanatory dictionary of the Estonian language, Retrieved from <http://eki.ee/dict/ekss/index.cgi?Q=elukutseline&F=M>



When talking about the competition format, it should be pointed out that the most popular esports leagues are built on the format of inter-team play, which makes it possible to draw parallels with traditional team sports such as basketball, football or volleyball.<sup>8</sup> The only difference is the field-specific object, ie the video game, around which the substantive activities are built. On the other hand, it must be understood that esports is an umbrella term that, like the traditional concept of sport, brings together various disciplines, ie video games, which form the basis of the structure of esports.<sup>9</sup> The most common video game genres of esports are multiplayer online battle arena (MOBA), first-person shooter (FPS), and real-time strategy (RTS) games.<sup>10</sup> Due to the specifics and content of these video game genres, the rules of leagues within different genres also differ and there may also be differences in format.

The professional literature has drawn attention to the problem of defining the term of esports at the national level and the lack of political motivation to deal with the regulation of this field. Internationally, it is noticeable that countries have developed different positions regarding the regulation of esports, who have introduced specific norms within the sector to regulate esports, who have recognized esports as a traditional sports.<sup>11</sup> According to the author, there is no uniform solution, but the national regulation of esports depends on the legal system of a particular country. Speaking of Estonian domestic law, the legislation in force in the current Estonian legal system does not provide a definition of the concept of esports. In other words, the legislature has not stated unequivocally whether esports is to be regarded as a traditional sport or it is entertainment in the form of gambling.

§ 2 (1) of the Estonian Gambling Act<sup>12</sup> (hereinafter HasMS) provides that gambling is a game in which precondition for participating is conditional on the making of a bet, the player has the opportunity to win and the result of the game depends in part or entirely on random activities.<sup>13</sup> Pursuant to that provision, gambling must satisfy all the above conditions.

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<sup>8</sup> Parshakov, P. (2016). Team vs. individual tournaments: evidence from prize structure in eSports. *Higher School of Economics Research Paper*, No. 138. p. 6.

<sup>9</sup> Purewal, J., Davies, I. (2016). The eSports explosion: Legal challenges and opportunities. *Landslide*, 9 (2). p. 4.

<sup>10</sup> Pu, H., Xiao, H., Kota, R. W. (2021). Virtual games meet physical playground: exploring and measuring motivations for live esports event attendance. *Sport in Society*, 1-23. p. 2.

<sup>11</sup> Yun, S. M., (2019). A Comparative Overview of Esports against Traditional Sports Focused in the Legal Realm of Monetary Exploitation, Cheating, and Gambling. *Cardozo Arts & Entertainment Law Journal*, vol. 37 (2), 513-551. p. 546-550.

<sup>12</sup> Gambling Act, RT I, 15.10.2008, 47, 261.

<sup>13</sup> *Ibid.*, § 2.

Speaking of the first condition provided in § 2 of the HasMS, which is to make a bet to participation, then literally interpreting a bet in the context of this provision, it can be assumed that making a bet requires a new contribution at the start of each new game. Interpreting the making a bet in the context of esports, it should be assessed whether the participation fee in esports competitions or tournaments could be considered a bet according to HasMS. According to the HasMS explanatory memorandum, "the concept of a bet has been established in a broad sense, according to which a financially valued obligation for the right to participate in gambling is also considered a bet"<sup>14</sup>. On the other hand, the legislator has provided that in the case of the criterion of making a bet as a condition of gambling, the amount of the bet is not relevant for classifying a certain activity as gambling, but the existence of a bet in general. In making a bet activity it is also important to address the question of whether a particular game is addictive and potentially costly.<sup>15</sup> On the other hand, it is important to assess whether a bet in the form of a financial obligation to participate in an esports league gives rise to gambling, similar to traditional gambling. The author is of the opinion that in the context an esports tournament or a league, the participation fee is a financial obligation in the form of a payment, but it is not a direct financial obligation on the part of the athlete to participate in the game, but a financial obligation in the form of a participation fee in a league. This is a one-time payment and does not require an additional bet before each game, similar to traditional gambling games. According to HasMS, the participation fee cannot be considered a bet that could result in a win in an esports tournament.

Speaking of the condition that the player has a chance to win. According to § 2 (3) of the HasMS, a win is considered to be the right to acquire money or another benefit that has a monetary value.<sup>16</sup> By interpreting this provision, the player who has won has the opportunity to participate in a new game, continue playing or receive other benefits. The purpose of esports competitions is to find out the winning team as in traditional team sports. In the context of § 2 (3) of the HasMS, each win does not in esports league mean that a team or a player has the opportunity to participate in a new game, continue to play or receive other benefits. Given that the structure of esports leagues is based on the model of traditional team sports, a certain team wins at the end of a certain tournament or season.

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<sup>14</sup> Ministry of Finance. (2007). Explanatory Memorandum to the Gambling Act (9519). p. 5.

<sup>15</sup> *Ibid.*, 5.

<sup>16</sup> Gambling Act, RT I, 24.10.2018, 2. § 2, section 3.

Consequently, according to HasMS, a victory in gambling cannot be regarded as a victory in esports competitions by analogy.

Speaking of the third condition of gambling, which is random activity, this means that the outcome of the game depends in part or entirely on random activity.<sup>17</sup> The question arises as to what is a coincidence in the case of a video game that is the essence of esports, and when it is the conscious effort and action of the player. Namely, in the video game industry, randomness is determined by pRNG (pseudo random number generator). This is the basis of random action in video games, ie it is an algorithm within the video game and a feature of the video game that determines the randomness or lack of elements of the game.<sup>18</sup> Given the competitive nature of esports, the additional question arises as to whether such an algorithm can determine the outcome of a game or is merely a technical detail within a video game that does not affect the outcome of the video game.

In addition, § 3 of the HasMS sets out the types of gambling. Point 4 of the same paragraph deal with games of skill which are games with the outcome of which depends predominantly on the physical skills or abilities or knowledge of the player, and which are played by means of a mechanical or electronic device.<sup>19</sup> Analyzing the definition of a game of skill and the concept of esports, due to the rather broad definition of a game of skill, it is also possible to consider video games that are the basis of esports as a game of skill.

According to the author, the substantial similarity of esports to the characteristics of gambling may conditionally create a situation where esports is considered as gambling under the applicable law.<sup>20</sup> This in turn may impose restrictions on persons wishing to pursue esports as a profession or to organize esports events, given the actual substantive difference between esports and gambling. Based on the above analysis, in view of the development of esports, the question should be raised domestically and in EU, whether esports should be considered as sports, gambling or regulated as a separate field, precisely in order to ensure an internationally strong and functional environment for

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<sup>17</sup> *Ibid.*, § 2, section 1, point 3.

<sup>18</sup> Heinzman, A. (2019). What Is RNG in Video Games, and Why Do People Criticize It? Retrieved from <https://www.howtogeek.com/446695/what-is-rng-in-video-games-and-why-do-people-criticize-it/> , 05. February 2021.

<sup>19</sup> Gambling Act, RT I, 24.10.2018, 2. § 4, point 4.

<sup>20</sup> Rizzi, A., Serao, N., Nowak, L. (2019). Esports in Italy: an industry ready to take off (or still in search of its regulatory soul)? *Interactive Entertainment Law Review*, 2(1), 42-49. p. 44-45.

esports in the Estonian economic environment. This is important given the economic potential of esports and its internationality.

Internationally, countries have different practices for defining esports as sports or gambling, creating great confusion in the legal landscape. For example, the United States issues visas to foreign nationals for domestic esports competitions and tournaments, for which the legal basis is that the person is an internationally recognized athlete.<sup>21</sup> Issuing an athlete visa to esports-related individuals has set a precedent in the United States, where an athlete is also considered as a persons engaged in esports as a profession.

On the other hand, § 2 (5) of the HasMS provides for an exception, according to which sports competitions are not considered gambling, regardless of whether it is possible to bet on them, win them and the result is determined by chance.<sup>22</sup> In other words, this provision excludes sports competitions from the scope of HasMS. The exception provided in HasMS would allow esports tournaments and competitions to be considered as sports competitions. Treating esports as a sporting event would conditionally create a situation in which esports athletes should be equated with athletes. This is the case where persons taking part in sporting events are considered to be athletes. Consequently, it is important to analyze whether esports can be considered as a sub-category of traditional sports at all, ie whether they meet the generally accepted conditions of sports.

Turning to the concept of sport, the Advocate General in the EU judgment C 90/16 *Bridge Union Ltd v Revenue and Customs Commissioners* analyzed the concept of sport. According to the Advocate General, sport generally refers to activities in which the physical part is significant, but it also acknowledges that, in order to be regarded as sport, a given activity "does not necessarily have to contain a physical element in order to be accepted as sport".<sup>23</sup> On the other hand international sport umbrella organizations, including the International Olympic Committee, have also recognized "mental sport or endorse activities without a physical element"<sup>24</sup>, such as for example chess or bridge,

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<sup>21</sup> Chung, E. (2019). Gotta Catch'Em All! The Rise of eSports and the Evolution of Its Regulations. *SMU Sci. & Tech. Law Rev.*, 22, 231-261. p. 235-238.

<sup>22</sup> Gambling Act, RT I, 24.10.2018, 2. § 4, point 4.

<sup>23</sup> Opinion of advocate general Szpunar, C-90/16, 15 June 2017, p 39.

<sup>24</sup> *Ibid.*, 38.

as sports. In short, when treating an activity as a sport, it is important to distinguish whether the activity considered as a sport has a necessary physical activity. According to the Advocate General, "it is also possible to define sport through competition and the fact that equipment is not provided by a single supplier. The latter condition excludes activities that do not have a broad basis in civil society, such as commercial products on the market designed by businesses for mere consumption, citing video games as an example".<sup>25</sup>

The author agrees that video games are indeed a commercial product on the market for consumption only, but that esports creates a whole new value and content for video games that precludes the playing of video games for consumption alone. Namely, the goal of competitive gaming is to play video games in a competitive format, where players must use their knowledge and skills to achieve victory.

On the other hand, the Advocate General referred to the fact that equipment is not supplied by a single supplier. In the case of esports, each discipline is a video game developed by a particular game publisher, but the question arises as to whether a video game can be considered as a equipment or whether the equipment needed to participate in the esports, ie the computer and its hardware, should be considered as equipment.<sup>26</sup> On a broader interpretation, the Advocate General's condition that equipment is not supplied by a single supplier can be regarded as an exclusionary condition intended to eliminate the monopoly position of a single producer on the market. Namely, to avoid a situation in which the equipment manufacturer, due to its monopoly position, has a greater degree of control over the persons involved in the sport.<sup>27</sup> In esports, game publishers have a monopoly position in the league on which a particular video game is based due to intellectual property rights, but participation in esports leagues takes place in accordance with the established rules, assessing the player's eligibility in accordance with the rules. This compliance assessment is similar to traditional team sports.

The Advocate General took the view that most activities considered to be sport "require a certain effort to overcome a challenge or obstacle (and are therefore not purely leisure activities), whether they are

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<sup>25</sup> *Ibid*, 38.

<sup>26</sup> Abanazir, C. (2019). E-sport and the EU: the view from the English Bridge Union. *The International Sports Law Journal*, 18(3), 102-113. p. 109.

<sup>27</sup> *Ibid.*, 109.

competing with an opponent or crossing body or mind boundaries "<sup>28</sup>. On the other hand, "overcoming these obstacles trains a certain physical or mental skill, (...) and these activities are not usually practised not solely in a purely commercial context."<sup>29</sup>

According to the author, in today's changing world, sport cannot be considered as a mere physical activity, referring to the fact that international sports umbrella organizations also consider mental activities as sports. In treating activities as sports, international sports organizations, have largely relied on the principles of whether these activities are understood and perceived by the public as sport and whether such public opinion suggests that the activity can be considered similar to the already established sports.<sup>30</sup> Consequently, the legislator should assess the substantive activity of esports and its compliance with the conditions characterizing sport.

Consequently, a unambiguous definition of esports at national level is also important in order to determine the circle of subjects wishing to engage in esports professionally or allowed to participate in esports competitions. In some countries, the development of the this field and the possibility for individuals to engage in competitive gaming has lagged behind the age limit, as esports is considered gambling under current law. § 34 of the HasMS currently in force in Estonia provides for an age limit of 21 years for participation in gambling.<sup>31</sup> Considering the average age of persons engaged in esports, many of the world's top esports athletes would be left out of the competitive gaming competitions taking place in Estonia. In addition, the age limit provided by law would also affect the legal relationship between esports teams and athletes.

On the other hand, it is also important to draw attention to the potentially violent content of video games and the resulting restrictions that may affect the range of participants in esports tournaments. It is important to emphasize once again that esports is understood as a umbrella term, which means that not all video games that are part of esports structure may contain violent content and action. On the other hand, attention should be drawn to violent video games, given that the more popular video

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<sup>28</sup> Opinion of advocate general Szpunar, C-90/16, 15 June 2017, p 42.

<sup>29</sup> *Ibid.*, 42.

<sup>30</sup> *Ibid.*, 39.

<sup>31</sup> Gambling Act, RT I, 24.10.2018, 2. § 34, section 2.

games underlying esports disciplines may contain varying degrees of violence or violent elements.<sup>32</sup> § 25 of the Child Protection Act of Estonia provides that the production, demonstration and distribution of objects, films and publications inciting cruelty and violence and containing pornographic content to children is prohibited.<sup>33</sup> A teleological interpretation of this provision must be based on the general welfare of children, and the list of objects of incitement to violence mentioned in this provision is not exhaustive. Consequently, the prohibition under this provision also applies to video games. The Chancellor of Justice has also drawn attention to this, who in 2017 found that the organizers of esports events taking place in Estonia must behave responsibly and avoid negative effects on children as a vulnerable target group.<sup>34</sup>

The need to regulate the employment relationship in esports stems primarily from people's fundamental rights. Namely, pursuant to § 29 of the Constitution of the Republic of Estonia, every citizen has the right to freely choose his or her field of activity, profession and place of work and accordingly the right of the state to take positive action to ensure this freedom, ie the state's obligation to ensure statutory working conditions and employment protection.<sup>35</sup> The right to be economically active and to earn a living in the field and in the way of one's choice is a precondition for a decent living for a person and his or her family. The current confusion in the legal landscape regarding the regulation of esports as a profession can create an unfavorable situation that violates the fundamental rights of individuals.

## 1.2 Governance of esports

The increasing development and commercialization of esports in recent years has created a situation where a balance should be struck between the independence of esports as an independent field and the protection of the rights of those involved in it. This is especially true in a situation where the views of esports organizations and teams on the qualification of the employment relationship are very different.

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<sup>32</sup> Collier, J. E., Liddell Jr, P., Liddell, G. J. (2008). Exposure of violent video games to children and public policy implications. *Journal of Public Policy & Marketing*, 27(1), 107-112. p. 107-108.

<sup>33</sup> Child Protection Act, RT I, 06.12.2014, 1. § 25 section 1.

<sup>34</sup> The Chancellor of Justice, E-spordi vanusepiirangud, 04.12.2017. Retrieved from [https://www.oiguskantsler.ee/sites/default/files/field\\_document2/E-spordi%20vanusepiirangud\\_0.pdf](https://www.oiguskantsler.ee/sites/default/files/field_document2/E-spordi%20vanusepiirangud_0.pdf) , 12.02.2021.

<sup>35</sup> The Constitution of the Republic of Estonia. Executive Edition. Tartu: Iuridicum Foundation, 2020. Retrieved from [https://pohiseadus.ee/sisu/3500/paragrahv\\_29](https://pohiseadus.ee/sisu/3500/paragrahv_29) , 14. February 2021.

This has led to a situation where the analysis of the relationship between esports and law has led to the view that, due to its specificity nature, esports is able to regulate themselves.<sup>36</sup> Self-regulation refers to the self-regulation of international umbrella organizations or leagues in order to ensure the legal structure of esports and internal regulations to ensure the employment protection of persons engaged in it. This is on the assumption that, like traditional sports and international umbrella organizations such as the International Basketball Federation (FIBA) or the Federation Internationale de Football Association (FIFA), which have established internal regulations to ensure the rights of professional athletes and others.

The difference between esports and traditional sports is that there is no clear leading international federation or other organization governing this area.<sup>37</sup> There are currently three major international organizations with different goals in regulating esports. First, The Esports Integrity Commission (ESIC) is an independent organization that works with the industry's largest stakeholders. The main objective of this organization is to combat fraud, including the detection and prosecution of match-fixing, fraud and doping.<sup>38</sup> Secondly, the World Esports Association (WESA), an independent organization whose members include various esports teams and one of the largest video game competition organizers in the industry, ESL, which produces competitions around the world. The aim of this organization is to standardize regulations within the field, including ensuring the protection of the rights of professional athletes and ensuring a fairer revenue-sharing mechanism.<sup>39</sup> The third organization is the International Esports Federation (IESF) that is an independent non-profit corporation that "serves as a global organization representing, coordinating, harmonizing, and administering esports while preserving the rights and providing a voice to all stakeholders of the esports industry"<sup>40</sup>.

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<sup>36</sup> Mulligan, P. (2020). Part 1: Level up - corruption and self-governance in Esports. Retrieved from <https://insidesportslaw.com/blog/part-1-level-up-corruption-and-self-governance-in-esports> , 16 February 2021.

<sup>37</sup> Geeraert, A., Alm, J., Groll, M. (2014). Good governance in international sport organizations: an analysis of the 35 Olympic sport governing bodies. *International journal of sport policy and politics*, 6(3), 281-306. p. 294.

<sup>38</sup> Martinelli, J. (2018). The challenges of implementing a governing body for regulating esports. *U. Miami Int'l & Comp. L. Rev.*, 26, 499-524. p. 506.

<sup>39</sup> Koot, J. (2017). Esports Governance and its Failures. Retrieved from <https://medium.com/@heyimJoost/esports-governance-and-its-failures-9ac7b3ec37ea> , 12. February 2021.

<sup>40</sup> International Esports Federation Statutes 2020. Retrieved from <https://ie-sf.org/wp-content/uploads/2021/01/IESF-Statutes-2021.pdf> , 12. February 2021.



International sports organizations play various roles in traditional sports, one of the most important is the enforcement of the so-called internal rules of the game and the regulation of the rights and obligations of persons involved in the sport. In esports, the role of international organizations is limited due to the role of video game mechanics. In fact, international umbrella organizations of esports cannot, in essence, regulate the rules of the game which are the subject of video games, since they have already been determined by game publishers during the development of the game.<sup>41</sup> In other words, a video game operates according to certain rules that are set by the game publisher during the development process when developing a video game. In short, any behavior allowed by game mechanics is part of the rules of the game in competitive gaming. Consequently, the only rules that can be established are the rules governing the external behavior of video games. These include, for example, the requirements applicable to the equipment used, the behavior of professional esports athletes, the minimum requirements for occupational safety and health, the use of doping, etc. At present, such rules and regulations have been established, either by the video game publishers or by the organizers of tournaments/leagues.

It can be seen from the above that there are several international organizations in the field of esports that have been established to regulate competitive gaming, but which have no legitimacy. The lack of legitimacy can be attributed to the fact that such international esports organizations are independent organizations without the support of video game publishers, stakeholders and countries.<sup>42</sup> This is due to the fact that many countries have not defined esports in essence and have not recognized esports as traditional sports, which has also hindered national interest and the need for national regulation. On the other hand, these international organizations do not have specific rules and regulations that would force athletes and teams to follow them. At present, esports is directly or indirectly regulated and controlled by the rules and structure of league organizers or game publisher companies. In essence, it can be said that at present the tasks of the governing body are de facto performed by game publishers and league organizers. In the case of game publishers, however, there is a clear distinction between the pursuit of economic objectives and the pursuit of commercial objectives for the enforcement of

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<sup>41</sup> Funk, D. C., Pizzo, A. D., Baker, B. J. (2018). eSport management: Embracing eSport education and research opportunities. *Sport Management Review*, 21(1), 7-13. p. 12.

<sup>42</sup> Peng, Q., Dickson, G., Scelles, N., Grix, J., Brannagan, P. M. (2020). Esports governance: exploring stakeholder dynamics. *Sustainability*, 12(19), 1-15. p. 9-10.

intellectual property rights, which can significantly undermine the employment protection of professional esports athletes.

### **1.3. Esports structure**

When talking about the structure of esports, it is also important to draw attention to the stakeholders in this field in order to find out the circle of subjects. Namely, there are essentially five major stakeholder groups in this field, which are: 1) game publishers, who develop and publish video games; 2) organizers of esports competitions and tournaments; 3) esports teams; 4) professional athletes and; 5) media platforms that play an important role in broadcasting competitions to a wider audience around the world.<sup>43</sup>

Looking at the aforementioned subjects, esports is very similar to the structure and stakeholders of traditional team sports. It should be borne in mind that, like traditional sports, video games also differ in terms of their content and rules of the game. Consequently, one of the main challenges in qualifying the employment relationship of esports is that not all leagues have a similar structure and they also differ in the internal rules of the video game that determine the structure of the leagues. It must be borne in mind that, similarly to traditional sports, there are different areas in esports, ie video games. Consequently, when qualifying an employment relationship and determining the legal status of an employee, the substantive differences of video games must be taken into account, ie the independence of the athlete during training and employment. Not all employment relationships of esports athletes cannot be qualified on the same basis. Consequently, due to the determination of the employment status of an esports athlete as an employee, it is important to distinguish the nature of the contractual relationship of the esports athlete, which also significantly affects the athlete's rights in employment to various legal guarantees.

#### **1.3.1 Game Publishers**

One of the most important part of esports structure are game publishers, without whom competitive gaming would not be possible as an independent field. Esports leagues are based on video games created by game publishers, following the example of traditional sports economics and the structure of various traditional team sports leagues, such as the National Basketball Association (NBA),

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<sup>43</sup> Chao, L. L. (2017). You must construct additional pylons: Building a better framework for esports governance. *Fordham Law Rev.*, 86(2), 737-765. p. 744-746.

National Football League (NFL), and so on. However, what distinguishes esports from traditional sports is the intellectual property rights of the video games that underlie esports leagues.<sup>44</sup> Given that intellectual property rights can be seen as a mechanism for protecting the economic interests of the author or the holder of intellectual property rights, this differs significantly from the traditional sports. International sport organizations for traditional sports have no legal rights as well as no physical means to restrict the practice of a particular sport. This is due to the fact that the rights related to the sports do not belong to a specific person. However, unlike traditional sports, game publishers have the intellectual property rights to the video games that underlie the leagues, which in turn distinguishes the operation and structure of esports from traditional sports. Namely, the publisher of video games can restrict the use of their intellectual property, including its presentation in video format on streaming platforms, public competitions, etc. Given that video broadcasting of esports tournaments and competitions to a wider audience through streaming platforms is an important part of the economic structure of esports. As can be seen from the above, intellectual property rights play an important role in competitive gaming structure, as well as indirectly in the employment protection of professional athletes. Consequently, it can be said that intellectual property rights in the structure of esports, unlike traditional sport, have a very significant impact on professional athletes, teams, league structure and competitions.<sup>45</sup>

Given the monopoly position, there is ambiguity in the legal landscape of many countries regarding the regulation of esports as a field and the definition of the employment relationship of the persons involved in it. Given the large increase in the popularity of esports in recent years compared to ten years ago, when competitive gaming was just emerging in the international arena, the area has gained great popularity and media coverage, drawing attention to various bottlenecks in the professional literature and esports communities, including the rights and occupational protection of professional athletes. This in turn has influenced the vision of game publishers in terms of the global economic sustainability of esports.

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<sup>44</sup> Holden, J. T., Edelman, M., Baker III, T. A. (2020). A short treatise on esports and the law: How America regulates its next national pastime. *University of Illinois Law Review*, 509-582. p. 519-520.

<sup>45</sup> Windholz, E. (2020). Governing Esports: Public Policy, Regulation and the Law. *Sports Law eJournal: Centre for Commercial Law, Bond University*, 1(1), 1-27. p. 25-26.

The issue of occupational safety and health for athletes has prompted game publishers to establish more efficient internal regulations for the leagues they manage, which also include mandatory minimum terms applicable to the contract between the athlete and team, including contract duration, pay, working hours and working conditions.<sup>46</sup> On the other hand, game publishers have not unambiguously defined the type of employment relationship between an athlete and a team, which is still one of the most important issues in view of occupational health and safety. Namely, the rules laid down in game publishers leagues are intended to ensure the economic and entertainment sustainability of the leagues, which have serious shortcomings in the employment protection of athletes. The difference between international sports organizations and video game publishers, as organizations responsible for the structure and legitimacy of esports leagues, is that, unlike international sports organizations, game publishers do not directly aim to manage the esports, rather esports is seen more as a tool for the marketing goal of the video game industry.<sup>47</sup> This is also reflected in the lack of interest of game publishers in the general regulation of esports, given that this is not their primary form of business. This, in turn, has raised the general question and the need for state intervention to define nationally the protection of the rights of those wishing to engage in esports.

### **1.3.2 League and tournament organizers**

Analyzing the organizers of esports leagues and tournaments, two types of persons can be distinguished: first, the game publishers themselves and, on the other hand, external league organizers with an indirect relationship with game publishers, which is expressed in a licensing agreement between the league host company and game publisher, which sets out the legal obligations to use the intellectual property or video game name.

The structure of the league largely depends on the business model of the league organizer and the rules of the video game. In general, the major and most popular video game leagues in the esports have become more and more similar to the structure of traditional team sports leagues. There is a European-style model of traditional team sports, where the number of teams in a league is determined,

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<sup>46</sup> Blizzard Entertainment (2017). Player Signings, Salaries, and More in the Overwatch League. Retrieved from <https://overwatchleague.com/en-us/news/20937016/player-signings-salaries-and-more-in-the-overwatch-league> , 16. February 2021.

<sup>47</sup> Reames, M. (2018). Player Representation and the Future Structure of Esports Leagues. Retrieved from <https://www.sporttechie.com/player-representation-and-the-future-structure-of-esports-leagues> , 28. February 2021.

but at the end of each season, teams from lower leagues have the opportunity to participate in a higher league in the form of transition games.<sup>48</sup> On the other hand, there is also a structure used in America, where the league consists of franchise teams that have acquired a contractual place in a given league. As a result, there is no single model for the structure of leagues.<sup>49</sup>

Nevertheless, the intellectual property of game publishers and their monopoly over the right to use video games play an important role in the functioning the leagues.<sup>50</sup> As a result, the relationship between the game publisher and esports leagues, teams and athletes are different than in traditional sports. According to the author, it is important to point out the differences in the structure and rules of the three major video game leagues in order to better understand the employment relationship of esports before analyzing the employment qualification of a professional athlete.

#### *1.3.2.1 League of Legends European Championship Series (LEC)*

League of Legends (LOL) is one of the most popular esports disciplines, and LEC is a league organized, operated and registered in the European Union by a subsidiary of Riot Games, that is based on the LOL video game.<sup>51</sup> This league-based video game is a team-based strategy game consisting of two 5-member teams. "The game operates like a combination of capture the flag and chess",<sup>52</sup> where teams must achieve victory or destroy another team's base. In terms of league structure, LEC is similar to traditional American team sports leagues such as the NBA or NFL, where the league consists of ten franchise teams.

The LEC League operates on the basis of rules developed by the game publisher, which set out the rules and requirements for players, teams, coaches and other persons participating in the league. The structure and organization of the league is slightly different from other esports leagues, in terms of the relationship between the athletes, the teams and the league. Unlike the structure of traditional team

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<sup>48</sup> Noll, R. G. (2003). The organization of sports leagues. *Oxford Review of Economic Policy*, 19(4), 530-551. p. 537.

<sup>49</sup> Windholz (2020), *supra nota* 44, 8.

<sup>50</sup> Ridenhour, K. F. (2019). Traditional Sports and Esports: The Patch to Collective Bargaining. *Iowa Law Rev.*, 105(4), 1857-1897. p. 1882-1883.

<sup>51</sup> League of Legends European Championships 2021 season official rules. Retrieved from [https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/blt44ccc3b4e4cbd379/602660a2601a4c183d7194c9/Rulebook\\_10FEB.pdf](https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/blt44ccc3b4e4cbd379/602660a2601a4c183d7194c9/Rulebook_10FEB.pdf), 03. March 2021.

<sup>52</sup> Hollist, K. E. (2015). Time to be grown-ups about video gaming: the rising eSports industry and the need for regulation. *Arizona Law Rev.*, 57(3), 823-848. p. 826.

sports leagues, where teams are contractually linked to the league and on the other hand athletes are contractually affiliated with teams, in LEC, athletes are contractually affiliated not only with the team but also with the league organizer.<sup>53</sup> This is precisely due to the fact that the league determines the standard contracts of players who want to join a team participating in the LEC and player use systems (video game platform) created by Riot Game. In other words, the game publisher determines the place and manner of work. On the other hand, the athletes must meet the player eligibility conditions set by the LEC league organizer. Similar to team sports, teams have the right to change players and terminate their contract, however, the LCS league organizer is the main disciplinary authority over the league's operation and the handling of game publishers and league-related violations.

The LEC League organizer also sets the salary floor, minimum salary requirements for players, the rights and obligations of players within the league, and has great control over the players behavior both as a professional athlete and outside the league. LEC internal regulations provide that "all players on a LEC team roster must have a written employment contract with the team they are playing for".<sup>54</sup> However, it should be noted that the league, organized by the same game publisher in the United States, states that "all players on an LCS team roster must have a written contract with the team they are playing for, referred to as a ("Player Services Agreement)".<sup>55</sup> According to the principle of *falsa demonstratcia non nocet*, the legal relationship is not defined by the title used in the contract, but by the content of the contract, and the title of the contract does not specify the qualification of the employment relationship which is the subject of the contract. Consequently, the substantive qualification of the employment relationship is important.

### 1.3.2.2 The ESL Pro League

ELS pro league differs from the other two esports leagues in the structure and independence of the underlying teams and players. ELS is a league run by a legal entity separate from the game publisher. The ELS league is based on the video game Counter-Strike: Global Offensive (CS: GO) created by

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<sup>53</sup> Holden, J. T., Baker III, T. A. (2019). The econtractor? Defining the Esports employment relationship. *American Business Law Journal*, 56(2), 391-440. p. 408.

<sup>54</sup> League of Legends European Championships 2020 season official rules. Retrieved from [https://static.wikia.nocookie.net/lolesports\\_gamepedia\\_en/images/0/06/LEC\\_2020\\_Rulebook.pdf/revision/latest?cb=20200131195923&format=original](https://static.wikia.nocookie.net/lolesports_gamepedia_en/images/0/06/LEC_2020_Rulebook.pdf/revision/latest?cb=20200131195923&format=original) , 03. March 2021.

<sup>55</sup> LCS and LACS 2020 official rules (v. 20.1). Point 3.10. Retrieved from [https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1\\_6bkbwz26cgp7fngeat6a.pdf](https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1_6bkbwz26cgp7fngeat6a.pdf) , 03. March 2021.

Valve Corporation. Given the intellectual property rights of a given game publisher to a given game, they have no direct link with the management of the ELS League. The league organizer, like the companies which manage the LCS and Overwatch leagues, does not lay down additional conditions for the contractual relationship between the teams and the players. The league's internal rules established by ELS regulate in-game and out-of-game competitor conduct, but ELS does not impose additional requirements on teams for their contractual relationship with professional athletes, but the rules set by the international esports umbrella organization ESIC are applied to the league. In doing so, the league management company relieves itself of its liability, leaving the teams free to determine the internal structure of the team, as a result of which each team is individually responsible for the legality of the employment contract with the esports athletes. This gives the team the autonomy to decide on the nature of the contractual relationship between them and the players, creating a situation in which the athlete, as the weaker party to the contract, may be deprived of the essential health benefits provided by the employer, including safety of the working environment. On the other hand, athletes do not have any uncertainty about the duration of the contract in this league, because unlike other leagues, the ESL has not determined the conditions for the transfer of players and the duration of the contracts.

An important difference in this league is precisely the rights and obligations arising from the relationship between the league organizer and the teams due to the structure of the league. This league is not like the LCS and Overwatch leagues, which consist of franchise team. As a result, teams participating in the ELS League have no contractual obligation to participate only in the ELS League, but the teams can choose which competitions or leagues they will participate in based on the CS:GO video game. It is also the basis of an overly financial structure, where the service of teams and players depends to a large extent on prize money, which in turn has an impact on the qualification of the employment relationship. Unlike the LCS League, where the league pays financial support to the teams, the ELS teams do not have a direct relationship with the league organizer.

#### *1.3.2.3 Overwatch League (OWL)*

The OWL is a league operated by game publisher Activision blizzard Inc., which, like the LEC esports league, is based on the structure of traditional team sports, but is distinguished from other esports leagues by the internationality of the teams. Namely, this league consists of 20 franchise teams located



in different countries. The ownership structure of teams is similar to traditional sports teams, where the teams belong to either individuals or legal entities.

Like the LEC esports league, the OWL league organizer sets out the league's internal rules and the rights and obligations of those involved in the league, including for example, player transfer periods, minimum wages, age limits, and so on. The length of the season is similar to the traditional sports leagues, which is a 20-week season that includes two games a week. Unlike the LEC, OWL does not set limits on the number of players and the nationality of the players of the teams. Similar to the traditional team sports, this is an international landscape where player contracts are made either in person or through an agent.

The OWL league is very different from other esports leagues, as the operator of the game publisher league has imposed strict requirements on contracts with players.<sup>56</sup> According to the rules, the employment relationship between teams and players must qualify as an employment contract and, on the other hand, the contract between the athlete and the team must be approved and registered by the league organizer.<sup>57</sup> The league's initiative to provide greater protection for athletes as the weaker party in the employment relationship is distinct, but it is unclear on what basis the league and the athlete assess the legality of the employment contract, given that the law applicable to the employment relationship may differ from the national law of the organizing company.

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<sup>56</sup> Blizzard Entertainment (2017), *supra* nota 46.

<sup>57</sup> Tolmachevska, Y. O., Tkalic, M. O. (2018). Esport: problems of the legal regulation. *Заснований у 1993 році Періодичність випуску*—4 номери на рік, 25(4), 89-99. p. 96.

## **2. THE NATURE OF THE EMPLOYMENT RELATIONSHIP OF PROFESSIONAL ESPORTS ATHLETE**

The development and commercialization of esports as a field has created a situation where the rights of persons wishing to engage in this field professionally are not protected in the same way as traditional workers. Within the field, there is no common understanding of the qualification of a professional athlete's employment, and there are used different forms of contracts under the law of obligations between players and the teams.<sup>58</sup> Esports athletes in this field are usually considered to be independent contractors, as a result of which athletes do not have the same social guarantees as employees. Consequently, it is important to determine the legal status of the esports athlete in order to assess whether the legal relationship between the athlete and the team is an employment contract. Consequently, it is important to analyze whether the employment relationship between the athlete and the team is an employment relationship under the law of obligations and whether the employment contract law applies to this employment relationship as a special norm. In essence, this means that the provisions of the Law of Obligations Act are a general rule for the Employment Contracts Act (hereinafter TLS) as a general rule, in the event of which a special rule applies to the employment relationship.

In the previous part of the work, the author referred to the similarity of the structure of esports to traditional team sports, ie how esports leagues have taken over the structure of team sports leagues. Therefore, it is important to analyze in the following what is the subordination of an athlete, as an employee, between the team and the league. As work in a relationship of subordination is the most important feature of an employment contract and is the main criterion for distinguishing employment under an employment contract from other contracts under the law of obligations.<sup>59</sup>

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<sup>58</sup> Clarke, O. (2018). eSports Player Contracts | Should Pro Gamers be treated like Pro Athletes?. Retrieved from <https://www.osborneclarke.com/insights/esports-player-contracts-should-pro-gamers-be-treated-like-pro-athletes/> , 26 March 2021.

<sup>59</sup> Rosioru, F., Kiss, G. (2013). The changing concept of subordination. *Recent Developments in a Labour Law*, 150-85. p. 7.

Defining the employment status of an esports athlete in an employment relationship is important because if a person works under an employment contract, he or she is subject to a number of statutory guarantees that do not apply to employment relationships concluded under other contracts under the law of obligations.<sup>60</sup> Examples of such guarantees are restrictions on working hours, the right to a minimum wage, restrictions on the termination of employment contracts prescribed by law, the right to leave, and so on. The purpose of the guarantees provided by law is to ensure the protection of the employee as the weaker party to the employment relationship. Unlike contracts under the law of obligations, which presuppose that the parties to the contract are on an equal footing with each other, the weaker and most economically dependent party to the employment contract is still the employee. In the context of esports, this is important given the monopoly position of game publishers in establishing internal rules of the league and the problems of work-related environmental protection arising from the nature of esports.

Considering the differences of opinion in different countries and groups of society regarding the treatment of esports as a traditional sport, in the author's opinion, the similarities of esports with traditional sports have also been referred to in the professional literature. This is true both of the economy and structure of the stakeholder groups and the esports leagues. Consequently, the author considers that the above similarities should also be examined with the possible application of the general principles of employment law applicable to employment in traditional team sports and their possible application to the employment relationship in esports. Namely, "there is a prevailing understanding at the international level and in the professional literature, according to which a professional athlete can be qualified as an employee in an employment relationship following all the general principles of employment law"<sup>61</sup>.

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<sup>60</sup> Schwab, B. (2018). Embedding the human rights of players in world sport. *The International Sports Law Journal*, 17(3), 214-232. p. 216.

<sup>61</sup> Reva, D. (2010). Elukutseline võistkonnasportlane kui töötaja. Töölepingu regulatsiooni kohaldamine sporditegevusele. *Juridica*, (6), 438-447. p. 438.

## 2.1 Qualification of an esports athletes employment relationship

The qualification of an esports athlete's employment in the field of esports and labor law raises the question of whether the athlete is an employee of a team or an independent contractor for the esports team. On the other hand, it is important to determine the employment status of an employment relationship primarily on the basis of the nature of the legal relationship between the athlete and the team or game publisher, and not on the formality. The above is important considering that within the field of esports, the legal status of an athlete in an employment relationship is primarily considered as an independent contractor. Entering into a contract with a person with a contract under the law of obligations instead of an employment contract in a situation where the employer still has significant control over the employee, ie there is a relationship of subordination characteristic of the employment relationship, significantly damages the employee's rights. In such a situation, the worker is wrongly classified as self-employed, when in fact he is under the control of his employer.<sup>62</sup> According to the principle of *falsa demonstratio non nocet*, the definition of a legal relationship must not be based on the title of the contract, but on the substance of the contract between the parties.

It is also important to draw attention to the law in force in the Republic of Estonia, due to which the fact "that modern employment relationships of a market economy nature must be assessed on the basis of the provisions of the 1992 TLS"<sup>63</sup> complicates the qualification of an esports athlete. Notwithstanding the above, the author of the work considers that the problems of determining the legal status of an employee can be solved through a purposeful interpretation of the employment law.

According to the current Estonian law, the TLS stipulates that on the basis of an employment contract a natural person (employee) does work for another person (employer) in subordination to the management and control of the employer and the employer pays to the employee remuneration for such work.<sup>64</sup> Pursuant to this provision, it is also possible to derive the concept of an employee, ie an employee is a natural person who works for another person in a relationship of subordination. It is important to distinguish that according to TLS § 1 (4) the person providing the work determines the

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<sup>62</sup> International Labour Organization. Non-standard Employment Around the World, p. 9.

<sup>63</sup> RKTK 3-2-1-3-05, p 16.

<sup>64</sup> Employment Contracts Act RT I 2009, 5, 35, § 1.

time, place and manner of performing the work. It is important to distinguish that the relationship of subordination between an employee and an employer is characterized by the following features: 1) the employee is economically dependent on the employer, 2) remuneration is paid for the work; 3) the employee does the work personally and; 4) the work is process-oriented, ie unlike other contracts, the work is not focused on a specific result.<sup>65</sup>

One of the most important decisions in determining the legal status of a worker in Estonia is the Supreme Court's decision no. 3-2-1-41-11, where the court explains the principles of establishing a relationship of subordination. The Supreme Court said "that according to the meaning of § 1 TLS, when establishing an employment relationship, it is necessary to determine whether the employee has a subordinate relationship with the employer, ie whether the alleged employer has the right to organize the work process, give instructions and control rules of procedure. In addition, the Court emphasized that where the contract allows the employee a degree of independence in, for example, the choice of manner, time and place of work, the degree of subordination of the employee is important, ie the extent to which he was bound by the employer's instructions as to the manner, time and place of work".<sup>66</sup> According to the explanations of the Supreme Court, the provisions of the TLS must be interpreted as meaning that the higher the degree of subordination of the employee and the person providing the employment, the more likely it is that the worker is classified as an employee.

The Supreme Court also gave clear guidelines in decisions 3-2-1-3-05<sup>67</sup> and 3-2-1-9-05<sup>68</sup> that in traditional team sports, professional athletes are in a contractual relationship with teams and are treated as employees considering the relationship of subordination between the athlete and the club. The Supreme Court emphasized "that in order to determine whether an employment relationship is an employment contract, the subordination relationship between the employee and the employer must be considered first, to what extent the employee is subordinate to the employer in the disputed relationship, ie what is the degree of employee independence in the employment relationship".<sup>69</sup>

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<sup>65</sup> Perulli, A. (2020). The legal and jurisprudential evolution of the notion of employee. *European Labour Law Journal*, 11(2), 117-130. p. 119-120.

<sup>66</sup> RKTK 3-2-1-41-11, p 14.

<sup>67</sup> RKTK 3-2-1-3-05

<sup>68</sup> RKTK 3-2-1-9-05

<sup>69</sup> *Ibid.*, 15.

Therefore, the higher degree of subordination between the parties distinguishes an employment contract from other civil law contracts.

Similar to the above-mentioned decisions of the Estonian Supreme Court, the Court of Justice of the European Union has also analyzed in Case C-176/96 whether a professional athlete can be considered an employee. The Court reiterated its earlier position in Case 66/85 Deborah Lawrie-Blum v Land Baden-Württemberg that an employment relationship is a relationship in which a person, "for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration."<sup>70</sup> On the other hand, such activities must be substantial, excluding the insignificance or ancillary nature of the work due to the small size of the work.<sup>71</sup>

In order to determine the employment relationship of a professional esports athlete, it is necessary to analyze in advance the subordination relationship between the athlete, the game publisher and the team, this means the extent to which the athletes are considered to be employees of the team or game publisher in the disputed relationship. As the Estonian Supreme Court emphasized "It is important to define who determines the time, place and manner of work; who pays for the tools; who bears the risks involved in doing the work; who receives income or profit; whether the person performing the work is included in the organization as an employee and whether he is subject to the internal procedures established in that organization"<sup>72</sup>. On the other hand, when defining the employment relationship, it is important to analyze the possible other parties to the employment relationship and their possible impact on the relationship between the team and the athlete. By the above, the author mean the dependency relationship between the esports team coach and the athletes, ie the parties to the employment relationship and their possible impact on the qualification of the employment relationship should be assessed as a whole.

Pursuant to § 1 (4) of the TLS, the provisions concerning employment contracts do not apply to a contract according to which a person required to perform work is substantially independent in the choice of the manner, time and place of performance of work.<sup>73</sup> Consequently, according to the current

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<sup>70</sup> Court decision, 13.04.2000, Lehtonen, C-176/96, ECLI:EU:C:2000:201, point 45.

<sup>71</sup> *Ibid*, point 44.

<sup>72</sup> RKTK 3-2-1-3-05, point 13.

<sup>73</sup> Employment Contracts Act RT I 2009, 5, 35, § 1 section 4.

Estonian law, subordination includes, as a criterion for defining an employee, more precisely the right of the employer to control and manage the manner, time and place of the employee's work.

### **2.1.1 Esports team as an employer**

Esports team is an independent company, which like traditional sports team, is a legal entity serving commercial purposes. The companies assemble the team independently and also arrange the teams financing and related sponsorship agreements. The structure of the team is similar to a traditional team sports club, consisting of management, players, coaches and support staff, depending on the size of the team and financial opportunities.<sup>74</sup>

The team participating in the esports competitions/leagues recruits the player based on his skills, which is a so-called means to achieve the desired result of the team.<sup>75</sup> The recruitment of players, depending on the player's tasks, largely depends on the content of the video game and its capabilities. As a result, the athlete is a means of achieving the team's objective, which means that the player can be expected to work in person. The player is admitted to the team with a specific goal and the person plays a specific role in the team. As a result, the player also has a certain freedom to make independent decisions in a in-game situations, taking into account the player's competence and the purpose why the player was recruited to the team. On the other hand, this does not mean that the player is free to decide on the time, place and manner of work. Namely, the athlete must participate in the trainings determined and organized by the team and represent the team according to the schedule of the esports league.

When talking about the work tasks of athletes, ie to represent a specific team in esports competitions and to participate in the process of preparation for competitions, ie training, then the process of doing work that is important for the team is clearly distinguishable. Namely, this process is managed and controlled by the esports team as an employer, unlike service providing contracts under the law of obligations, where the final result of the work is important for the employer or the client and the worker has largely the right to decide independently where, when and how he works. As a company

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<sup>74</sup> Navarre, T. (2020). eSports Teams & Players: How eSports Teams Work. Retrieved from <https://www.lineups.com/esports/esports-teams-players/> , 28. February 2021.

<sup>75</sup> Tang, W. (2018). Understanding esports from the perspective of team dynamics. *The Sport Journal*, 41(2), 1-14. p. 7.

operating for economic purposes, an esports team, given its team integrity and cooperation, cannot afford independent decision-making power from athletes, like independent contractors, given the nature of the esports team's activities. Therefore, esports as a work is a process in which team management and control are important to achieve the economic sustainability of a team.

One of the differences between esports and traditional team sports is the training process as a way to prepare for competitions. Considering that the environment of video games is the cyberspace, the training takes place with the help of an electronic device, ie the tool is a computer. At first glance, it may seem that this is a telecommuting (remote work) activity, where individuals do not have to be in the same room or place as a team. In reality, the structure of esports training is similar to that of traditional sports, such as basketball or football, where individuals are in a specific territory or location.<sup>76</sup>

The special feature of esports is the use of team houses or gaming houses, where team players live and train together.<sup>77</sup> Typically, such additional terms and conditions are set out in the team and athletes agreement and such additional terms and conditions may also be set out in the internal rules of the esports league, such as in the Overwatch League.<sup>78</sup> As can be seen from the above, the esports teams not only determines the content and tasks of work, but also obliges the person to participate in the training process according to the location specified in the contract or the conditions of the league rules established by the game publisher. As the esports team presents the time, number of times and place of the training to the athletes as employment conditions, the team organizes the working conditions in the form of training. Direct control by the employer in determining the time and place of the athlete's training plays an important role in determining the legal status of the athlete as an employee, because employers have the right to control employees working hours and place of work to the extent permitted by applicable law.<sup>79</sup>

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<sup>76</sup> Nielsen, R. K. L., Hanghøj, T. (2019). Esports skills are people skills. *In Proceedings of the 13th European Conference on Game-Based Learning*, 3-4 October 2019, Odense, Denmark. 535-542. p. 536.

<sup>77</sup> Şahiner, D. D., Aytekin, A. B., Karakaş, M. (2020). Legal Assessment On Gaming Houses In Terms Of E-Sports Law, Retrieved from <https://www.kilinclaw.com.tr/en/legal-assessment-on-gaming-houses-in-terms-of-e-sports-law/> , 05. March 2021.

<sup>78</sup> Holden, Baker (2019) *supra* nota 51. p. 408.

<sup>79</sup> International Labor Office (ILO). *Regulating the employment relationship in Europe: A guide to Recommendation No. 198*. Geneva: ILO 2013. p. 43.



Considering the delimitation of the relationship of subordination in the employment relationship, this difference connects the players even more with the employers or teams. Namely, the assignment of a mandatory working place by the team to the players significantly restricts the athlete's freedom of action and indicates that the athlete is subordinated to the organization.<sup>80</sup> On the other hand, the distribution of additional instructions in the employment relationship or the establishment of internal team rules for athletes is not inherent in an employment relationship under the law of obligations, including between independent contractors.

Training in esports, like traditional team sports, plays an important role in team competitiveness and results. The working days of top-level athletes include an average of 5,5-10 hours of training, which is significantly different from traditional team sports training.<sup>81</sup> Similar to traditional team sports, athletes can also train independently, but considering the structure of the video games that form the basis of major esports leagues, esports is largely based on team activities. Consequently, an athlete cannot be considered to be an employee with independent decision-making power either, as the person is not free to decide on his/her working hours. Each player has a role to play, but the role of a particular person in the game as a whole affects the overall result of the team. Consequently, the coach on the team's salary also plays an important role in the relationship of subordination between the athlete and the team. This is due to the fact that the coach's task is primarily to manage and organize the team's training and competition activities. As a result, the coach also sets requirements for the athletes regarding the time, procedure and place of training, through which the team determines the time and place of the work to be performed.<sup>82</sup>

Similar to training, the team also determines the so-called place of competition, ie the place of work in the context of esports. As a result, the esports team as the employer, has paid the possible costs associated with the work, which at the moment constitute participation fees in competitions or leagues.<sup>83</sup> This characterizes the conditions of the relationship of subordination in a situation where

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<sup>80</sup> Employment Contracts Act RT I 2009, 5, 35, § 20.

<sup>81</sup> DiFrancisco-Donoghue, J., Balentine, J., Schmidt, G., Zwibel, H. (2019). Managing the health of the eSport athlete: an integrated health management model. *BMJ open sport & exercise medicine*, 5(1), 1-6. p. 2.

<sup>82</sup> Semenova, M., Lange, A., Kuposov, D., Somov, A., Burnaev, E. (2020). Personality Traits and Coping Strategies of eSports Players. In 2020 7th International Conference on Behavioural and Social Computing (BESC) 1-5. IEEE. p. 3.

<sup>83</sup> Sloun, S. V. (2018). Esports Franchise Economics. Retrieved from <https://loupventures.com/esports-franchise-economics/>, 02. March 2021.

the athlete represents a specific organization. This fact precludes the independence of the athlete to decide where, how and when the person works.

On the other hand, the contractual obligations of esports athletes, like those of team sports, are not only limited to training and competitions. Athletes, as members of the team, have general obligations to the teams, observing the instructions and standards of conduct set by the teams both during the competition period and outside the competition period, ie in free time.

Such behavior on the part of the team distinguishes the organization of the way the employer does the work. Namely, employers can organize the way work is done in a number of ways, such as by issuing instructions or by establishing, monitoring and disciplining mandatory rules and codes of conduct.<sup>84</sup>

For example, one such important part of an esports athletes contractual obligations is to participate in team sponsors representative and promotional events, and streaming of the video game on a streaming platform that is the subject of the esports contract.<sup>85</sup> It is a tool that serves the marketing goal of the team, which can be considered as labor conscription or a contractual obligation of an esports athlete to the team.

From the authors point of view, the analysis of the criteria of the way, time and place of work provided important knowledge in defining the employment status of working athletes in defining the relationship of subordination between an athlete and an esports team. From the above analysis, it can be concluded that the athlete is to a greater extent subordinated to the esports team interests, therefore the relationship between the athlete and the esports team can be qualified as a relationship of subordination. In the relationship of subordination between the athlete and the esports team, the athlete is personally dependent on the esports team, as a result of which the athlete, like a person working under a traditional employment contract, needs the same social protection.

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<sup>84</sup> ILO. Regulating the employment relationship in Europe: A guide to Recommendation No. 198. Geneva: ILO 2013. p. 38.

<sup>85</sup> Matthew Lavelle, M., Faint, G. (2021). Esports Player Contracts: A guide for teams and players (part one). Retrieved from <https://www.brabners.com/blogs/esports-player-contracts-guide-teams-and-players-part-one> , 01. March 2021.

### 2.1.2 Game publisher as an employer

The monopoly position and role of game publishers in the field of esports and the regulation of esports leagues arising from the intellectual property rights differs significantly from the traditional team sports. Consequently, a possible legal relationship should also be explored, in which the relationship of subordination between athletes and game publishers arising from the structure of the esports leagues can be considered as an employment relationship. Pointing out that the most important criterion for defining an employee is subordination. This is on the condition that if there is no relationship of subordination between the parties of the employment relationship, there is no employment law relationship.<sup>86</sup>

According to the author, it is important to point out that the structure of leagues depends significantly on the will of the game publisher or independent league organizer,<sup>87</sup> therefore, it cannot be said from the analysis that all esports leagues created by game publishers are unequivocally subordinate. Namely, the nature of the possible legal relationship must be taken into account when defining the employment relationship, and on the other hand, the specific employment relationship between the game publisher and the athletes should be based on the specifics of the video game and the league owner's will. Consequently, part of the following analysis is of a more general nature in order to determine whether a game publisher can be regarded as an employer at all as a result of a relationship of subordination.

With regard to the employer's direct control over the determination of the working time and place of the athlete, the fulfillment of those criteria should be assessed in terms of the use of the intellectual property of the game publisher. Namely, one of the prerequisites for participating in esports competitions and leagues is participation in a video game created by a game publisher. In order to participate in a certain esports league or belong to a team, a person must have access to a given game, ie the person must be a registered user and meet the requirements of the game publisher. Every video game publisher has its own platform in cyberspace that allows users to play a specific video game

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<sup>86</sup> Davidov, G., Freedland, M., Kountouris, N. (2015). The subjects of labor law: Employees' and other workers. In Comparative labor law. *Edward Elgar Publishing*. p. 5.

<sup>87</sup> Consolazio, D. (2019). WHAT ESPORTS LEAGUES ARE THERE?. Retrieved from <https://www.hotspawn.com/other/guides/what-esports-leagues-are-there> , 02. March 2021.

when they sign in. Athletes use the game publisher's video game based platform for both training and participation in esports competitions.

Video game publishers platform can be seen as a tool for working, but also as a place to work and to determine the possible time of work in cyberspace in the form of competitions. Considering that the biggest organizers of esports leagues are game publishers themselves, it is the game publishers who organize the venue and schedule of esports competitions in these leagues. As a result, game publishers have a great deal of influence and control over the way, place and time an athlete works as a worker. On the other hand, it must be borne in mind that, unlike the relationship between the esports team and the athlete, the game publisher does not have direct control over the training process of the athlete, including the team's strategy and structure.<sup>88</sup> According to the author, the athlete is not significantly independent in the choice of the way, place and time of work, as a result of which the given circumstances indicate an indirect relationship of subordination.

In the author's opinion, the determination of the employment status of an employee cannot be based on an indirect relationship of subordination, despite the fact that the athlete is significantly independent in the choice of the way, place and time of work. However, similar to today's job platforms (Bolt, Wolt) the game publishers platforms cannot be expected to be subordinated in the traditional sense.<sup>89</sup> The professional literature has shown that subordination is the most important criterion for defining an employee, but the relationship of subordination does not always clearly indicate whether the employee is an employee or an independent contractor. Therefore, the attention should also be drawn to the criterion of economic dependence in determining the employment status of a worker. On the other hand, it must be borne in mind that the criterion of economic dependence alone does not determine the relationship of subordination, in view of the fact that independent contractors may, like an employee, be economically dependent on the employer.

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<sup>88</sup> Wong, J. (2020). More than Just a Game: The Labor and Employment Issues within eSports. *UNLV Gaming Law Journal*, 11(1), 123-152. p. 135.

<sup>89</sup> Lianos, I., Countouris, N., De Stefano, V. (2019). Re-thinking the competition law/labour law interaction: Promoting a fairer labour market. *European Labour Law Journal*, 10(3), 291-333. p. 320.

The difference between esports leagues and traditional team sports leagues is that in some leagues, the game publishers who organizes the league also finance the teams with funds.<sup>90</sup> Such a league structure is, for example, in the LEC and Overwatch league.

Consequently, the question arises as to whether the distribution of funds by game publishers to esports teams to meet the criterion of a minimum salary for athletes can be indirectly regarded as remuneration paid by game publishers to esports athletes.<sup>91</sup> It must be acknowledged that these are funds for teams and that the teams, as an independent companies, have the power to decide where the funds are placed inside the team, but the possible situation where these funds may be used to meet the athlete's minimum salary criterion must be taken into account. The author is of the opinion that it follows from the above that it is important to analyze the distribution of the game publisher's funds to the teams on a case-by-case basis when defining the employment relationship of an athlete. In such a case, there may be an indirect remuneration paid by the game publisher. It is necessary to keep in mind the possible share of the game publisher's funds in the athlete's salary, taking into account the minimum remuneration requirement set in the internal rules of the league.

On the other hand, when analyzing the criterion of economic dependence, one should also talk about the context of the use of work equipment. Namely, when using work equipment, it can be assumed that the employer provides the employee with the necessary means to perform the work, having paid for these means. However, the precondition for the use of work equipment is the fact that the employer has to offer a job, as a result of which it can be assumed that it is an employment relationship.<sup>92</sup> Irrespective of the purpose for which the means of employment are provided, the provision of the means necessary for the worker to perform the work can be regarded as circumstances which can be regarded as favorable to the status of worker. Consequently, the use of equipment in esports leagues run by a game publisher should be assessed.

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<sup>90</sup> Sauzin, T. (2019). LoL — How much does a League of Legends team cost?. Retrieved from <https://www.millennium.gg/news/6009.html> , 05.03.2021.

<sup>91</sup> Bayliss, H. A. (2016). Not just a game: the employment status and collective bargaining rights of professional esports players. *Washington and Lee Journal of Civil Rights and Social Justice*, 22(2), 359-410. p. 391.

<sup>92</sup> Tavits, G. (2001). Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. *Dissertationes Iuridicae Universitatis Tartuensis (177)*. *University of Tartu Press*. p. 67

For example, in the LEC league, the rules state that competitions organized by the league must provide athletes with equipment, including a PC and monitor, headsets and/or earbuds and/or microphones and a table and chair.<sup>93</sup> Athletes may not use equipment provided by themselves or the team except PC keyboards, PC mice and PC mousepads. It is, according to the rules of the league, a means of preventing possible influences on the outcome of the game.

The International Labor Office (ILO) has pointed out that, in today's employment relationship, the criterion of the ownership status of work equipment alone should not play a significant role in determining the status of a worker.<sup>94</sup> As an exception, it is possible to distinguish an independent contractor in an employment relationship who has made a significant investment in the purchase of work equipment.<sup>95</sup> Consequently, the author also considers that the computer, monitor, headphones, chair and table considered as equipment are not important in determining subordination in this legal relationship considering the purpose of using these tools, ie these devices are used only on a certain competition basis and persons must use the tools provided by themselves or by the team to perform work or participate in training as part of the work during the non-competition period.

The author considers that the circumstances and conditions of the legal relationship between game publishers and athletes indicate an indirect relationship of subordination, given that, due to intellectual property rights in video games, game publishers have significant influence over athletes in playing video games and participating in esports competitions. The interests of athletes are more subject to the control and common interests of game publishers. However, given that the legal relationship between the game publisher and the athlete has a significantly higher degree of independence to decide than the relationship of subordination between the team and the athlete. Consequently, a game publisher cannot be regarded as a direct employer, since the athlete is more subordinate to the activities of the team and the degree of subordination which characterizes that employment relationship.

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<sup>93</sup> League of Legends European Championships 2021 season official rules. Retrieved from [https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/blt44ccc3b4e4cbd379/602660a2601a4c183d7194c9/Rulebook\\_10FEB.pdf](https://assets.contentstack.io/v3/assets/bltad9188aa9a70543a/blt44ccc3b4e4cbd379/602660a2601a4c183d7194c9/Rulebook_10FEB.pdf), 03. March 2021. p 7.1.

<sup>94</sup> ILO. Regulating the employment relationship in Europe: A guide to Recommendation No. 198. Geneva: ILO 2013. p. 45.

<sup>95</sup> *Ibid.*, 46.

Unlike the national laws of the USA or Canada, the current Estonian national law does not provide for a situation where an employee would have two employers, ie a joint-employment, in the case of one employment relationship. According to this concept, it is an employment relationship where several organizations share the responsibility for protecting workers rights.<sup>96</sup> Joint employment is a recognized concept in the US, Canada and New Zealand. Consequently, in the aforementioned countries, a situation is theoretically possible in which the protection of the rights of esports athletes in the employment relationship is ensured to a greater extent, taking into account the large number of subjects considered as employers in the employment relationship.

Based on the above analysis, the author considers that although the game publisher has a great influence on the employment relationship of the athletes due to the intellectual property rights of the video game, the personal interests of the athlete are not significantly subordinated to the will of the game publisher, and the person is more independent of the training and preparation process, ie the way of doing the work, the place, as well as the time. Consequently, the relationship between an athlete and a game publisher cannot be regarded as an employment relationship.

### **2.1.3 Esports athlete as an independent contractor**

The Estonian Supreme Court has stated in judgments 3-2-1-3-05 and 3-2-1-9-05 that athletes and sports clubs are free to enter into any civil law contract in their mutual relations, including an employment contract.<sup>97</sup> Therefore, the possible treatment of an esports athlete as an independent contractor should not be ruled out in the qualification of employment status.

In the course of the previous analysis, the author has pointed out that the employment relationship between an esports athlete and a team is largely characterized by a relationship of subordination, however, given the different structures of the esports leagues, it should also be analyzed whether the esports athletes contractual relationship with the team may constitute a person working under a contract for the provision of a service under the law of obligations.

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<sup>96</sup> Wears, K. H., Fisher, S. L. (2012). Who is an employer in the triangular employment relationship? Sorting through the definitional confusion. *Employee Responsibilities and Rights Journal*, 24(3), 159-176. p. 160.

<sup>97</sup> RKTK 3-2-1-9-05, p 14.

On the basis of the applicable Estonian national law, service contracts are regulated by Part 8 of the Law of Obligations Act (hereinafter VÕS)<sup>98</sup>. This section prescribes and regulates various types of contracts under which one person can provide services to another person. In practice, the most commonly used types of service contracts are the authorisation agreement and contract for services. This is due to the fact that the VÕS does not stipulate exactly what the service provided must consist of. This, in turn, expands the range of potential service providers, giving individuals greater freedom to provide a service.

By qualifying the employment relationship of an athlete as an independent contractor, such an employment relationship would be characterized by a greater independent decision-making competence than the subordination relationship, ie the athlete would determine how, when and where to work.<sup>99</sup> § 619 of the VÕS stipulates that in an authorisation agreement, one person undertakes to provide services to another person pursuant to an agreement (to perform the mandate) and the mandator undertakes to pay remuneration to the mandatary therefore if so agreed.<sup>100</sup> In addition, the principal must comply with the duty of loyalty and diligence and the instructions of the principal when performing the mandate.<sup>101</sup> By treating the esports athlete as an independent contractor, the person would organize his/her own activities, mainly determining the way, place and time of the work.

An independent service provider contract requires certain training, knowledge and skills from the person providing the service, which the person provides to other persons for remuneration.<sup>102</sup> Esports athlete has the knowledge and specific skills in the field of competitive gaming, but the question arises that what can be considered as the provision of a service to an esports athlete. This would mean that the athletes would train independently and participate in the competitions only in order to achieve the obligation/task stipulated in the contract concluded with the team. According to the author, such activities are precluded by the team element of video games, which are the basis of the most popular

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<sup>98</sup> Law of Obligations Act, RT I, 2001, 81, 487.

<sup>99</sup> Verhulp, E. (2017). The Notion of 'Employee' in EU-Law and National Laws. The European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies.

<sup>100</sup> Law of Obligations Act, RT I, 2001, 81, 487. § 619.

<sup>101</sup> *Ibid.*, § 620 and § 621.

<sup>102</sup> Erikson, M., Dr Rosin, A. (2018). Tuleviku töötægija õiguslik staatus. Töötaja või iseseisev teenusepakkuja? Arenguseire Keskus, Retrieved from <https://www.riigikogu.ee/wpcms/wpcontent/uploads/2018/08/T%C3%B6%C3%B6tegija-%C3%B5iguslik-staatus.pdf> , 26. March 2021. p. 16



esports leagues. As a result, athletes cannot have independent decision-making power over how, when and where they work, even if the nature of the work in cyberspace allows it.

Given that the provision of services as an independent contractor is characterized by the continuous provision of services to persons in the labor market, similarly to traditional team sports esports athletes are not allowed to represent another team or participate in another league based on the same video game during the contract. In the middle of the season, the trades of athletes between esports teams are hindered by the internal rules of the leagues, which set trade and free-agent signing deadlines. As a result, athletes do not have the opportunity to provide services for different teams in competitive gaming.

As there are no references to case law for the qualification of an employment relationship of an esports athlete, it is clear from the previous analysis of the employment relationship that the application of contracts under the law of obligations, including an employment contract and an authorisation agreement, to a professional athlete is excluded. This is precisely due to the degree of subordination between the athlete and the esports team. It can be concluded from the above that in the case of persons participating in esports and belonging to an esports team, professionally playing video games in the form of esports can only be done on the basis of an employment contract.

## **2.2 Employment relationship with a minor**

In the context of the legal analysis of the qualification of an esports employment relationship, attention should also be paid to minors, ie persons under 18 years of age. The playfulness and the growing popularity of recreational leisure activities of video games have also greatly influenced the age diversity of esports athletes. Namely, playing video games as a leisure activity does not impose general age restrictions. However, it should be borne in mind and pointed out that video games may contain elements of violence or incitement to violence. Consequently, attention should also be paid to the Child Protection Act (LasteKS). This is especially true when comparing the age difference of those who are professionals in esports compared to traditional team sports.

Namely, compared to traditional team sports, the average age of persons engaged in esports is several times lower, for example, the average age of the LOL league participant is 21.2 years.<sup>103</sup> One of the prerequisites for people engaged in traditional sports is the physical ability or physical form, which in turn also affects the average age of professional sportsmen. Due to the existence of physical preparation and physical contact in a particular team sport, the physical performance of athletes under the age of 18 and adults cannot be compared. However, unlike traditional sports, esports is not physically demanding and, given the nature of video games, it is also possible for minors to engage in them professionally. This, in turn, has affected the average age of those involved in esports compared to athletes in traditional team sports. Consequently, analyzes of the esports employment relationship must also draw attention to the fact that one of the parties to the employment relationship may be a minor.

The current Estonian law allows to enter into an employment relationship with a minor, but stipulates additional conditions for employment and occupational safety, taking into account that a minor is a more vulnerable party in an employment relationship. According to TLS, the admissibility of a minor's employment and the work performed depends on the person's age, compulsory schooling and the nature of the work.<sup>104</sup> The work responsibilities of a minor must not be in conflict with the conditions specified in § 7 (2) of the TLS and they must be simple in nature and must not require great physical or mental effort.

On the other hand, the employment relationship with a minor should also take into account the principles provided in the Child Protection Act (LasteKS) in conjunction with the TLS. Under Paragraph 2 (2) of the TLS, an employment contract may not be concluded with a minor or a minor may not be allowed to work in a way that is likely to harm the moral development of the minor. According to the author, the possible violent content of video games must be pointed out again here. Namely, § 25 (1) of the LasteKS provides that the production, demonstration and distribution of publications, films, sound and video recordings and objects inciting cruelty and violence to children is prohibited.<sup>105</sup> The prohibition provided for in § 25 of the LasteKS does not extend to the playing of

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<sup>103</sup> ESPN Stats & Info (2017). Average age in esports vs. major sports. Retrieved from [https://www.espn.com/esports/story/\\_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl](https://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl) , 27. March 2021.

<sup>104</sup> Employment Contracts Act, RT I 2009, 5, 35, § 7.

<sup>105</sup> Child Protection Act, RT I, 06.12.2014, 1. § 25 section 1.

video games as an activity, but only to the production, distribution and demonstration of video games. According to the explanatory memorandum to the LasteKS, the demonstration of publications, films, sound and video recordings and objects inciting cruelty and violence means the showing of a work or copies thereof directly or by technical means.<sup>106</sup> Consequently, the author of the work considers that these provisions are also applicable to the employer when concluding an employment relationship with a minor and where the content of the employment relationship is playing of violent video games in the form of esports. It is important to point out that LasteKS does not set an age limit for a child, as a result of which it should be pointed out that all people under the age of 18 are children by law.<sup>107</sup>

On the other hand, the legislator has stated in the Explanatory Memorandum to the Children's Act that the interpretation of § 25 of the Children's Act must be based on the definition of the Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty (PorTS)<sup>108</sup>. According to this legislation, the promotion of violence or cruelty is considered to be its portrayal in an affirmative way, with the aim of spreading violent or cruel behavior among people.<sup>109</sup> The author considers that this section does not explicitly prohibit the playing of video games as an leisure activity in general, but prohibits the production, demonstration and distribution of video games inciting cruelty and violence to children.<sup>110</sup> Thus, each esports team participating in a league must determine, before entering into an employment relationship with a minor, whether the video game on which the employment relationship is based, can as work call for violent or cruel behavior and approves such behavior.

Internationally, various rating systems have been developed to label and highlight violence or other inappropriate activities in video games for minors. In the European Union, the PEGI evaluation system, which is recognized by the Member States of the European Union and the European Commission, is used as such a system.<sup>111</sup> The PEGI system assesses the level, nature and language of

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<sup>106</sup> Government of the Republic. (2014). Explanatory Memorandum to the Child Protection Act (677 SE). p.56.

<sup>107</sup> Child Protection Act, RT I, 06.12.2014, 1. § 2.

<sup>108</sup> Government of the Republic. (2014). Explanatory Memorandum to the Child Protection Act (677 SE). p. 56.

<sup>109</sup> Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty, RT I, 1998, 2, 42. § 1 section 2, point 4.

<sup>110</sup> The Chancellor of Justice, E-spordi vanusepiirangud, 04.12.2017. Retrieved from [https://www.oiguskantsler.ee/sites/default/files/field\\_document2/E-spordi%20vanusepiirangud\\_0.pdf](https://www.oiguskantsler.ee/sites/default/files/field_document2/E-spordi%20vanusepiirangud_0.pdf) , 12. February 2021.

<sup>111</sup> 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

violence in video games.<sup>112</sup> Such international video game rating systems are also used by game publishers and league organizers to impose age restrictions on participation in a particular esports league through internal rules.

The author is of the opinion that the PEGI video game evaluation system evaluates games according to the level, nature and language of video game violence, but guided by the will of the legislator in the Children's Act, the aim of this law is to further protect people under 18. Consequently, the PEGI rating system does not assess "whether a particular video game calls for violent behavior"<sup>113</sup>.

The purpose of the PEGI rating system is to determine whether and to what extent a video game contains violence, but it does not include an assessment of whether a particular video game may influence or encourage the person playing the game to behave violently. Researchers also disagree on this point, namely various studies have found links between violent video games and aggression and antisocial behavior, but it is not known whether such behavior is manifested in playing video games short-term or as a result of long-term activity.<sup>114</sup> Consequently, the author considers that, in view of the LasteKS, the PEGI system is not sufficient to assess and ensure the imperative protection mechanisms provided in the LasteKS to protect children under the age of 18.

TLS provides additional preconditions for concluding an employment contract with a minor, one of which is the consent of the legal representative of a person under the age of 18, usually a parent. According to the TLS, a minor's declaration of intention to enter into an employment contract made without the consent of the legal representative is void, unless the parent subsequently approves it.<sup>115</sup> If TLS makes the consent of a legal representative with a person under the age of 18 a precondition for concluding an employment contract, then LasteKS does not provide an exception for

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of video games (2008). Retrieved from <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex%3A52008DC0207> , 28. March 2021.

<sup>112</sup> Hilgert, F., Sümmermann, P. (2016). Video Game Age Ratings in Europe. Retrieved from <https://gameslaw.org/video-game-age-ratings-in-europe-part-1-of-3-the-basics/> , 20. March 2021.

<sup>113</sup> The Chancellor of Justice, E-spordi vanusepiirangud, 04.12.2017. Retrieved from [https://www.oiguskantsler.ee/sites/default/files/field\\_document2/E-spordi%20vanusepiirangud\\_0.pdf](https://www.oiguskantsler.ee/sites/default/files/field_document2/E-spordi%20vanusepiirangud_0.pdf) , 12. February 2021.

<sup>114</sup> Anderson, C. A., Bushman, B. J. (2001). Effects of violent video games on aggressive behavior, aggressive cognition, aggressive affect, physiological arousal, and prosocial behavior: A meta-analytic review of the scientific literature. *Psychological science*, 12(5), 353-359. p. 358-359.

<sup>115</sup> Employment Contracts Act, RT I 2009, 5, 35, § 8 section 1.

demonstrating video games inciting cruelty or violence to children even in a situation where the consent of the minor's representative is available. Consequently, the author draws attention to a possible bottleneck in the esports employment relationship, where one of the parties is a minor. Given the development of this field in Europe, the national legislator should further analyze the esports employment relationship, where it is the duty of the athlete to play video games in a competitive format as work obligation and to participate in esports competitions.

### **2.3 Problem areas of application of employment contract regulation**

Atypical employment relationships have increasingly emerged alongside traditional employment relationships, which are not characterized by indefinite-term relationships of subordination between the employee and the employer. As a result of the above analysis, the author concluded that the employment relationship between an athlete and an esports team is largely characterized by a relationship of subordination. Consequently, the employment relationship of an athlete is an employment relationship of a law of obligations nature, which is an employment relationship subject to the TLS.

According to the author, it is important to assess whether, given the similarities of esports to traditional sports, the lack of special regulation may encourage the violation of the rights of esports athletes. This is precisely on the assumption that the employment relationship of esports athletes differs from the traditional employment relationship. The author of the work aims to draw attention to the differences in the employment relationship of esports and possible bottlenecks in the application of the TLS. Considering the structural similarities of esports to traditional team sports, the author considers it justified to analyze whether similar to the special regulation in the form of the Sport Act, the legislator should also establish differences to ensure the employment protection of cyber sportsmen.

In Estonia, in addition to TLS, the sports field and the employment relationships of persons engaged in sports are regulated by the Sport Act, which stipulates among other things the general organizational and legal bases for organizing sports, the rights and obligations of athletes and coaches and the general

terms and conditions of the contract with the athletes.<sup>116</sup> It is a question of defining the general principles and scope of sport and defining the circle of subjects.

Like traditional sports, some countries have considered it necessary to introduce special regulations to regulate the field of esports. It is important to point out that such a decision is largely due to the national question of whether esports are to be regarded as traditional sports or as an independent sector. Consequently, the actual need for the legislator to define the concept of esports also differs to exclude the situation where esports is subject to the gambling act based on the universal features of gambling and the broad definition of games of skill set out in the gambling act.

In the European Union, one such pioneer has been France, which adopted the Digital Republic Bill in 2016. One of the aims of this legislation was to regulate nationally the organization of and participation in video game competitions, ie esports as an area of activity. From the point of view of labor law, this played an important role in establishing the legal framework of labor law for professional esports athletes, thus ensuring employment protection and social guarantees for those wishing to engage in esports professional, similarly to traditional workers. The French law provides that the employment relationship of esports athletes is to be governed by French labor law, ensuring that contracts between players are employment contracts.

### **2.3.1 Differences in the employment relationship of an athlete compared to a traditional employment relationship**

Traditional team sports are characterized by a seasonal nature. Seasonality is one of the reasons why fixed-term employment contracts are widespread in traditional team sports. Similar to traditional sports, the employment relationship in esports is also characterized by seasonality, which is due to the competition format and structure of the major esports leagues. The goals of esports teams are related to the seasonal goals, which are characterized by the strategic acquisition of the team, based on players with specific skills who perform certain tasks within the video game.<sup>117</sup> The seasonality of the employment relationship is due to the uncertainty of the team's financial resources, as the team's budgets largely depend on the sponsors and the team's results in a certain league or tournament.

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<sup>116</sup> Sport Act, RT I 2005, 22, 148, § 1 section 1.

<sup>117</sup> Ashton, G. (2020). How the Esports Player Transfer Market Differs from Soccer or the NBA. Retrieved from <https://esportsobserver.com/esports-player-transfers-2020/>, 27. April 2021.

Consequently, the employment relationship of an athlete is characterized by instability and a fixed-term employment relationship. It is a fixed-term employment contract that allows esports organizations to recruit a team each season according to the organization's financial capabilities and to achieve a purposeful result. On the other hand, a fixed-term employment contract guarantees teams and athletes flexibility in employment. The author is of the opinion that considering the opportunities for personal development of esports athletes based on video games and esports career opportunities, it is important that individuals are able to change employers flexibly due to the level of personal development. Unlike a traditional employment relationship, an employment contract of the indefinite-term would not allow athletes and esports organizations sufficient flexibility, given the specific nature and seasonality of esports.

TLS presumes that an employment contract is entered into for an indefinite-term. The conclusion of a fixed-term employment contract between an employer and an employee presupposes a valid reason arising from the temporary fixed-term nature of the work. In addition, TLS also lays down restrictions on the consecutive entering and renewal of a fixed-term employment contract. If the employee and the employer have entered into a fixed-term employment contract for similar work more than twice in a row or the fixed-term contract has been extended more than once in five years, the employment relationship shall be deemed to have been entered into for an indefinite-term from the start.<sup>118</sup> In addition, the legislator has specified the specificity of the consecutive entering into an employment contract, according to which if the time between the termination of employment contract and the consecutive entering of the next employment contract exceeds two months, then there is no consecutive entering of an employment contract.<sup>119</sup> The author of the work is of the opinion that the condition of consecutive entering into a fixed-term employment contract in this form may create a situation where esports clubs maliciously take advantage of the condition arising from the consecutive entering of a fixed-term employment contract set forth in the TLS. Namely, a situation may arise where a new fixed-term contract is consecutively entered with an esports athlete only after two months have elapsed. Given the seasonality of esports leagues, this may mean that the employment contract is concluded from the beginning of the competition season until the end of the league season or the last league-based competition game, excluding the off-season between two seasons from the

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<sup>118</sup> Employment Contracts Act, RT I 2009, 5, 35, § 10 section 1.

<sup>119</sup> *Ibid.*, § 10 section 1.

employment contract period. Such conduct is in accordance with applicable law but does not fulfill the purpose provided by law to protect the employee as a weaker party to the employment relationship, significantly damaging the interests of the athlete.

As a result, for example, France as a pioneer in the regulation of esports in the European Union has laid down in national law the conditions for a minimum contractual duration for esports athletes. Namely, it is allowed to enter into a fixed-term employment contract between an athlete and a esports club for a maximum of 5 years and a minimum of 12 months.<sup>120</sup> In addition, there is also an exception for concluding a contract for less than a year. The legislature has also provided, for example, an exception where the club concludes a mid-season employment contract with a new player to replace the main player in the middle of the season before the end of the transfer period. Consequently, in that situation, it is not reasonable for a club to sign a contract for 12 months.

In Estonia, the legislator has previously created a distinction between the restriction on the consecutive entering and extension of a fixed-term employment contract, for example, for traditional sports athletes. The Sport Act provides that, depending on the nature of the sport, an athlete may conclude a fixed-term employment contract for up to five years or enter into consecutive fixed-term employment contracts repeatedly for five years or extend fixed-term employment contracts repeatedly for five years.<sup>121</sup> The legislator has relied on the need for distinction because an employment contract of an indefinite-term between an athlete and a sports club may not serve the interests of both parties, given that an employment contract of an unspecified term reduces the flexibility of the employment relationship. Namely, it restricts the possibilities of esports clubs to recruit a team according to seasonal goals, as well as the purposeful career opportunities of an athlete, including joining a team of a higher level in the next season.

When talking about the fixed-term nature of the esports employment relationship, it is also important to talk about the differences between the termination of a fixed-term employment contract and an employment contract of an indefinite-term. Unlike an employment contract of an indefinite-term, TLS does not allow for the early termination of a fixed-term employment contract. Namely, § 85 (2) and

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<sup>120</sup> Auxent A. (2016). Esports are now officially in France. Retrieved from <https://esportsobserver.com/esports-are-now-officially-legal-in-france/>, 27. April 2021.

<sup>121</sup> Sport Act, RT I 2005, 22, 148, § 10<sup>3</sup> section 3.



(5) of the TLS preclude the ordinary cancellation of a fixed-term employment contract by an employee and an employer. According to TLS, the principle is that a fixed-term employment contract expires at the end of the term, ie at the end of the contract.<sup>122</sup> This means the principle of the legitimate expectation that TLS will ensure, through the ordinary cancellation of a fixed-term employment contract, that both parties have a permanent and stable expectation that both parties will fulfill their obligations until the end of the employment contract.<sup>123</sup> As an exception, pursuant to § 79 of the TLS, the parties may terminate a fixed-term employment contract by agreement at any time. Given the short-term nature of the esports career, it can be assumed that such an agreement would be detrimental to the esports athlete in view of the situation prevailing in the esports players market.

On the other hand, TLS also provides for the possibility for both parties to the contract to extraordinarily cancel a fixed-term employment contract. One such exceptional ground for cancellation of the contract is a decrease in incapacity for work due to the state of health under TLS. Pursuant to clause 88 (1) 1) of the TLS, an employer may terminate an employment contract in an extraordinary manner if the employee has not been able to perform work duties for a long time due to a state of health. The second sentence of the same paragraph states that a reduction in the capacity for work due to a state of health is presumed if the employee has not been able to perform the duties for four months. Considering the temporary nature of the employment relationship in esports, the extraordinary cancellation of the employment contract due to the reduction of working capacity due to the state of health may be of significant significance. It is important to draw attention to the cancellation of a fixed-term employment contract due to a decrease in working capacity in circumstances where, similarly to traditional sports, one of the negative aspects of esports is injuries. This is due to the risk factors related to the esports work environment. Unlike traditional sports, injuries in esports are not based on general physical activity but on continuous uniform activity in a forced position. Despite the lack of physical activity, injuries and health problems characteristic of the field is common among those engaged in this field. This, in turn, raises the question of whether in the case of a fixed-term contract concluded for one season, the requirement arising from § 88 (1) 1) of the TLS that the employee is unable to perform duties within four months is proportionate to the short-

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<sup>122</sup> Employment Contracts Act, RT I 2009, 5, 35, § 80 section 1.

<sup>123</sup> Käärats, E., Treier, T., Suder, S., Pihl, M., Proos, M. (2021). Employment Act. Explanations to the Employment Contracts Act. Republic of Estonia Ministry of Social Affairs. Retrieved from [https://www.sm.ee/sites/default/files/toolepinguseaduse\\_selgitused\\_sisu\\_web.pdf](https://www.sm.ee/sites/default/files/toolepinguseaduse_selgitused_sisu_web.pdf) , 02. May 2021.

term nature of the fixed-term employment contract. On the one hand, such long-term incapacity for work may represent a significant burden on the team, given that the athletes perform a specific role in the team due to the skills on which they were recruited, but on the other hand, given the instability of the employment relationship in esports, the abolition of such a criterion may reduce the protection of athlete as a weaker party.

When talking about the employment protection of an athlete, attention must also be paid to the instability in the esports employment relationship, which is characterized by the temporary nature of the contractual relationship of the athlete due to strong competition. This situation is characterized by long working hours, which may include 10-14 hours of training. Consequently, unlike traditional team sports, the violation of the rules of working and rest time is a big problem in this field.

One of the characteristic features of esports and traditional sports is individual performance, ie the contribution of an individual to team performance. Similar to a traditional athletes, participation in training is a part of the everyday work of an athlete. As a result, an athlete's performance depends on participation in training and continuous self-development. An important part of video games is strategic thinking and the existence of specific in-game knowledge. Similar to improving the physical fitness of athletes, the goal of improving in-game performance in esports is to play video games as a workout. Given that many teams use gaming houses, there are also situations where teams knowingly violate the requirements of working and rest time and the working environment. Considering the similarity of the work environment to office workers due to the nature of esports, continuous uniform activities in a forced position can have a long-term effect on a person's health. In addition, research has shown that, due to the specific nature and characteristics of esports, athletes are at greater risk of worsening their health problems.<sup>124</sup> This is precisely due to low physical activity. Consequently, the author considers that violating the restrictions on work and rest time may also cause potential problems in terms of working time in defining video games as a leisure activity and esports as work. This is precisely considering that individuals live and train in gaming houses, which are contractually determined by teams. Pursuant to § 28 (2) 4) of the TLS, the employer has the obligation to ensure the agreed working and rest time and to keep records of working time. As a result, esports teams have a legal obligation to adhere to work and rest periods. On the other hand, the TLS does not lay down

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<sup>124</sup> DiFrancisco-Donoghue (2019), *supra note* 81, 2.

more specific requirements or instructions for the employer to determine the employee's working time. In the recent case C-55/18, the Court of Justice of the European Union has clarified the obligation of the employer to keep a much broader record of the recording of working time. The court emphasized that the employer has an obligation to set up a system for calculating working time in order to determine whether the employer has complied with the regulation of working and rest time.<sup>125</sup> Consequently, it is the responsibility of the esports teams to ensure that the actual working hours of the athlete are in accordance with the TLS. It is especially important to pay attention to work and leisure time in esports, taking into account the average age of cyber sportsman and the participation of minors in esports and treating it as work. Namely, the legislator has provided for additional conditions for minors to work, setting out additional time requirements for the performance of compulsory school work for minors.

The author of the thesis considers that in order to ensure a more comprehensive national overview of esports organizations and professional esports athletes, including minors, a national esports-related database or register should be established, similar to traditional sports. The aim of this database would be to have a national overview of organizations engaged in esports and professional esports athletes. For example, under French national law, organizations wishing to engage in esports must pre-register an esports organization or team before concluding a contract with the athletes, one of the criteria being the consent of the national administration responsible for the digital sector.<sup>126</sup> The aim is to protect the employment relationship of persons wishing to engage in this field professionally.

As a result of the above analysis, it can be stated that similar to the employment relationship in traditional sports, the employment relationship between an athlete and an esports club differs from a traditional employment relationship. The author of the work is of the opinion that regardless of the specific nature and seasonality of esports, the rights of persons wishing to engage in esports professionally in employment are generally successfully protected by the TLS. Consequently, it cannot be said that the employment relationship in the field of esports differs significantly from the employment relationship of traditional teams sports athletes and it is not possible to apply labor law to the employment relationship of an esports athlete. However, the author is of the opinion that given

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<sup>125</sup> Court decision, 14.05.2019, CCOO, C-55/18, ECLI:EU:C:2019:402, point 60.

<sup>126</sup> Stadler, A., Völkel, O. (2019). The pioneering French regulation on esports. Retrieved from <https://www.svlaw.at/en/the-pioneering-french-regulation-on-esports> , 03. May 2021.

that there is no general umbrella organization in esports field and that video game publishers have a monopoly due to the intellectual property of video games, the lack of special regulation may encourage violations of the rights of athletes, as clubs do not feel connected to the implementation of labor law.

## CONCLUSION

The development of esports as a field has affected and will continue to affect the daily lives of various groups of people in the coming years. It is a phenomenon that has grown out of the video game industry, the economic scale of which is surpassing the major events of various traditional sports. As a result, there is a need to regulate this area.

The aim of this master's thesis was to explore the employment qualification of a professional athlete more generally and whether the lack of specific regulations may create a situation for professionals engaged in esports, similar to the traditional athletes in the past, where athletes rights were violated.

The research question of the master's thesis was whether the professional esports athlete is an employee and are his/her rights protected by the Estonian Employment Contracts Act?

In the first part of the work, the author analyzed the concept of esports, the law applicable to esports and the circle of subjects. Namely, there is no legal definition of esports as a term in the current Estonian law, as a result of which a situation may arise where the Gambling Act is applied to esports based on the universal features of gambling provided in the Gambling Act and the broad definition of the game of skill. Considering that erroneous treatment of esports as gambling would significantly infringe the rights of persons wishing to engage in this field professionally. Based on the analysis of the master's thesis, in the light of the development of esports, the question should be raised at the national level whether esports should be considered as sports, gambling or regulated as a separate field.

In the main part of the work, the author analyzed the legal relationship between the athletes and the esports team. Within the field of esports, there is no common understanding in the qualification of the employment relationship of a professional athlete, and various forms of legal relations are used. The esports leagues created on the basis of video games are similar in their structure and stakeholders to the traditional team sports leagues. From the author's point of view, the analysis of the criteria of the

way, time and place of work provided important knowledge in defining the labor law status of working athletes in determining the subordination of an esports athlete and an esports team. As a result of the analysis, the author came to the conclusion that in the esports employment relationship, the athlete is to a greater extent subordinated to the esports team interests, therefore the relationship between the athlete and the esports team can be qualified as a relationship of subordination. In the relationship of subordination between the athlete and the team, the athlete is personally dependent on the esports team, as a result of which the person needs the same social protection as a person working under a traditional employment contract. Consequently, the employment relationship of an athlete can be legally qualified as an employment relationship.

It is also important to point out that, similarly to the traditional team sports employment relationship, the employment relationship between the athlete and the esports club is different from the traditional employment relationship. The author of the work is of the opinion that regardless of the specific nature and seasonality of esports, the rights of persons wishing to engage in esports professionally in the employment relationship are generally successfully protected by the TLS. However, as the author pointed out in his master's thesis, the differences arising from the nature of the employment relationship of an esports athlete and the lack of special regulation may encourage the violation of the rights of athletes, as esports clubs do not feel connected to the implementation of employment law, as a result, different forms of legal relationship are used.

The author of the work is of the opinion that considering the development of this field in Europe, as well as in Estonia, the state should not wait for the occurrence of possible bottlenecks in the regulation of esports and policy-making. Pursuant to § 29 of the Constitution of the Republic of Estonia, every citizen has the right to freely choose his or her field of activity, profession and place of work and accordingly the right to positive state action in securing this freedom, ie the state's obligation to ensure statutory working conditions and employment protection.

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