

THE FISCAL IMPLICATIONS ON THE NEW PHENOMENON ESPORTS

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1. Acknowledgements

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2. Introduction

*“It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is the most adaptable to change”.*⁵

Leon C. Megginson, Professor of Management and Marketing at Louisiana State University 1963

1. The author would like to open the thesis with this progressive citation of Professor Leon C. Megginson. Many people are mistaken about this, but Charles Darwin never said this quote. It is the writings of Leon C. Megginson, Professor of Management and Marketing at Louisiana State University at Baton Rouge, who was interested in the theories of evolution and inspired by Charles Darwin's “The origin of species”⁶ on this quote.

In this regard, it is appropriate to briefly elaborate this specific quote. The digitalisation is transforming many aspects of our lives, as well as the way our economy and society is organised and functions. New technologies will be the cornerstones of the digital transformation and will impact production models, manpower, relationships with consumers, etc. Artificial Intelligence, machine learning, big data, 4D printers, 5G, Virtual Reality and blockchain are among the technologies that will mark our future.⁷ To survive this revolution, adaptation is needed to the fast-changing digital environment. In this context we can speak of Digital Darwinism, which is an up-to-date version of the quote stated above, referring to the need for business and people to adapt to new situations arising due to digitalisation.⁸

⁵ L.C. MEGGINSON, ‘Lessons from Europe for American Business’, *Southwestern Social Science Quarterly*, 1963, Vol. 44, No. 1, 4.

⁶ C. DARWIN, *The origin of the species*, London, Dent, Everyman's library, 1959, 488 p.

⁷ OECD (2019), “Tax and Digitalisation”, *OECD Going Digital Policy Note*, OECD, Paris, 1-2, www.oecd.org/going-digital/tax-and-digitalisation.pdf.

⁸ R.T. KREUTZER, ‘Digital Darwinism and the Need for a Digital Transformation’, *Annual International Conference on Business Strategy & Organizational Behaviour*, 2014, 38-46.

2. Digitalisation has a wide range of implications on taxation, impacting tax policy and tax administration at the domestic and international level, offering new tools, and introducing new challenges. As a result, the tax policy implications of digitalisation have been at the centre of the recent global debate over whether the international tax rules continue to be “fit for purpose” in an increasingly changing environment. Through the Inclusive Framework on BEPS, discussions on how to address the tax challenges that arise from digitalisation have been ongoing.⁹ On 12th of October 2020, the G20/OECD Inclusive Framework on BEPS released two detailed “blueprints” in relation to its ongoing work to address the tax challenges arising from digitalisation of the economy. The Pillar One Blueprint sets out “building blocks” for potential future international agreement on rules for taxable presence (nexus) in countries and profit allocation between countries to address tax challenges arising from digitalisation. The blueprints were presented to the G20 Finance ministers and work to address the political and remaining technical issues will continue.¹⁰

3. After this brief introduction on the increasing influence of digitalisation on our lives and the existing international tax rules, it is time to address the main theme of this thesis, Esports. This type of sport has rapidly risen to the forefront of the entertainment and legal worlds and plays an important role in the digitalisation of our society.¹¹ Turning from a social phenomenon into a major industry where top gamers around the world battle each other, creating a huge spectator sport, and attracting bigger sponsors, Esports transformed from a niche to a serious booming business. This turnout can be demonstrated with astonishing numbers and statistics. Newzoo¹² has calculated that the global Esports revenues will grow to \$1,1 Billion in 2020, a year-on-year growth of +15.7%, up from \$950.6 million in 2019. China is the largest market by revenues with total revenues of \$385.1 million in 2020. It is followed by North America, with total revenues of \$252.8 million, and Western Europe, with total revenues of \$201.2 million. Brands invest \$ 822.4 million in the market with sponsoring, advertisement, and such, which is 75% of the total market. Furthermore, the total amount of prize money of all Esports events held in 2019 reached \$167.4 million. Consequently, the Esports industry

⁹ OECD (2019), “Tax and Digitalisation”, *OECD Going Digital Policy Note*, OECD, Paris, 1-2, www.oecd.org/going-digital/tax-and-digitalisation.pdf.

¹⁰ OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en>.

¹¹ S. MIN YUN, “A comparative overview of Esports against traditional sports focused in the legal realm of monetary exploitation, cheating and gambling.”, *Cardozo Arts & Entertainment Law Journal*, 2019, Vol. 37 Issue 2, 39p.

¹² Newzoo, *2020 Global Esports Market Report*.

is an extremely socially relevant topic for further research. With the increasing money streams and turnover, the tax aspect will only increase in the future.

4. Whereas tax law always tries to address the tax challenges arising from digitalisation, it cannot by nature keep up with growing speed and complexity of the Esports industry. Traditional international taxation principles refer to physical presence as a general requirement for a nexus of taxation for companies. However, digitalisation breaks domestic borders, allows international expansion into new markets such as Esports where different market participants are looking to monetise their investments in various ways, and facilitates cross-national collaboration without having any physical presence in such foreign countries.¹³ Similar to the sports industry, a single international Esports event can involve participants from multiple jurisdictions competing in a source state, while being simultaneously broadcast to various countries around the world. As such, for a given tournament there will, in general, be many countries involved all of whom wish to tax in some capacity. From a tax perspective, this creates a significant risk of double taxation or double non-taxation without the proper allocation of taxing rights using international tax treaties.¹⁴

To avoid double taxation, countries conclude double taxation treaties with each other, almost all of which are based on the OECD MC. Article 17 OECD stipulates that entertainers and sportspersons who are residents of a contracting state (state of residence) may be taxed in the other contracting state (source state) in which their personal activities are performed.¹⁵ Traditionally this provision applies to participants of more classical sports such as cyclists, runners, and swimmers. However, the commentary on article 17 OECD MC states that the provision also applies to certain sports activities with an entertainment content, such as billiards and snooker, chess, and bridge tournaments.¹⁶ But what about Esports? Can an Esports player be considered as a sportsperson under article 17 OECD MC?

¹³ S. GROTH and S. KÄMMERER, “Regulation (Tax): Esports from a tax perspective”, *Digital Trend Outlook Esport 2020*, 1, <https://www.pwc.de/en/technology-media-and-telecommunication/digital-trend-outlook-esport-2020/regulations-tax.html>.

¹⁴R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 19.

¹⁵ Article 17, §1 OECD MTC.

¹⁶ Sec. 5 and 6, OECD Comm. on Art. 17.

If article 17 OECD MC is applicable on Esports players, the most intriguing question is where their activity is performed. In case of offline gaming, Esports players could in principle be taxable in the state where the performance is physically exercised. By contrast Esports players competing online, who are not physically present in the other jurisdiction, would generally not be caught by the exception entailed in the provision, according to which the income intricately connected with the performance is subject to tax in the State of source. This can lead to a different tax treatment between online- and offline gaming. In the light of the above, one could argue therefore that a change of the current international tax rules would be preferable.

5. This brings us to the central research question of this thesis: “Do the current international tax rules fit to address the booming phenomenon of Esports?” The research examines relevant international income tax issues relating to Esports from the perspective of the professional Esports players, focusing on the income that is closely related to the performance, such as the prize money and salaries. To answer the central research question, there will be examined whether Esports can be considered as a sport under international tax regulations, and how double tax treaties can apply to the various incomes of Esports players. Further, the issues that can arise in the income tax treatment of professional Esports players under the current international tax rules will be examined. In case of Online tournaments issues of double taxation and double non-taxation can occur. The aim of this thesis is to propose solutions on the international income tax issues of Esports players, and how to adapt the current international tax rules to Esports as one of the many facets of the digitalisation.

First, the history and the rise of Esports will be discussed. Then, a general section comes about the definition, types of games, stakeholders involved and the difference between online and offline gaming. Afterwards, the questions will be raised whether Esports can be considered a sport from a legal perspective and to what extent Esports is accepted as an official sport by the International Olympic Committee, and how is it situated within European law and jurisprudence. Furthermore, it will be examined how the income of a professional Esports player can be treated under the double tax treaties with a specific focus on article 17 OECD MC. This examination will focus on the place of performance as an important factor in the context of digital activities and online gaming. Thereafter, the issues that can arise in the income tax treatment of professional Esports players under the current international tax rules will be examined. Finally, proposals will be made on how to adapt or change the current international tax rules to Esports as one of the many facets of the digitalisation.

6. Within this thesis the various sources of income streams related to Esports will only be discussed briefly. The main purpose of this thesis is to examine the relevant international income tax issues relating to Esports from out of the perspective of professional Esports players, focusing on the income that is closely related to the performance, mainly the prize money and salaries. The other income streams such as broadcasting and media rights, sponsorship and advertising, game publisher fees and ticket sale and merchandising, are too specific to do further in-depth analysis in this thesis.

7. The research methodology used in this thesis includes the classic legal method, legal analysis, evaluation of existing regulations of international tax law, evaluation of double tax treaties and case studies. The list of sources reveals that there is rather little case law available on the topic of Esports since it is a recent phenomenon making its entrance into tax law. Despite the lack of jurisprudence on Esports, the jurisprudence of the European Court of Justice, with regarding the concept of sport, will be analysed, to determine whether Esports can be considered as a sport under European- and international tax law. Furthermore, the existing legal doctrine concerning the international taxation of athletes and the applicable international tax legislation will be used to support this research. Based on scientific literature on the taxation of international athletes, the problems and questions that arise in the application of article 17 OECD MC MC on Esports will be identified. Secondary sources will be used to explain the general principles of international tax law, and the original source subject to interpretation will be the OECD MC and its commentaries.

8. Academic importance of this thesis results from a new perspective given to the issue of taxation of international athletes, more especially the taxation of international Esports players. It contributes to the understanding of the legal environment of international Esports events and the fiscal situation of the participants. The tax treatment of athletes is an important part of the regulatory environment of Esports events and requires a clear policy. This thesis may serve as a comprehensive source of information on the types of revenue received from participation in international Esports events. The research should raise awareness of tax issues in Esports and contributes to the adoption of a consistent approach to the taxation of international Esports players. In practise, the information collected, and the results of the research will be of interest to those stakeholders involved in the Esports industry, their advisors, and the general policy makers.

3. What are Esports?

3.1. The rise of Esports and its history

9. In the modern age of technology, there is a type of sport that has rapidly risen to the forefront of both entertainment and legal worlds: Esports.¹⁷ Until the seventies, only a small part of the people had access to computers. At that time, there was no market for video games for entertainment purposes. In the following years, the market for video games grew, computers became cheaper, and the number of consoles and arcades rose exponentially. However, many companies in the industry struggled to monetise their products sufficiently.¹⁸ The first big Esports event was a 10,000 people strong competition held in America in 1981 by Atari "The Space Invaders Championship". Once computers had begun to gain increased internet accessibility, video games saw further growth in the nineties.¹⁹

The introduction of the internet through local area networks (LAN) was a major turning point in the evolution of the Esports industry. The advancement of the LAN technology changed the mode of Esports consumption from gamer-versus-computer to gamer-versus-gamer, which allowed the gamers to participate in online game events over the worldwide internet.²⁰ Together with the introduction of consoles like the PlayStation, a broad spectrum of people was now reached by video games.²¹

10. This evolution in Esports took almost simultaneously place in South-Korea and the United States, but the difference between western and Asian cultures lead to the emergence of two different gaming cultures with different business ecosystems. In the United States and Europe, the history of competitive gaming is usually associated with the release of networked 'first person shooting games',

¹⁷ S. MIN YUN, "A comparative overview of Esports against traditional sports focused in the legal realm of monetary exploitation, cheating and gambling.", *Cardozo Arts & Entertainment Law Journal*, 2019, Vol. 37 Issue 2, 513.

¹⁸ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 17-41.

¹⁹ A. HOPE, "The evolution of the electronic sports entertainment industry and its popularity", In J. SHARP & R. SELF (Ed.), *Computers for Everyone*, 2014, 87.

²⁰ D. LEE & L.J. DCHOENSTEDT, "Comparison of eSports and traditional sports consumption motives.", *The ICHPER-SD Journal of Research in Health*, 2011, Physical Education, Recreation, Sport & Dance, 6(2), 39.

²¹ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 21.

such as “Doom” in 1993 followed by “Quake” in 1996. During that time, teams of online players started to compete in online tournaments. Most of the business concepts of those professional leagues were based on major professional sports leagues in the United States.²² Eastern Esports culture started out in South-Korea in the mid-nineties. Under the influence of a crisis that vexed Asia at that time, South Korea try to conquer this crisis through modernisation. The South Korean government decided to build a national broadband network of faster internet connection and subsidised the purchase of the portable computer. Additionally, so-called gaming cafés sprang up.

Alongside the growth of the ecosystem, the South Korean government established the Korean Esports Association (KeSPA) in 2000. It was the first professional Esports federation who was established and organised as branch under the Ministry of Culture, Sports and Tourism, regulating Esports tournaments and distributing broadcasting licenses in mutual understanding with the game publishers.²³ It became evident that South Korea would differ from the rest of the world. The rest of the world at that time was the Wild West. Many organisations were founded in those times, and only a few were professional. The more Esports ecosystems grew, the more legal problems arose. South Korea and KeSPA were a long ahead of the curve and started to put in place laws and regulations to address the core problems facing the Esports industry. With this proactive approach South Korea is still called “the Mecca of Esports”²⁴ in both gaming and regulation.²⁵

11. For the most part, Esports survived the pioneer phase quite well and began to grow steadily. Video games and online gaming continued to grow in popularity. Several events and tournaments proved that Esports could become even more prominent. For example, the CPL World Tour was a tournament broadcasted by MTV and consisted out of nine tour stops over the whole world, culminating in a final tournament in New York City. The prize money was \$1,000,000, the largest

²² M.G. WAGNER, “On the Scientific Relevance of eSports”, *Symposium conducted at 2006 international conference on Internet computing & conference on computer games development*, 2006, Las Vegas, NV, 1-2, <http://ww1.ucmss.com/books/LFS/CSREA2006/ICM4205.pdf>. (Accessed on 10 February 2021).

²³ E. OZKURT, “Esports in South Korea – a short overview of the legal ecosystem”, *Lawinsport* 2019, <https://www.lawinsport.com/topics/item/esports-in-south-korea-a-short-overview-of-the-legal-ecosystem>. (Accessed on 10 February 2021).

²⁴ J. HEINZ and A. STRÖH, *The eSports Market and eSports Sponsoring*, Marburg, Tectum Wissenschaftsverlag, 2017, 16-17.

²⁵ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 22; E. OZKURT, “Esports in South Korea – a short overview of the legal ecosystem”, *Lawinsport* 2019; <https://www.lawinsport.com/topics/item/esports-in-south-korea-a-short-overview-of-the-legal-ecosystem>. (Accessed on 25 February 2021).

ever for the CPL. At the same time, the World Esports Games were announced in China and South Korea, because of which Esports also entered the Chinese market.²⁶

Slowly Esports found their way into television in the US and Europe. “Twitch”, a streaming platform introduced in 2011, allowed the entire world to access to the excitement of competitive gaming as a spectator sport and gave Esports a platform to reach previously unthinkable heights. People were now able to watch any tournament easily and, besides the benefit of growing spectatorship, Esports organisations became able to show their value creation in specific numbers. Twitch's impact on the entire Esports industry should therefore not be underestimated.²⁷

With broadcasting now through Twitch and YouTube, giving tournaments promoters the perfect outlet to easily push live streams to millions of viewers, events and tournaments were now more visible. More and more companies from outside the endemic Esports ecosystem bought into Esports growth looking to support and capitalize on the new market.²⁸ In 2009, 161 Esports tournaments were organised, but by 2012 that number had shot up to 696 and continued to rise.²⁹

12. Today, the Esports market has become a multi-million-dollar industry, as more governments and corporate entities acknowledge it as a legitimate market.³⁰ The figures and statistics do not lie, and expectations are sky-high. In the coming year, the global Esports industry will generate revenues of \$1.1 billion, a year-on-year growth of +15.7%. By the end of 2020, the global Esports audience reached 495.0 million, made up of 222.9 million Esports enthusiasts and a further 272.2 million occasional viewers. As the Esports market matures, new monetisation methods will be implemented and improved upon. Likewise, the number of local events, leagues and media rights deals will increase. Therefore, *Newzoo* expects the average revenue per fan to grow to \$5.27 by 2023.³¹

²⁶ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 25.

²⁷ *Ibid.*, 32.

²⁸ J. RONQUILLO, "The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property," *Intellectual Property and Technology Law Journal*, Spring 2019, Vol. 23, nr. 2, 81-82.

²⁹ T. BARKER, 'League of Legends: Chinese Viewership Drives Worlds to Highest Peak in Esports History', 12 November 2018, <https://thegamehaus.com/columns/league-worlds-viewership-esports-2018/2018/11/12/>. (Accessed on 16 February 2021).

³⁰ S. MIN YUN, "A comparative overview of Esports against traditional sports focused in the legal realm of monetary exploitation, cheating and gambling," *Cardozo Arts & Entertainment Law Journal*, 2019, Vol. 37 Issue 2, 513-514.

³¹ *Newzoo, 2020 Global Esports Market Report*.

The future of Esports looks bright and promising.³² The trend has also increased enormously in Belgium. According to an investigation done by PayPal and SuperData, the Belgian Esports market amounted \$3 million with an expected growth of \$2 million by 2019. With more than 1.1 million unique viewers in 2017, the Belgian market was responsible for 4% of the total European Esports fan base.³³ The positive revenue growth and the growing fan base have led to several interesting initiatives in Belgium. In 2018, telecom provider Proximus, together with the Electronic Sports League and the Belgian Pro League, set up competitions around the popular games "Counter-Strike", "League of Legends" and "FIFA". Shortly afterwards traditional sports teams, such as Club Brugge and KRC Genk, followed the trend of this initiative by establishing their own Esports teams in their club structures as a method to attract new followers and to expand their fanbase.³⁴

13. Furthermore, COVID-19 also had an impact on the Esports industry. With traditional sports around the world on hold, people turn to gaming to fill the empty hours of lockdown and isolation. Unlike traditional sports, physical contact is not needed between players in an Esports context. Online streaming platforms such as Twitch have reported massive increases in user streaming hours and online game platforms such as Steam have reported record numbers.³⁵ As a result of the pandemic, many traditional athletes were forced to train inside, which made certain sports organisations and federations think. Traditional sports were able to respond to this plight and organised their own online competitions, which gave the athletes the opportunity to participate from home. Esports received special attention in cycling, with the first digital Tour of Flanders.³⁶

³² W. PARTIN, 2018b. Twitch Isn't for Esports. It's for Streamers; <https://compete.kotaku.com/twitch-isnt-for-esports-its-for-streamers-1824263773>. (Accessed on 16 February 2021).

³³ PayPal, *The Gender PayPal 2018 Gaming Insights Divide, eSports and More*, 2018; <https://www.paypal.com/stories/us/paypal-2018-gaming-insights-the-gender-divide-esports-and>. (Accessed on 16 February 2021).

³⁴ See <https://sporza.be/nl/2021/01/14/club-brugge-breidt-esports-team-uit-vanaf-nu-ook-counterstrike~1610635881893/>. (Accessed on 16 February 2021).

³⁵ D. KOZELKO, 'COVID-19: how is esports coping compared to traditional sports?', *Lawinsport* 2020; <https://www.lawinsport.com/topics/item/covid-19-how-is-esports-coping-compared-to-traditional-sports>. (Accessed on 16 February 2021).

³⁶ G. VERACHTERT and C. KAURA, *De internationale fiscaliteit van artiesten en sporters: uw 100 antwoorden*, Brussel, Lefebvre Sarrut Belgium, 2020, 164.

3.2. Definition

14. Esports has become significant in both business and societal terms. For this purpose, it is important to start an academic research with a clear and scientific concept of Esports. Previous studies have shown that it is not easy to give an unambiguous definition on Esports. On the one hand, this is because many domains approach Esports with a different scientific slant, and on the other hand by the discussion or Esports can be considered as a sport.³⁷ There are an astounding number of Esports definitions in both the academic and non-academic literature. This academic research analyses the concept of Esports from a legal perspective and looks for a workable definition for tax purposes.

15. Perhaps the oldest and most explicit definition of Esports by WAGNER (2006), leans heavily on a definition for the term “sport”, proposed by scientist TIEDEMANN on the International CESH-Congress in Italy (2004). TIEDEMANN defines:

“Sport” is a cultural field of activity in which human beings voluntarily go into a relation to other people with the conscious intention to develop their abilities and accomplishments - particularly in the area of skilled motion - and to compare themselves with these other people according to rules put self or adopted without damaging them or themselves deliberately.”³⁸

In defining Esports, WAGNER (2006) extends this general definition of sports with the addition of “in the use of information and communication technologies”. He argues that Esports is too narrowly defined if it is merely seen as “a competitive way of playing computer games within a professional setting”, the way Esports is perceived by the public.³⁹

This definition has been criticised several times by other authors. Some have stated that the definition is far too broadly defined and leaves too much space for interpretation and therefore does not solve

³⁷ J. HAMARI and M. SJÖBLOM, "What is eSports and why do people watch it?", *Internet Research*, 2017, Vol. 27 No. 2, 211-217.

³⁸ C. TIEDEMANN, *Sport (and culture of physical motion) for historians, an approach to precise the central term(s)*, IX. international CESH-Congress, Crotona, Italy, 2004, 3.

³⁹ M.G. WAGNER, “On the Scientific Relevance of eSports”, *Symposium conducted at 2006 international conference on Internet computing & conference on computer games development*, 2006, Las Vegas, 3; <http://ww1.ucmss.com/books/LFS/CSREA2006/ICM4205.pdf>. (Accessed on 17 February 2021).

the looming question of what sporting activities can be defined to be either an electronic sport or ‘traditional’ sport.⁴⁰ Furthermore, the statement that people develop and train with the use of information and communication technologies in Esports leaves out the aspect of competition.⁴¹

KARHULATHI did a literature review on the definition of Esports and came to the following conclusion:

*“[...] contemporary academics seem to have a shared conceptual frame for labelling Esports. With nuance, they all perceive Esports through two criteria: technological specificity (computers, cyberspace, electronics) and advanced competition (athleticism, professionalism, sport). These criteria are directly connected to the videogame culture so that Esports is recognized as an “extension of gaming”.*⁴²

16. This thesis has the aim to examine the relevant international income tax issues relating to Esports from the perspective of the professional Esports players, focusing on income that is closely related to the performance. For this purpose, a general definition that considers the competitive and professional context of Esports is preferable. Esports will be defined as follows:

*“Esports is competitive gaming at a professional level and in an organised format (leagues or tournaments, online or offline) with a specific goal (winning a champion title or prize money) and a clear distinction between players and teams competing against each other or against a computer.”*⁴³

17. From a legal point of view it is important to make note of the used parameters ‘competition’ and ‘professionalism’. First, highlighting professionalism as a parameter can fail to transform an activity into sport. If the remuneration of players is set as the element, amateur players, who only play for

⁴⁰ E. WITKOWSKI, “On the Digital playing Field: How we “Do Sport” With Networked Computer Games”, *Games and Culture*, 2012, Vol. 7 No. 5, 349-374.

⁴¹ E. SETH, R. JENNY, D. MANNING, C. MARGARET and T.W. OLRICH, “Virtual(ly) Athletes: Where eSports Fit Within the Definition of “Sport”, *Quest* 2017, Vol 69, No. 1, 4; <https://doi.org/10.1080/00336297.2016.1144517>.

⁴² V. KARHULATHI, “Reconsidering Esport: Economics and Executive Ownership”, *Physical Culture and Sport Studies and Research* 2017, Vol 74, 45; <https://doi.org/10.1515/pcssr-2017-0010>. (Accessed on 18 February 2021).

⁴³ This definition on Esports is inspired by definitions used in the Deloitte Insights report of 2020, “*Let’s play! The European Esports market*” and the Newzoo 2020 “*Global Esports Market Report*”.

fun, are left out. Furthermore, the presence of semi-professional players and the idea that sport and its definitions are social constructs, complicate matters more.⁴⁴ Despite this comment, the element of professionalism will be used as only professional Esports players are included in the target group. This reasoning can be substantiated by the fact that professional Esports players earn a lot of prize money and receive a salary from their employment contract. The income earned by an amateur Esports player is rather limited and only includes prize money. Just to give a good example, good amateurs who are dipping their toes into the professional world, may start out earning just a few hundred dollars from amateur competition prize money. This in comparison to average professional gamers who are somewhere in the middle earning between \$ 3000 and \$ 15000 per month.⁴⁵

18. Regarding the element of competition, there has been debated several times about what type of competitions need to be included in the definition of Esports. The current debate on Esports would put its focus only on multiplayer competitions where competitors, individually or in teams, aim to outperform each other in real time. Nevertheless, this is not the only type of competition in the world of video gaming. From a legal perspective it is important to notice that the definition of Esports must consider different types of games and competitions. Not only competitive video gaming would be considered within the ambit of Esports, but also ‘single player’ games.⁴⁶ Furthermore, suggestions are made to introduce the term "discipline", which makes it easier to evaluate different levels of institutionalisation within the Esports industry.⁴⁷ In concrete, Esports competitions based on different video games such as League of Legends, FIFA Series and NBA 2K Series, constitute different disciplines. The introduction of the concept of disciplines may help to avoid the stereotyping of lumping all video games together. Every video game is different, and every Esports competition based on a certain video game, is still different. Therefore, the position of video games and the Esports competitions based on them should be analysed on a case-by-case basis.⁴⁸

⁴⁴ C. ABANAZIR, “E-sport and the EU: the view from the English Bridge Union”, *International Sports Law Journal* 2019, Vol. 18, 103.

⁴⁵ See: How Do Esports Teams Make Money? 5 different ways discussed; <https://cyberathletiks.com/how-do-esports-teams-make-money-5-different-ways-discussed/>. (Accessed on 18 February 2021).

⁴⁶ C. ABANAZIR, “E-sport and the EU: the view from the English Bridge Union”, *International Sports Law Journal* 2019, Vol. 18, 103-104.

⁴⁷ C. ABANAZIR, “Institutionalisation in e-sports”. *Sport Ethics Philos*, 2018, 123-125, Vol. 13:2, <https://doi.org/10.1080/17511321.2018.1453538>.

⁴⁸ C. ABANAZIR, “E-sport and the EU: the view from the English Bridge Union”, *International Sports Law Journal* 2019, Vol. 18, 104.

19. Lastly, it is important to consider the means of producing video games and the competitions in which they are utilised. The developers of the various video games have an "absolute power" over their products.⁴⁹ Unlike traditional sports where organisers of competitions seek for authorisation from the international federations⁵⁰ for the participation of clubs, teams, and players, organisers of Esports competitions seek authorisation from intellectual property right holders with a view to the utilisation of the video game. As a result, the video games used as the basis for Esports competitions will always be subject to intellectual property laws. Therefore, policymakers should decide beforehand whether the scope of the definition covers only high-profile competitions where publishers get involved, but also low-profile competitions organised by third parties with little or no monetary incentive.⁵¹ Despite the critical remarks made on the parameter's 'professionalism' and 'competition', they are widely accepted.⁵² From a scientific and fiscal point of view, these elements are therefore necessary to define the concept of Esports in this thesis.

3.3 The ecosystem of the Esports industry

20. To get a better understanding and view on the complex Esports industry, it is worth to analyse the Esports ecosystem and to identify the various stakeholders involved. SCHOLZ notes that "The Esports industry, with its various stakeholders, can be seen as an interwoven network, where stakeholders need each other to work and to succeed."⁵³ As stated in the previous chapters, many actors are involved for decades. Over the years a separation has occurred among the stakeholders involved. There are the long-term or primary stakeholders in Esports, which are highly intertwined and interconnected, creating a business around the audience. In recent years, various secondary stakeholders joined the industry with different backgrounds, introducing new ideas and concepts.⁵⁴ To this end, it is necessary to discuss the primary and secondary stakeholders separately.

⁴⁹ V. KARHULATHI, "Reconsidering Esport: Economics and Executive Ownership", *Physical Culture and Sport Studies and Research* 2017, Vol 74, 47, Reviewed on: <https://doi.org/10.1515/pcssr-2017-0010>.

⁵⁰ ECJ 16 December 2020, Case T 93/18, *International Skating Union vs European Commission*.

⁵¹ C. ABANAZIR, "E-sport and the EU: the view from the English Bridge Union", *International Sports Law Journal* 2019, Vol. 18, 104.

⁵² ESAU, R., "International tax aspects of esports – Part one", *GSLTR*, 2020/03, 19.

⁵³ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 118.

⁵⁴ *Ibid*, 43.

3.3.1 Primary stakeholders

21. Primary stakeholders are linked in the value chain network and are directly connected to each other, at least to a certain degree. They can be further separated based on their position in the value network. Game developers, professional teams, tournament organisers, and professional players are primary roles that are essential for the Esports industry. The primary stakeholders' service providers, communities, hardware providers, and infrastructure providers are support activities.⁵⁵

3.3.1.1 Publishers and Game Developers

22. Without publishers and game developers there would be no Esports. Publishers and game developers are the companies that publish the video games. Publishers finance the design, development, marketing and distribution of video games; therefore, they are the ultimate owners of video games' intellectual property.⁵⁶ Riot Games, Valve, Activision Blizzard and Electronic Arts are the largest competitors in the Esports industry, owing well established games titles, hosting and producing coverage for some of the scene's largest competitions. Executive ownership⁵⁷ and the intellectual property rights are the triggers that make those publishers the most powerful and most relevant players in the Esports ecosystem.⁵⁸ By using licensing agreements to create a governance framework, publishers ensure that stakeholders, such as tournament organisers comply with their interests, particularly maintaining their reputation and popularity. Although game publishers take the lead in governing the Esports industry, there seems to be a lack of interest in governing the entire industry. Activities (major network-level activities) that are not regulated or coordinated by the game publishers, open the door for regulation by other stakeholders.⁵⁹

⁵⁵ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 45.

⁵⁶ Q. PENG, G. DICKSON, N. SCELLES, J. GRIX and P.M. BRANNAGAN, "Esports Governance: Exploring Stakeholder Dynamics" *Sustainability* 2020, Vol 12, No. 8270, 7; <https://doi.org/10.3390/su12198270>.

⁵⁷ V. KARHULATHI, "Reconsidering Esport: Economics and Executive Ownership", *Physical Culture and Sport Studies and Research* 2017, Vol 74, 46, Reviewed on: <https://doi.org/10.1515/pcssr-2017-0010>.

⁵⁸ G.L. VITALE, "Publishers & Game Developers: The mighty ones within", in PWC 2020, *Digital Trend Outlook 2020: Esports*; <https://www.pwc.de/en/technology-media-and-telecommunication/digital-trend-outlook-esport-2020/publishers-game-developers.html>. (Accessed on 24 February 2021).

⁵⁹ Q. PENG, G. DICKSON, N. SCELLES, J. GRIX and P.M. BRANNAGAN, "Esports Governance: Exploring Stakeholder Dynamics" *Sustainability* 2020, Vol 12, nr. 8270, 8-9; <https://doi.org/10.3390/su12198270>.

3.3.1.2 Tournament Organisers

23. In the history of Esports, the tournament organisers have been a driving force, especially as the game developers often neglected their Esports title. Tournaments can include various games, as well as tournaments in locations that are often neglected by the game developers. In offering their services, organisers play a vital role within the ecosystem, as they connect game developers with their respective audience and try to improve the interconnection between these two stakeholders.⁶⁰ With the advent of the platforms, it is even possible for everyone to organise and offer tournaments and events.⁶¹ Due to the competitive environment, tournament organisers must adapt and innovate. Despite the power of the game publishers, it is the organiser who keeps the variety of the games in search for a next big Esports title. Tournament organisers have positioned themselves as enablers with a diversified portfolio, trying to create a consistent, transparent, and complementary league and competition system at all levels. They are not one-trick ponies like the game developers.⁶²

3.3.1.3 Professional teams

24. Like in traditional sports, professional teams are necessary to create a sustainable environment for tournaments and competitions at the highest level. Depending on the game, league or competition, the squad size can vary.⁶³ Moreover, Esports teams often consist of multiple teams within the organisation that can play in different games, communities, and tournaments.⁶⁴ Like traditional sport teams, they try to get the best players possible and support them with coaches, training possibilities and an environment in which they can focus solely on becoming better and beating the competition.⁶⁵

⁶⁰ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 58-62.

⁶¹ D. ADVANI, G.L. VITALE and K.A. AKMAN, "Leagues and Tournaments: The powerhouse", in PWC 2020, *Digital Trend Outlook 2020: Esports*; <https://www.pwc.de/en/technology-media-and-telecommunication/digital-trend-outlook-esport-2020/publishers-game-developers.html>. (Accessed on 24 February 2021).

⁶² T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 62.

⁶³ A. NIXON, D. GEEY, C. PAGET, J. MADILL, T. DAVIES and R. GANDHI, "Esports uncovered – Part 2: the key stakeholders - a comparison with the football industry", *Lawinsport* 2017; <https://www.lawinsport.com/topics/item/esports-uncovered-part-2-the-key-stakeholders-a-comparison-with-the-football-industry>. (Accessed on 25 February 2021).

⁶⁴ J. RONQUILLO, "The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property," *Intellectual Property and Technology Law Journal*, Spring 2019, Vol. 23, nr. 2, 84.

⁶⁵ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 63.

To fund this support, teams will receive income from Esports events, for example in the form of sponsorship and prize money and keep a profit portion. Furthermore, the team has the obligation to pay salaries or independent contractor fees to the team members for the participation in the competitions. From out of a tax perspective, these activities will cause teams to be considered enterprises under art. 3 of the OECD MC, as it applies to the “carrying on of any business”.⁶⁶

3.3.1.4 Professional Esports players

25. Probably the most important stakeholder in the Esports industry is the professional Esports player. Despite the enormous increase in the number of leisure and amateur players, it is only possible for a few of them to break through. Becoming a professional gamer requires a lot of dedication and specialisation in a specific type of games. Each game is so complex and nuanced these players can be training at least 12 hours a day for several years to reach the top of their chosen industry game. Unlike traditional sports, the lifecycle of a professional career may be drastically shorter. Even though a professional career can start at a young age, video games on a competitive level may not have plannable longevity, which depends on the popularity of the game and power of the publishers and developers.⁶⁷ This highly competitive environment leads to a lot of choosiness among the teams. The teams will look for players to represent them in competitions and tournaments.⁶⁸ Common practice in the Esports industry is for individual players to earn income indirectly. In many cases, income will first be earned by the player’s team and subsequently paid to the player in the form of a salary or independent contractor fees.⁶⁹ From out of a tax perspective, the legal classification of the income earned by the player is important to determine the tax jurisdiction of a state.

⁶⁶ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 21.

⁶⁷ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 67; A. NIXON, D. GEEY, C. PAGET, J. MADILL, T. DAVIES and R. GANDHI, “Esports uncovered – Part 2: the key stakeholders - a comparison with the football industry”, *Lawinsport* 2017; <https://www.lawinsport.com/topics/item/esports-uncovered-part-2-the-key-stakeholders-a-comparison-with-the-football-industry>. (Accessed on 1 March 2021).

⁶⁸ *Supra* nr. 24.

⁶⁹ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 21.

3.3.1.5 Providers and Communities

26. As discussed above, the game publishers and developers, tournament organisers, professional teams and professional players can be categorised as primary activities, following Porter's value chain.⁷⁰ However, it is necessary for the industry to create a real valuable product, to reach a broader audience and to increase the potential monetization of the audience. To achieve this, various support activities are required, including infrastructure providers, service providers, hardware providers, and community enablers.⁷¹

3.3.2 Secondary stakeholders

27. In addition to the primary stakeholders, various secondary stakeholders are joining the industry with different backgrounds, introducing new ideas and concepts.⁷² They have an indirect impact and are not causally linked to the value chain of the Esports industry, but influence the industry through investments or pressure for change in a particular direction. Primary stakeholders must respond to the actions of secondary stakeholders and categorise the power, legitimacy and urgency of these secondary stakeholders, such as governing bodies, sports businesses, sponsors, the audience, investors, entrepreneurs, media, businesses, and others.⁷³

3.3.2.1 Governing bodies

28. For years, criticism has been voiced about the fact that Esports is like the Wild West when it comes to regulation and governance.⁷⁴ Despite the monopolistic position in the Esports governance of the game publishers, some influential stakeholders within the network are emerging, trying to create a specific governance. To represent and protect their interests, some Esports tournament

⁷⁰ M.E. PORTER, *The Competitive Advantage: Creating and Sustaining Superior Performance*, New York: Free Press, 1985, 1-32.

⁷¹ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 70-73.

⁷² *Supra* nr. 20.

⁷³ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 45.

⁷⁴ K. HOLLIST, "Time to Be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation", *Arizona Law Review* 2016, Vol. 57, 823-847; T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 73.

organisers, teams and players have cooperated to create national and international Esports governing organisations, separate from game publishers. These attempts have resulted in more than one Esports governing organisation. The International Esports Federation (IeSF)⁷⁵, the World Esports Association (WESA)⁷⁶ and the Global Esports Federation (GEF)⁷⁷, have all claimed to be the international organisation for governing Esports worldwide. Although tensions exist, none of these organisations seems to have acquired the legitimacy needed to govern Esports worldwide. In addition, both IeSF and GEF associate themselves with traditional sports organisations such as the WADA (World Anti-Doping Agency) or national Olympic committees to legitimise their governance.⁷⁸ Also, in recent years, many Esports federations have been established on a national level. For example, as a member of the IeSF, the Belgian Esports Federation (hereinafter “BeSF”) was established with the aim of providing a platform for Esports initiatives and developing Esports in Belgium.⁷⁹

29. However, many secondary stakeholders do not realise that Esports is an umbrella of different games. Beyond those attempts to create governance structures mimicking those of traditional sports, the game developers and publishers still own the games and have all the legal rights to change the games. This type of governance mimicking sports could also be harmful, as the Esports industry would bow to the traditional sports governance model. Governance in Esports is not a way to create a top-down structure of regulations, but rather the emergence of a bottom-up consensus of necessary social norms.⁸⁰ Practice has shown that the Esports industry should follow a stakeholder-driven approach where the focus is on coordination and organisation of all the stakeholders involved. This approach can be found in corporate governance structures, where the focus lies on creating an environment that allows a thriving environment for the Esports industry. Consequently, bottom-up corporate governance, with all stakeholders working together, may be a meaningful approach for the Esports industry.⁸¹

⁷⁵ International Esports Federation Statutes 2020; <https://ie-sf.org/wp-content/uploads/2021/01/IESF-Statutes-2021.pdf>. (Accessed on 2 March 2021).

⁷⁶ World Esports Association. 2020, <http://www.wesa.gg/>. (Accessed on 2 March 2021).

⁷⁷ Global Esports Federation 2020, <https://globalesports.org/about/>. (Accessed on 2 March 2021).

⁷⁸ Q. PENG, G. DICKSON, N. SCELLES, J. GRIX and P.M. BRANNAGAN, "Esports Governance: Exploring Stakeholder Dynamics" *Sustainability* 2020, Vol 12, No. 8270, 9; <https://doi.org/10.3390/su12198270>. (Accessed on 2 March 2021).

⁷⁹ Belgian Esports Federation, <https://www.besf.be/about-besf/>. (Accessed on 2 March 2021).

⁸⁰ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 73-75.

⁸¹ *Ibid*, 75.

3.3.2.2 Sports organisations

30. As discussed earlier, there has been a trend in recent years that more and more traditional sport organisations and clubs are investing heavily in Esports.⁸² As many young sports businesses struggle to attract a younger audience, the Esports industry is a global market with massive growth potential and a younger target audience. Numbers are exponentially increasing, as there were more than 200 sports teams with some form of Esports team in their organisation in 2018. Not only large international sports organisations and clubs, such as the NBA, Manchester United, Paris Saint-Germain and FC Bayern Munich, have followed this trend⁸³, there is also movement on a national level. In January 2017, the first Esports football league, “E-Divisie”, was launched in the Netherlands.⁸⁴

3.3.2.3 Sponsors

31. A driving force of the Esports industry are the sponsors. Of the \$1.1 billion Esports revenues that were generated in 2020, an impressive \$636.9 million came from sponsorships.⁸⁵ With the same approach as the sports organisations, brands try to approach a wider audience that are difficult to reach via the traditional methods. A young and an international audience can be achieved through sponsoring in the Esports industry.⁸⁶ Well-known brands found their way to the market through the sponsorship of Esports teams and tournaments. Some Esports teams are already ahead of the curve in exploiting commercial partnership opportunities. By way of example, Red Bull has targeted StarCraft 2 and Dota 2 games, as well as individual partnerships with individual Esports athletes, who are even allowed to use Red Bull’s training facilities.⁸⁷

⁸² *Supra* No. 12, 13 and 19.

⁸³ Deloitte Insights 2020, *Let’s play! The European Esports market*, 13; <https://www2.deloitte.com/content/dam/Deloitte/ec/Documents/technology-media-telecommunications/Lets%20Play!%20The%20European%20esports%20market9073.pdf>. (Accessed on 3 March 2021)

⁸⁴ A. TIELBEKE, “Eredivisie Launches Official Esports Competition for Fifa Gamers: The E-Divisie”, 2017; <https://eredivisie.nl/nl-nl/nieuwsbericht/eredivisie-launches-official-esports-competition-for-fifa-gamers-the-edivisie>. (Accessed on 3 March 2021).

⁸⁵ Newzoo, *2020 Global Esports Market Report*, 29.

⁸⁶ T.M. SCHOLTZ, *eSports is Business: management in the world of competitive gaming*, Cham, Palgrave Pivot, 2019, 75.

⁸⁷ A. NIXON, D. GEEY, C. PAGET, J. MADILL, T. DAVIES and R. GANDHI, “Esports uncovered – Part 2: the key stakeholders - a comparison with the football industry”, *Lawinsport* 2017;

3.3.2.4 Government

32. In principle, game developers and organisers of tournaments draw up their own regulations for their specific games and the related tournaments and competitions. However, these rules are usually only related to organisational aspects of the tournaments itself and often do not solve the overarching problems in Esports such as gambling, match fixing and so on. Furthermore, the question must be popped whether it is up to the government to take regulatory initiatives regarding Esports, particularly the recognition of Esports as an official sport from both a social- and tax law perspective. Tax administrations will not keep on watching from the sidelines but will take direct action in the short term to prevent gamers and their entourage from slipping through the mesh of the net. The only question is to what extent the existing legislative framework allows this, and to what extent any adjustment is needed.

3.3.2.5 Audience

33. The core of all stakeholders is the audience through their consumption and corporations via sponsorships. Most of the revenue of the audience comes from merchandise and tickets at Esports online and offline events, fees for streaming platforms, premium content and pay TV. The Esports audience will grow to 495.0 million globally in 2020, and it is expected that this trend will continue.⁸⁸ In this way, there will be a positive impact on the size and monetisation of the Esports audience, which will lead to an increase in commercial and media rights revenues to the benefit of all Esports stakeholders.⁸⁹

<https://www.lawinsport.com/topics/item/esports-uncovered-part-2-the-key-stakeholders-a-comparison-with-the-football-industry>. (Accessed on 3 March 2021).

⁸⁸ Newzoo, *2020 Global Esports Market Report*, 27.

⁸⁹ Deloitte Insights 2020, *Let's play! The European Esports market*, 2;

<https://www2.deloitte.com/content/dam/Deloitte/ec/Documents/technology-media-telecommunications/Lets%20Play!%20The%20European%20esports%20market9073.pdf>. (Accessed on 3 March 2021).

3.4 Difference between online and offline gaming

34. Esports can be further divided into two subcategories: online and offline gaming.⁹⁰ This classification is based by the medium in which the videogames are played. Offline gaming is for the moment the most attractive form of Esports. Competitors play against each other on a live location, at a specific venue in front of spectators. The competitors will travel to the venue (studio or stadium) where computers and game consoles have been setup for them to play on. Fans can visit these events and watch the games on a big screen in the venue. At the same time, these offline matches may also be simultaneously live streamed on online streaming platforms like YouTube and Twitch, reaching hundreds of millions of viewers.⁹¹ The largest tournament to date was the League of Legends Worlds 2020, held in Shanghai (China), with a total amount of 3.8 million viewers. These tournaments are often played for large amounts of prize money. The largest tournament to date was the International 2019: Dota 2 Championship, held in Shanghai (China), with a prize pool of \$34 million.⁹²

Due to the COVID-19 pandemic, online gaming, where competitors play against each other over the internet not on a centralised location, is becoming more prominent. Gamers can participate in online tournaments which can be joined from all over the world from their own computer. They are organised much more often, but these are smaller and more accessible than the offline tournaments. These tournaments are also live streamed on services such as Twitch TV and YouTube Gaming for viewers to watch around the world. An example of this type of play was the seventh season of the Esports Championship Series for the game Counter Strike: Global Offensive held in June 2019 with a prize pool for the online qualifiers of \$250,000.⁹³

⁹⁰ S. VAN OVERBEEK and D. MOLENAAR, “The Emergence of Esports”, *Bulletin for International Taxation*, 2018, Vol. 73, No. 2, 107.

⁹¹ M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport* 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152 (Accessed on 4 March 2021).

⁹² Source : <https://www.esportsearnings.com/tournaments>. (Accessed on 4 March 2021).

⁹³ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 18.

4. Can Esports be considered as a Sport?

35. The discussion about the question whether Esports can be seen as an official sport, is going on a worldwide level for several years.⁹⁴ There is no universally accepted conclusion yet, with strong proponents on both sides and some neutral views in between. Although the discussion was initially only on a social-philosophical level, in the meantime some attention has been paid in the legal discourse. After all, the discussion is only about the societal view of the issue, but its outcome has legal and fiscal consequences, and will therefore influence the future growth of Esports. Often, favourable legal and fiscal regimes were implemented to safeguard the development and integrity of sports.⁹⁵ From out of a tax perspective, it is necessary to determine whether Esports should be regarded as sport under international and national tax laws.

4.1 Recognition of Esports as an Olympic Sport

36. As mentioned, the sporting element in Esports is becoming fierce worldwide and the International Olympic Committee (hereinafter “IOC”) has already taken up position on this matter several times. Although the IOC is not a judicial body, and its view has no legal authority and enforceability, it can exert a significant influence on the state apparatus to assess whether Esports must be considered as a sport. After all, the IOC is the highest authority in the structure of the global Olympic Movement and the most powerful sports organisation on this planet, so its opinion can be decisive whether to recognise a certain sport.⁹⁶

37. In the past, it seemed rather unrealistic that Esports would qualify as an official sport for Olympic inclusion and would be included in the Olympic games. Indeed, the 9th president of the IOC, Thomas Bach stated that: “we want to promote non-discrimination, nonviolence and peace among people” and “this does not match with the video game, which are about violence, explosions and

⁹⁴ EU Final report of the Sport Forum on Malta in March 2017 (EC), Accessed on 5 March 2021, [EU Sport Forum 2017: Final report \(europa.eu\)](#); J. HOLDEN, A. KARBURAKIS and R.RODENBERG, “The Future is Now: Esports Policy Considerations and Potential Litigation” *Journal of Legal Aspects of Sport* 2017a, Vol. 27 (1), 46–78.

⁹⁵ Article on the favourable fiscal regimes for athletes and sport clubs in Belgium; [Expertcommissie wil fiscaal gunstregime voor sportclubs behouden, in ruil voor aantal heffingen en meer transparantie | VRT NWS: nieuws.](#) (Accessed on 5 March 2021).

⁹⁶ Article 1 of the Olympic Charter.

killing. And there we need to draw a clear line”.⁹⁷ In the meantime, the IOC has revised its position on Esports. Under the motto “it is all about the kids, and their money”, this success has triggered an interest by the Olympic movement. With the viewing statistics of the Olympic games having dropped 15% during the Rio Olympics, the Olympic Movement is very much aware that it needs to attract a younger audience.⁹⁸ Esports seems to be the ideal partner to achieve this goal. Yet there still seems to be several obstacles before Esports can be recognised as an official Olympic sport.

In a communication the IOC Summit agreed that competitive gaming entails physical activity which can be compared to that required in more traditional sports. This, on the other hand, cannot necessarily be said to apply to leisure electronic gaming. For this reason, the use of the term sport regarding Esports needs further dialogue and study. It concluded that there were various uncertainties regarding Esports, more especially violent games, virtual reality, competition between game developers and the commercial drive, which make further discussion about inclusion premature.⁹⁹ Some of these arguments can easily be rebutted. For example, it is hard to argue that the sports movement is solely values-based and not commercially driven when it has been established that sports constitute an economic activity to which, in principle, European law applies.¹⁰⁰ However, there has still something to be done before Esports can be officially recognised by the IOC.¹⁰¹

The First step for a sport being included in the Olympic programme is achieving official recognition as a sport by the IOC. This can be done by establishing a strong International Sports Federation that governs the sport in question. The federation will further need to adapt its statutes, practices, and activities in accordance with the Olympic Charter.¹⁰² This seems to be the bottleneck for the Esports industry as it is still the Wild West when it comes to transparency and governance. With three organisations claiming to be the international organisation for governing Esports worldwide, Esports

⁹⁷ A. VANTYGHEM, “How are new sports included in the Olympics (and does Esports fit the mould)?, *Lawinsport* 2020; <https://www.lawinsport.com/topics/item/how-are-new-sports-included-in-the-olympics-and-does-esports-fit-the-mould>. (Accessed on 7 March 2021).

⁹⁸ A. VANTYGHEM, “Esports: Will professional gamers become our new sports legends?”, Atfield, 20 January 2020; [Atfield - Esports: will professional gamers become our new sports legends?](#). (Accessed on 7 March 2021).

⁹⁹ See: <https://www.olympic.org/news/communique-of-the-7th-olympic-summit>. (Accessed on 7 March 2021).

¹⁰⁰ ECJ 12 December 1974, No. C-36/74, ECLI:EU:C:1974:140, *Walrave and Koch v Association Union Cycliste Internationale and Others*.

¹⁰¹ A. VANTYGHEM, “How are new sports included in the Olympics (and does Esports fit the mould)?, *Lawinsport* 2020; <https://www.lawinsport.com/topics/item/how-are-new-sports-included-in-the-olympics-and-does-esports-fit-the-mould>. (Accessed on 7 March 2021).

¹⁰² Article 25, §1 and §2 of the Olympic Charter.

struggles to impose unified rules upon the Esports athletes and struggles to control the game developers.¹⁰³ The emergence of a powerful international federation over which key publishers and developers agree, appears to be the next critical step in the further development of Esports as an Olympic sport.¹⁰⁴ For now, only Esports demonstrations and exhibitions will take place at the Olympic Games in Tokyo 2020 and Paris 2024.¹⁰⁵ It is of the author's opinion that it will only be a matter of time before Esports will be included on the Olympic program. In the long run, the IOC will need Esports much more because of its strong economic and commercial value.

4.2 Esports under EU Law

38. Despite its growing popularity, increased turnover, and the possibility to become part of the Olympic games, Esports still suffers from sceptics pointing out its lack of transparency, lack of physicality and institutionalisation. What is the view of the European Union on this situation, and to what extent can Esports qualify as a sport under EU law?

4.2.1 Legal situation

39. The question to what extent the EU law is applicable on Esports, can be answered easily. If an Esports competition or its participants sponsorship relationships relates to an economic activity, Esports would be subject of EU law.¹⁰⁶ On the other hand article 165 TFEU forms the legal basis to support sports inside the European Union, stipulating a sports policy and developing the European dimension in sport.¹⁰⁷ The discussion whether the specific nature of Esports corresponds to the

¹⁰³ *Supra* No. 22.

¹⁰⁴ A. VANTYGHM, "How are new sports included in the Olympics (and does Esports fit the mould)?", *Lawinsport* 2020; <https://www.lawinsport.com/topics/item/how-are-new-sports-included-in-the-olympics-and-does-esports-fit-the-mould>. (Accessed on 8 March 2021).

¹⁰⁵ J. TARRANT, "Esports in talks with Paris 2024 over demonstration event", *Reuters* 2018; <https://www.reuters.com/article/us-olympics-2024-esports-idUSKBN1HW10W> (Accessed on 8 March 2021).

¹⁰⁶ ECJ 12 December 1974, No. C-36/74, ECLI:EU:C:1974:140, *Walrave and Koch v Association Union Cycliste Internationale and Others*; ECJ 18 July 2006, No. C-519/04, ECLI:EU:C:2006:492, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, paras 22-28 and ECJ 11 April 2000, Joined cases C-51/96 & C-191/97, ECLI:EU:C:2000:199, *Deliège v Ligue de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquéé (C-191/97)*, paras 46-53.

¹⁰⁷ Article 165 TFEU.

specific nature of sport in Article 165 TFEU, is a complex question that deserves a sole article. Yet it has already been found that the EC has provided support for video games development projects.¹⁰⁸

For the time being, the EC and the other EU bodies have not yet decided on the status of Esports within the entertainment industry. An explicit confirmation by ECJ in its case law is also lacking for the moment. However, it can be argued that the judgement of the *English Bridge Union*¹⁰⁹ of the ECJ and the opinion of the Advocate General can give direction in the discussion at hand.¹¹⁰

4.2.1.1 Decision of the European Court of Justice about duplicate bridge

40. The decision results from a dispute between the English Bridge Union and the UK tax authorities. As the organiser of duplicate bridge tournaments in the UK, The English Bridge Union was collecting entry fees on these events. In view of the UK tax laws, VAT must be paid on the entrance fees. Duplicate bridge is a form of bridge in which each partnership successively plays the same deal as their counterparts at other tables. Scoring is just based on a relative performance. Considering that the registration fee should be exempt from VAT under Article 132 (1) (m) of Directive 2006/112, English Bridge Union requested the tax authorities for reimbursement of that tax. It held that duplicate bridge should be considered as a sport for the purposes of EU VAT Directive.¹¹¹ This request was denied.¹¹²

The ECJ concluded that duplicate bridge cannot be considered as a sport for the purposes of the EU VAT Directive, because it relates to activities characterised by a not negligible physical element, which element appears to be ‘negligible’ for duplicate bridge.¹¹³ The English Bridge Union argued that duplicate bridge involves logic, memory, and planning, which constitutes an activity beneficial to the mental and physical health of regular participants. ECJ found this contribution not sufficient

¹⁰⁸ Education, Audiovisual and Culture Executive Agency, n.d., Creative Europe – MEDIA - Development of European Video Games; [Development of European Video Games | EACEA \(europa.eu\)](#). (Accessed on 8 March 2021).

¹⁰⁹ ECJ 26 October 2017, No. C-90/16, ECLI:EU:C:2017:814, *The English Bridge Union Limited V. Commissioners for Her Majesty's Revenue & Customs*, 2017, 6.

¹¹⁰ C. ABANAZIR, “E-sport and the EU: the view from the English Bridge Union”, *International Sports Law Journal* 2019, Vol. 18, 106.

¹¹¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax.

¹¹² ECJ 26 October 2017, No. C-90/16, ECLI:EU:C:2017:814, *The English Bridge Union Limited V. Commissioners for Her Majesty's Revenue & Customs*, paras 6-12.

¹¹³ *Ibid* para 27.

for the conclusion that duplicate bridge was a sport under the EU VAT Directive because it had to be physical or mental activity itself.¹¹⁴ Finally, the ECJ suggested that duplicate bridge could fall under this exception of cultural services, for which also a VAT exemption exists.¹¹⁵ Judging by the ECJ decision, the physical element and its exception in the form of social and cultural heritage of a country are two aspects that have a direct effect on the way Esports can be categorised.

41. The physical element is a criterion that is often used to qualify an activity as a sport.¹¹⁶ It is therefore indisputable that the position of the EU reflects a consensus regarding the physical element's significance for sport. The question whether Esports contains a physical element is a highly debatable topic on which there is no consensus yet.¹¹⁷ It is often stated that Esports requires minimal physical exertion and constitutes a negligible physical element. It is of the author's opinion that this argument is outdated as recent studies have shown that Esports require much physical and mental activity, comparable to normal athletes. A research of Dr. FROBÖSE has shown that Esports players achieve up to 400 movements on their consoles per minute, four times as much as an average person, while the activity is asymmetrical because both hands are being moved and various parts of the brain are being used at the same time. Most games are extremely complex and require fine motor skills. The body gets it is a share of endurance training too as in league level competitions, the pulse of player can be as high as 160-180 bpm. Furthermore, the resistance to endure stress is imposed as the amount of cortisol produced is at the same level as of racing -car driver.¹¹⁸

Consequently, despite the above stated research, there is still a lot of doubt in the legal doctrine. To examine whether the physical element in Esports is negligible, and whether Esports falls within the scope of EU sport law and policy, the legal doctrine seems to lay back on two questions. The first

¹¹⁴ S. VAN OVERBEEK and D. MOLENAAR, "Esports and taxation", *GSLTR* 2018, Vol. 35, 14.

¹¹⁵ ECJ 26 October 2017, No. C-90/16, ECLI:EU:C:2017:814, *The English Bridge Union Limited V. Commissioners for Her Majesty's Revenue & Customs*, para 28.

¹¹⁶ Council of Europe, Committee of Ministers Recommendation No. R (92) 13 REV of the Committee of Ministers of Member States on the Revised European Sports Charter, Article 2 (1)(a): "*Sport*" means all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships, or obtaining results in competition at all levels.

¹¹⁷ C. ABANAZIR, "E-sport and the EU: the view from the English Bridge Union", *International Sports Law Journal* 2019, Vol. 18, 106.

¹¹⁸ S. VAN OVERBEEK and D. MOLENAAR, "Esports and taxation", *GSLTR* 2018, Vol. 35, 15; A. HAPPONEN and D. MINASHKINA, "Professionalism in Esport: Benefits in Skills and Health & Possible Downsides", *LUT Scientific and Expertise Publications* 2019, 29; file:///C:/Users/vdb/Downloads/2019_LUT_report_90_esport_health_benefits.pdf. (Accessed on 9 March 2021).

question should be whether fine motor skills are enough to render an activity as a sport or not. If so, then Esports may well be recognised as a sport and thus enjoy its benefits such as a VAT exemption.¹¹⁹ This prerequisite seems to be met as the IOC recognised activities as an official sport, where only fine motor skills are required such as shooting, snooker and chess. The second question is posted by considering Parry's argument that the physical element in the moves of Esports players does not have a direct effect on the real world, but rather influence the virtual world. A lack of direct effect on the real world while playing games constitutes a barrier for the recognition of Esports as a sport.¹²⁰

42. Now, it is not possible to give an unambiguous answer to this situation and it remains to be seen how the EC and the CJEU will approach this situation. Parry's approach seems to be too far-reaching and takes no account of today's ongoing digitalisation. The reality is that the best professional Esports athletes follow training regimes, crafted specially for their needs. Also, it does not seem to differ that much from physicality in Olympic sports archery and shooting. Therefore, it is hard to deny that Esports implies a clear physical activity and does not constitute a negligible physical element.¹²¹ A case-by-case approach is needed to determine whether the physical element is sufficiently present. Although a vast majority of popular Esports require certain physical skills, the effort remains fine-motoric. As mentioned, there are both pro and contra arguments regarding the qualification as a sport.

43. With regard to the EU VAT Directive, the ECJ the CJEU left open the possibility of qualifying as 'cultural services', for which also a VAT exemption exists.¹²² Case law of the ECJ has shown that it considers the social and cultural heritage of an activity and the social function of sports.¹²³ In the case of the *English Bridge Union*, Advocate General SZUPUNAR gives a workable definition of sport. In reaching his conclusion, SZUPUNAR referred directly to the position of video games within the entertainment industry. The opinion reads:

¹¹⁹ C. ABANAZIR, "E-sport and the EU: the view from the English Bridge Union", *International Sports Law Journal* 2019, Vol. 18, 107.

¹²⁰ J. PARRY, "Esports are Not Sports", *Sport, Ethics and Philosophy* 2018, Vol 13:1, 7.

¹²¹ A. VANTYGHM, "Esports: Will professional gamers become our new sports legends?", Atfield, 20 January 2020; [Atfield - Esports: will professional gamers become our new sports legends?](#) (Accessed on 9 March 2021).

¹²² Article 132 (1) (n) of the VAT Directive 2006/112/EC.

¹²³ ECJ 15 December 1995, nr. C-415/93, ECLI:EU:C:1995:463, *Union royale belge des sociétés de football association ASBL/Jean-Marc Bosman, Royal club liégeois SA/Jean-Marc Bosman and others and Union des associations européennes de football (UEFA)/Jean-Marc Bosman*, 1995, 43; ECJ 16 March 2010, nr. C-325, 2010 ECR I-2196, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, paras 39-45.

“Where a physical element is not necessary, sport is defined by competition and the fact that equipment is provided by not just one supplier – which excludes activities without a broad basis in civil society, such as commercial products in the marketplace, designed by firms for pure consumption (for instance video games).”¹²⁴

The paragraph constitutes two obstacles for Esports in its recognition as a sport under the EU law. One strand posits that there should not be a monopoly in respect to the provision of sport equipment. On the one hand, a video game is not a ‘sporting equipment’ per se, and in the context of Esports, the term ‘equipment should refer to the hardware that runs the game. On the other hand, the spirit of the definition requires the extension of the term to video games themselves. It is the game developer or publisher which has the absolute power and the executive ownership of the game. Furthermore, the opinion of the Advocate General states that activities including video games cannot be deemed as a sport because video games are designed and marketed for pure consumption.¹²⁵ Esports competitions based on video games created for purely consumption purposes and organised by persons aiming to profit from these activities, may find themselves out of the scope. Moreover, the mental well-being of the Esports participants is a much-debated subject which can create an obstacle for the recognition of Esports. The reason why Esports has become a part of the agenda is its commercial viability. Consequently, it can be maintained that the social function of sport as defined and perceived by the EU, may constitute an impediment to Esports recognition as a sport.¹²⁶

44. The question whether Esports could be considered as a sport under the EU VAT Directive remains unanswered for the time being. If we can rely on the ECJ decision in the *English Bridge Union* case, the answer will be rather negative. However, it must be born in mind that this definition was given for the purposes of an interpretation of the scope of an exemption. To be taxable, a transaction needs to be effectuated by a taxable person acting as such, which implies the existence of a sustainable economic activity.¹²⁷

¹²⁴ Concl. AG M. SZPUNAR in ECJ 15 June 2017, C-90/16, *The English Bridge Union v. HRMC*, para 38.

¹²⁵ C. ABANAZIR, “E-sport and the EU: the view from the English Bridge Union”, *International Sports Law Journal* 2019, Vol. 18, 108-109.

¹²⁶ *Ibid* p. 110-111.

¹²⁷ A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 66.

5. General Rules of the Income Tax Treatment of Esports players under Double Tax Treaties

5.1 The application of double tax treaties to Esports players

45. Like in the sports industry, Esports players are not only active on a national level. Esports competitions are performed on international level in various countries around the globe. Most of the players have a different domicile than the country they are performing in. In addition, these tournaments are simultaneously broadcast worldwide. In general, many countries will be involved, all of whom wish to tax in some capacity. This creates a significant risk for double taxation or double non-taxation. Most countries have a source withholding tax on income earned by non-residents, while almost every country tax its residents on their worldwide income. This creates an overlap situation because foreign income is taxed twice in these two systems. To avoid these situations, countries conclude bilateral tax treaties with each other, allocating taxing rights and granting tax exemptions or credits.¹²⁸

46. The taxation of sportspersons and entertainers is so important that most bilateral tax treaties include a provision specifically addressing them. Despite the established model treaties, such as the OECD MC, there is still a significant lack of uniformity amongst bilateral tax treaties. Nevertheless, the core concepts underlying most bilateral tax treaties are similar regarding the international taxation of sportspersons. The most widely accepted model income tax treaty is the OECD Model Convention.¹²⁹ Notwithstanding the rules for taxation of income from employment and business profits, laid down in articles 7 and 15 OECD MC, article 17 OECD MC provides an exception to these rules regarding performing artists and sportspersons. According to this article, the state where the performance takes place will (the source state), in principle, has the power to tax the income of the artists or sportsmen. The application of article 17 OECD MC is crucial in determining whether the income of the athlete can be taxed in the state where the performance is exercised. If article 17 is not applicable it is highly likely that the income of the athlete will be taxable exclusively in the state

¹²⁸ S. VAN OVERBEEK and D. MOLENAAR, “Esports and taxation”, *GSLTR* 2018, Vol. 35, 14; R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 19.

¹²⁹ A. D. APPLEBY, “Leveling the Playing Field: A Separate Tax Regime for International Athletes”, *Brook. J. Int'l L.* 2011, Vol 36:2, 607-608.

of residence of the athlete. Therefore, it is crucial to know whether the participants, herein referred to as “professional Esports players”, can be classified as entertainers or sportspersons under the convention.

5.2 Personal scope of article 17 OECD MC

5.2.1 General aspects

47. First, it is important to note that the scope of article 17 OECD MC applies to income that has a close connection to the ‘public performance’. Given the various streams of income derived from the public performance of the Esports players, this broadened scope of article 17 OECD MC can have a substantial impact on a professional Esports player or team’s tax situation. The article was initially intended to be exclusively allocate taxing rights involving a public performance. This requirement was not explicitly mentioned in the article, but finds its roots in the English text of the 1963 OECD Model Convention. The terms ‘athlete, sportsman and sportsperson have never been accompanied with the word ‘public’. Nonetheless, it has been commonly understood that the requirement of public performance extends to this category of taxpayers as well.¹³⁰

However, depending on the interpretation, the word ‘public’ refers only to entertainment or entertainments and sports. Clarifying the meaning of this word poses nonetheless some difficulties.¹³¹ Both the legal doctrine and the OECD itself became critical on the necessity for a public nature of the activities exercised by sportsmen. Because the OECD MC and accompanying commentary does not specifically state the need for a “public performance” for an entertainer or sportsperson’s income to fall under the scope of article 17 OECD MC. This criticism was further elaborated in an update to the commentary of article 17 OECD MC in 2014, which states that ancillary activities, such as training, preparations, or rehearsal, would be covered by this article.¹³² The rationale of the OECD is that these activities are part of the regular activities of the entertainers and sportspersons. Therefore, some authors have conceded that with the update to the commentary a public performance element

¹³⁰ A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 46-47.

¹³¹ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 63-64.

¹³² OECD Commentary on Article 17, para. 9.1.

is not necessarily an essential element for the personal activities of an entertainer or sportsperson to fall under the scope of article 17 OECD MC.¹³³ The author is of the opinion that the OECD should include a clarification in the Commentary regarding the fact whether article 17 OECD MC covers income derived from public appearances that take advantage of the fame and reputation of an individual without a performance. Without any doubt it can be said that the performance in the source state and the link with this performance are necessary elements in the whole trade-off.

48. To be categorised as an ‘entertainer’ or ‘sportsperson’ under article 17 OECD MC, an individual does not necessarily have to act in a professional manner. For instance, a person who takes part in sporting activities solely for leisure purposes and wins prize money, will fall within the scope of article 17 OECD MC.¹³⁴ Even the participation in a one-time event or a ‘once-in-a-life-time’ appearance falls within the scope.¹³⁵ In the context of Esports this view will be truly relevant to casual and amateur gamers. Due to the enormous popularity and increase in players, the trend continues where organisers and game developers try to attract the attention of the occasional gamers by organising local and third-rate tournaments. These tournaments are a steppingstone to a professional career within Esports and are often accompanied by prize money. This means that an occasional participation in an Esports tournament also results in a taxation of the prize money earned by the amateur Esports player.

49. Furthermore, article 17 OECD MC needs to be treated as a special regulation, as it takes precedence over articles 7 and 15 OECD. The importance of this deviation lies in the fact that income earned under article 17 OECD MC, covering the taxation of entertainers and sportspersons, may be taxed in the source state. This approach is in stark contrast to article 15 OECD, covering employment income, which requires a substantial presence test to be met for the source state to have taxation rights, or article 7 OECD, covering business income, which requires a permanent establishment for

¹³³ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 20; L.A. R. TOPETE, “Analysis of the Case Law on the Scope of Article 17 of the OECD Model: Issues Resolved and Yet to Be Resolved”, *Bulletin for International Taxation* 2017, Vol.71, No. 3/4, 1-12.

¹³⁴ A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 47; K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 61.

¹³⁵ OECD Commentary on Article 17, para. 9.1.

source taxation.¹³⁶ Before 2014, the article explicitly stated that it applied ‘notwithstanding the provisions of article 7 and 15 OECD’.¹³⁷

50. In 2014, the OECD made significant changes to the commentary, with options for limiting the effect of article 17 OECD MC. As a result, states can provide for a different arrangement in their individual treaties. The wording of the article 17 OECD MC was modified to expressly mention only the derogation to article 15 OECD, which give states the possibility to limit the application of the article to ‘business profits.’¹³⁸ To this end, the words ‘notwithstanding the provisions of article 15 OECD’ may be replaced with ‘subject to the provisions of article 15 OECD’. Entertainers and sportspersons with an employment contract would then fall under the normal 183 days rule of article 15 OECD. For example, Germany has the practice of limiting the provision to independent activities.¹³⁹

51. States have the option of providing their double taxation agreements with a derogation from article 17 OECD MC. It is also an option for states to exempt subsidised performances from source tax in the country of performance.¹⁴⁰ This is for example the case in the double tax treaty between Belgium and the Netherlands. The treaty adapts article 17 OECD MC by providing for an exemption in the state where the activity is carried on for income from personal activities of sportspersons who are at least 30% funded from public sources or who exercise their activities in the context of exchanges agreed between the contracting states. In that case, only the state of residence has tax authority.¹⁴¹ The option of granting the residence state the exclusive right to tax income from performances subsidised from public funds is also suggested in the commentary on article 17 of the OECD.¹⁴² To this end, an additional article 17(3) OECD MC has been proposed, under which the provisions of article 17(1) and (2) OECD would not apply to income derived from activities performed in a contracting state by entertainers or sportspersons if the visit to that state is wholly or mainly supported by public funds of one or both of the contracting states or political subdivisions, or

¹³⁶ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 20.

¹³⁷ Article 17 (1) and (2) of the OECD Model Convention.

¹³⁸ *Ibid.*

¹³⁹ See art. 17 Belg.- Ger. Income and Capital Tax Treaty of 1967.

¹⁴⁰ OECD Commentary on Article 17, para. 13.

¹⁴¹ See art. 17 Belg. – Neth. Income and Capital tax treaty 5 June 2001.

¹⁴² OECD Commentary on Article 17, para 13.

local authorities thereof.¹⁴³ The use of this option is widespread and has become more than an exception.¹⁴⁴

Another possibility is, for example, to allow the operation of article 17 OECD MC only when the sportsperson earns a significant amount of income in the source state. This is the so-called the *minimis* rule which was adopted by the US Model (2006). The US provides in its double tax treaties an income threshold of \$20.000 which must be met before athletes can be taxed in the source state.¹⁴⁵ In 2014, the OECD agreed that such regulation could be appropriate for non-resident sportspersons who stay in the performance state for a short time and receive relatively little income that is then subject to taxation in the residence state. This frequently used limitation was also added to the OECD Commentary in 2014.¹⁴⁶ Another optional exception is the “league clause” where countries can choose to exclude sportspersons employed by a group or team from the scope of application of article 17 OECD MC.¹⁴⁷ This exclusion may also be limited to those employed by a team that participates in a multinational league, which is particularly the case of the US-Canada double tax treaty.¹⁴⁸

52. In the absence of the specific distribute rule, provided in article 17 OECD MC, sportspersons performing on individual basis would fall within the scope of either article 7 or article 14 OECD, depending on the applicable double tax treaty. Sportspersons competing as a group member would fall under article 15 OECD.¹⁴⁹ This is for example the case in the double tax treaty between France and Belgium where no separate provision for withdrawing athletes' income from independent personal and employment services is provided.¹⁵⁰

¹⁴³ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries”, *Global Tax Treaty Commentaries IBFD* 2016. (Accessed on 6 April 2021).

¹⁴⁴ For example, see the Arg.-Spain Income and Capital Tax Treaty (2013),

¹⁴⁵ See art. 16 Belg. - US Income Tax Treaty of 1970.

¹⁴⁶ OECD Commentary on Article 17, para. 10.1.

¹⁴⁷ *Ibid.* para. 14.1.

¹⁴⁸ Article XVI (3) of the Convention between the United States and Canada with respect to taxes on income and on capital; A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 48.

¹⁴⁹ *Ibid.*

¹⁵⁰ G. VERACHTERT and C. KAURA, *De internationale fiscaliteit van artiesten en sporters: uw 100 antwoorden*, Brussel, Lefebvre Sarrut Belgium, 2020, 180.

5.2.2 The concept of a ‘sportsperson’ under the OECD MC

53. Just as for entertainers, the OECD MC does not contain a definition for a ‘sportsperson’. Therefore, article 3 OECD requires to look at national legislation for a definition of the term’s entertainers and sportspersons unless the context is different.¹⁵¹ National laws generally do not define the concept of sportsperson. Such definitions can be found in the regulations on professional sports. However, it should be noted that the meaning given to the concept of a sportsperson to regulate sporting activities can differ substantially from the meaning as defined by the OECD for the purposes of tax treaties.¹⁵² This view is confirmed by many academics, courts, and tax authorities around the world.¹⁵³ Therefore, when considering whether an individual will be considered a sportsperson for purposes of applying the OECD MC, analysis on a case-by-case basis is advised.¹⁵⁴

Regarding sportspersons, the OECD Commentary does not provide any further description or definition. Nor does it provide a list with examples as it does with entertainers. However, it is indicated in the Commentary that not only traditional athletic sports events such as running, high jumping and swimming¹⁵⁵ are covered by article 17 OECD MC. In addition, activities primarily considered to have an ‘entertaining character’ such as billiards, snooker, chess, or bridge, are also covered under the scope.¹⁵⁶ As a guideline it can be assumed that a competition element is present, with a public, as well as that participants must be prepared ‘like an athlete’. As a result, mental games played in public are also included in article 17 OECD MC, at least if they require the discipline or training as physical activities.¹⁵⁷ Contrary to EU law, the OECD seems to adopt a broader approach to the concept of a ‘sportsperson’.¹⁵⁸ Now the pressing question remains whether Esports can qualify as a sport within the meaning of article 17 OECD MC.

¹⁵¹ Article 3 OECD MC.

¹⁵² K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 45.

¹⁵³ L.A. R. TOPETE, “Analysis of the Case Law on the Scope of Article 17 of the OECD Model: Issues Resolved and Yet to Be Resolved”, *Bulletin for International Taxation* 2017, Vol.71, No. 3/4, 1-12.

¹⁵⁴ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR* 2020/03, 19.

¹⁵⁵ OECD Commentary on Article 17, para. 5.

¹⁵⁶ *Ibid.* para. 6.

¹⁵⁷ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 50.

¹⁵⁸ *Supra.* No. 40-44.

5.2.2.1 Individual Esports players

55. In case of offline professional Esports players, it would be farfetched to classify a professional Esports player competing in an offline tournament as anything other than a sports person. While not performing a traditional sport, these individuals are clearly engaging in a physical and/or mental activity given the intense competition that surrounds these Esports events. These competitions are performed for the entertainment of the public, drawing in millions of viewers around the globe through both direct (audiences at events) and indirect (streaming, video on demand, etc.) channels. This additional online viewership component is identical to the sports industry in which matches are played in front of a live audience, as well as being broadcast worldwide. Considering this analysis, it is of the author's opinion that these professional Esports players need be considered as 'sports persons' for the application of the OECD MC. Therefore, any business or employment income derived by a professional Esports player in respect of his or her public participation in offline Esports events, or any income having a close connection to this public performance, will fall under the scope of article 17 OECD MC.¹⁵⁹

56. Contrary to traditional sporting events and offline Esports events, there is no live audience in case of online Esports events. Here, the previously discussed condition of a public performance seems to be a bottleneck in the case of professional Esports players. Nevertheless, the legal doctrine seems to agree that the activities of these purely online Esports players still clearly fall within the scope of article 17 OECD MC.¹⁶⁰ The author follows this statement since online Esports players are still sports persons engaging in an organised competition, requiring physical and mental prowess and with organised rules.¹⁶¹ Moreover, the condition of a public performance should also not be considered as an essential element for the personal activities of sports person to fall under the scope of article 17 OECD MC.¹⁶² Although there may be no live fans in attendance, these individuals are performing

¹⁵⁹ R. ESAU, "International tax aspects of esports – Part one", *GSLTR* 2020/03, 20.

¹⁶⁰ This conclusion is also shared in the legal doctrine, See R. ESAU, "International tax aspects of esports – Part one", *GSLTR*, 2020/03, 20; S. VAN OVERBEEK and D. MOLENAAR, "The Emergence of Esports", *Bulletin for International Taxation*, 2018, Vol. 73, No. 2, 106-111; E. STEINHAUSER, "Besteuerung international tätiger E-Sportler", *Steuer und Wirtschaft International* 2019, Vol. 12, 574-582; M. TENORE, "Esports and tax, how the OECD Model Tax Convention applies to player's income", 7 September 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 28 March 2021).

¹⁶¹ *Ibid.* 20-21.

¹⁶² *Supra*, No. 47.

for millions of viewers worldwide who are able to watch the performance through online streaming platforms for entertainment value. Furthermore, the jurisprudence and legal doctrine argue that a direct performance in front of an audience is not necessary to be considered a performing artist as an indirect performance through other forms of media is specifically accepted by the OECD and relevant case law.¹⁶³ Also, live broadcasts of sport performances are covered by the scope of article 17 OECD MC.¹⁶⁴ Based on this analysis online Esports players will fall under the scope of article 17 OECD MC.

57. This analysis clearly reveals that the concepts of an entertainer and a sportsperson under article 17 OECD MC need to be renewed. Both concepts date back to 1963 and were adopted to address the challenges of taxing these groups of individuals, athletes and artists which earned income in multiple jurisdictions.¹⁶⁵ Today, the way in which athletes and artists earn their income, has changed drastically due to modernisation and digitisation. The OECD tries to keep up to date by updating its Commentaries but has yet not found an answer to the emergence of the online Esports industry. Therefore, the concepts of an entertainer and a sportsperson need to be clearly defined within the OECD MC, to limit the confusion associated with interpreting these terms.¹⁶⁶

5.3 Material scope of article 17 OECD MC

5.3.1 Income covered by article 17 OECD MC

58. The OECD commentary describes the income falling within the scope of application of article 17 OECD MC as follows: “*having a close connection with the public performance and being derived directly or indirectly from a performance by an individual entertainer or sportsperson.*”¹⁶⁷

According to the OECD commentary, the income that has a ‘close connection’ with the public performance, is covered by article 17 OECD MC.¹⁶⁸ Such connection exists where it cannot

¹⁶³ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries”, *Global Tax Treaty Commentaries IBFD* 2016. (Accessed on 6 April 2021).

¹⁶⁴ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 62.

¹⁶⁵ D. MOLENAAR, M. TENORE and R. VANN, “OECD - Red Card Article 17?”, *Bulletin for International Taxation* 2012, Vol. 66, No. 3, 132.

¹⁶⁶ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR* 2020/03, 21.

¹⁶⁷ OECD Commentary on Article 17, para. 8-9.

¹⁶⁸ *Ibid.* para. 9.

reasonably be considered that the income would have been derived in the absence of the performance of these activities.¹⁶⁹ This connection may be related to the timing of the income-generating event (e.g. a payment received by a professional Esports player for an interview given during an Esports event) or to the nature of the consideration for the payment of the income (e.g. a payment made to an Esports player for the use of his picture on posters, advertising a tournament in which he will participate).¹⁷⁰

59. Normally royalties for intellectual property rights will be covered by article 12 OECD MC rather than article 17 OECD MC, but in general advertising and sponsorship fees will fall outside the scope of article 12 OECD MC. The distributive rule of article 17 OECD MC will apply in this case to advertising and sponsorship income that has a close connection with the public performance provided by the sportsperson.¹⁷¹ Despite the various efforts the OECD has taken in its commentary to address the interpretation difficulties surrounding such fees, there remains a lot of uncertainty about this approach in practice. Many situations require a case-by-case in-concrete assessment.¹⁷² For the Esports industry, this application is considered of a crucial importance, since sponsoring and advertising represents the largest income streams and cover 75% of the total market revenue.¹⁷³ These revenues are too extensive to be discussed in depth and are therefore outside the scope of the research. Nevertheless, any sponsorship or advertising income realised by a professional Esports player that has a close connection to his or her public performance, will be governed under article 17 OECD MC.¹⁷⁴

60. By income derived ‘directly or indirectly’ from a performance, the reference is made to the payment method. Therefore, article 17 OECD MC includes all income from activities performed during the performance in person. This means any remuneration received by the Esports player for the provision of services in the country of performance, if there is a direct connection between the provision of services and the income obtained (e.g. prize money, appearance fees for the

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ The 1987 OECD Report, para. 81-83.

¹⁷² G. VERACHTERT and C. KAURA, *De internationale fiscaliteit van artiesten en sporters: uw 100 antwoorden*, Brussel, Lefebvre Sarrut Belgium, 2020, 166; A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 51-52.

¹⁷³ *Supra*, No.3.

¹⁷⁴ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 23.

competitions, bonuses from sponsors or the government, reimbursement of travel and accommodation expenses or the free use of a car).¹⁷⁵ As stated in the OECD Commentary, the income will not always be paid to the individual directly, with respect to a specific performance.¹⁷⁶ It is common practice in the sports and Esports industry for individual players to earn income indirectly.

5.3.1.1 Indirect earnings by Esports players

5.3.1.1.1 Team earnings

61. First, it is important to notice that article 17 OECD MC covers both persons performing on individual basis and those performing as a member of a group or a team. In most cases, income is first earned by the player's team and afterwards paid to the player in the form of a salary or independent contractor fee. As discussed earlier, teams receive income from Esports events, for example in the form of sponsorship and prize money. From out of a tax perspective, these activities will cause teams to be considered enterprises under art. 3 of the OECD MC, as it applies to the “carrying on of any business”.¹⁷⁷ At first sight, paragraph 1 of article 17 OECD MC appears to indicate that any income earned by the team would fall out of the scope. This would result to the application of either article 15 OECD MC, covering employment income, or article 7 OECD MC, covering business income. The source state in which the performance took place would no longer have a right to tax, which conflicts with the goal of article 17 OECD MC. The OECD has addressed this problem in its commentary by allowing the contracting state to “look through” teams and personal management companies to tax the player under article 17 (1) OECD, even if the income is not actually paid as remuneration to the player himself.¹⁷⁸ However, a treaty by itself cannot create a taxing right. Article 17 OECD MC states that the source country “may” tax the income, not that it must. Creating taxing rights is left to a country’s domestic law, with the treaty serving to allocate these taxing rights between competing jurisdictions.¹⁷⁹

¹⁷⁵ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 65.

¹⁷⁶ OECD Commentary on Article 17, para. 8.

¹⁷⁷ *Supra* No. 24.

¹⁷⁸ OECD Commentary on Article 17, para. 8.

¹⁷⁹ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 22.

5.3.1.1.2 Rent-a-star-company and intermediary payments

62. Additionally, Esports players may incorporate themselves into a single shareholder management entity, referred to in the model commentary as a “star company”, and pay themselves subsequently through dividends or salary.¹⁸⁰ These ‘star companies’ are established under a specific mechanism where the company is set-up in low tax jurisdiction, usually with an intention to reduce the tax burden.¹⁸¹ Similar to teams, the source state may tax an appropriate proportion of any remuneration paid to the Esports player by that company.¹⁸² To the extent where the domestic law of the source state allows to ‘look-through’ such entities and, thereby, to attribute the income directly to the player, the source state may also tax the entirety of the income accruing to the company concerned from performances taking place in territory under article 17 OECD MC.¹⁸³ However, the legislation of some other countries was not flexible to counter the tax avoidance schemes concerned.

Therefore, article 17, §2 OECD MC is established against tax avoidance scenarios caused by entertainers and sportspersons, earning income through intermediary companies to avoid or minimise source taxation. Article 17, §2 OECD MC enables the source state to look through these intermediary companies and tax the income in the hands of the third party, in cases where the income derived from the personal activities of the Esports player accrues to the third party concerned. This article applies regardless of whether the Esports player owns the intermediary company (i.e., their personal management company) or not (i.e. their team).¹⁸⁴

The broad approach of article 17, §2 OECD MC which covers taxation at the level of the intermediary, and taxation at the level of the sportsperson under article 17, §1 OECD MC, creates a risk of economic double taxation. The OECD appears to be aware of this problem and states in its commentaries that the combination of §1 and §2 of article 17 OECD MC should not lead to income being taxed twice.¹⁸⁵ To avoid double taxation, the source state can follow the following approaches: or exclusively tax the company based on article 17 OECD MC, §2; or tax the Esports player in

¹⁸⁰ Ibid, 21.

¹⁸¹ A.E. YAZICIOGLU, *International Taxation Law in Sports Events*, London, Routledge, 2021, 53-54.

¹⁸² OECD Commentary on Article 17, para. 8.

¹⁸³ Ibid.

¹⁸⁴ R. ESAU, “International tax aspects of esports – Part one”, *GSLTR*, 2020/03, 22.

¹⁸⁵ OECD Commentary on Article 17, para. 11.

accordance with article 17, §1 OECD MC or taxing both persons exclusively on the part of the income they receive, by taxing the income received by the company, but allowing a reduction for the relevant part of the remuneration paid to the player and taxing that part in the hands of the player and vice versa.¹⁸⁶

5.3.1.2 Direct earnings by Esports players

5.3.1.2.1 Prize money and awards

63. The prize money is considered as a substantial element of the professional Esports player's income. As mentioned earlier, the prize money awarded to players and teams has only increased in recent years and will continue to grow in the coming years.¹⁸⁷ Prize money can either be paid directly to the Esports players themselves or indirectly to the players' team. As confirmed by the OECD commentary, the prize money that is paid directly to the Esports player will be covered under article 17, §1 OECD MC.¹⁸⁸ The result is a taxation in the source state and a relief provided by the residence state of the Esports player.¹⁸⁹ Regarding the prize money paid to the team, reference can be made to the previous part on indirect earnings.¹⁹⁰

64. Often the prize money is accompanied by symbolic and material rewards in international sporting competitions. These medals and trophies certainly have a monetary value and are convertible into cash, which practice is illustrated by sporters selling their trophies on the internet.¹⁹¹ For many years there has been no serious attempt to tax commemorative medals, belts, cups and other trophies received by sportspersons.¹⁹² This changed by a decision of the Court of Hasselt in 2010, confirming the correctness of a withholding tax in relation to the value of a diamond tennis racket trophy obtained for a victory in the Diamond Games tennis tournaments in Antwerp.¹⁹³ Later also confirmed by the OECD commentary on article 17.¹⁹⁴

¹⁸⁶ Ibid.

¹⁸⁷ *Supra*. No. 3.

¹⁸⁸ OECD Commentary on Article 17, para. 8.

¹⁸⁹ R. ESAU, "International tax aspects of esports – Part two", *GSLTR*, 2020/14, Vol. 11, No. 22, 19.

¹⁹⁰ *Supra* No. 61.

¹⁹¹ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 108-109.

¹⁹² Ibid, 110.

¹⁹³ Rb. Hasselt 7 juli 2010, *Fisc.Koer.* 2010, afl. 14, 598.

¹⁹⁴ OECD Commentary on Article 17 (2010).

5.3.1.2.2 Employment income

65. Esports players can participate in an international Esports tournament as a part of a team or on an individual basis. In most cases professional Esports players tend to compete as member of a team and will generally be remunerated for their services to the team. In this case, the player would sign an employment contract with the team and be paid a regular salary, with standard deductions for income tax, social security and so on. The team, which can be viewed as its own entity (separate taxpayer), will receive income from Esports events, for example in the form of sponsorship or prize money.¹⁹⁵

As discussed, Esports players that are part of a team will be considered as ‘sportspersons’ under the OECD MC. Regarding the exception in article 17 OECD MC, any of the team member’s employment income attributable to their personal performances as an entertainer or sportsperson in each jurisdiction will be covered under article 17 OECD MC. The state of residence of the Esports player will therefore be able to tax additionally under the OECD MC and provide relief in the form of an income exemption or foreign tax credit to avoid double taxation. Any employment income, not relating to the team members’ activities as an entertainer or sportsperson, will be covered under article 15 OECD MC employment income. In determining the tax consequences of a Esports player’s employment income, the first step is to split the income received between income covered by article 17 OECD MC and income covered by article 15 OECD. As mentioned earlier, a close connection between the employment income earned and the public performance must be demonstrated. Clearly, the employment income earned by the Esports player for his attendance at the tournament has a close connection to their public performance and will be covered by article 17 OECD MC.¹⁹⁶

66. Arguable is how ancillary activities, such as training and preparatory activities, as well as casual earnings related to press appearances, interviews and autograph sessions, are treated. An Esports tournament precedes preparation and training. A significant amount of the employment income paid to the Esports player can be allocated to this type of activities. The OECD took a clear position on

¹⁹⁵ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 19-20.

¹⁹⁶ *Ibid.*

this matter in the 2014 update to the Model commentary. It clarifies that any income that can be attributed to the player's training and preparatory activities will be covered by article 17 OECD MC.¹⁹⁷

Nevertheless, there are still some complications regarding these preparatory activities. Namely, it is common practice for Esports players to perform training and preparatory activities in jurisdictions that are separate from where the tournaments and public performance occurs. The question then arises as to which state the right to tax is granted.¹⁹⁸ In those cases, it is accepted and confirmed by the OECD commentary that the taxing right will be given to the state where the public performance occurs, regardless of whether the public performance and preparatory work takes place within the same state.¹⁹⁹ For this reason, it is irrelevant as to where the training or preparatory activities occur as long as these activities have a connection with the public performance in the state in which the Esports tournament takes places.²⁰⁰ If there is no connection between the preparatory activities and the public performances, the income from these activities may be taxable in the state where the activities occur, even if there is no public performance.²⁰¹ This is also confirmed by case law.²⁰²

67. Other ancillary income commonly referred to as “casual earnings”, such as interviews, autograph sessions and participation in press conferences, will fall under the scope of article 17 OECD MC if it has a close connection to the public performance. To verify this close connection, two factors are suggested by the OECD that should be considered: the timing of the income-generating event and the nature of the consideration for the payment of the income.²⁰³ In terms of timing, it is generally accepted that any consideration for casual earning activities, such as interviews and autograph sessions taking place during or immediately before or after a tournament, will fall under the scope of article 17 OECD MC. The commentary indicates that the scope of article 17 OECD MC can be

¹⁹⁷ OECD Commentary on Article 17, para. 9.1.

¹⁹⁸ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 21.

¹⁹⁹ OECD Commentary on Article 17, para. 9.1.

²⁰⁰ A. CORDEWENER, “Article 17. Entertainers and Sportspersons”, in R. EKKEHART and A. RUST (ed.), *Klaus Vogel on Double Taxation Conventions*, Alphen aan den Rijn, Kluwer, 2015, Vol. 2, 1353.

²⁰¹ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 21.

²⁰² District Court Zeeland-West Brabant, 12 December 2016, 16-1205, IBFD Case Law.

²⁰³ OECD Commentary on Article 17, para. 9.1.

interpreted quite broadly. Nevertheless, a case-by-case analysis is needed to determine whether this type of incomes have enough of a sufficient link to the public performance.²⁰⁴

68. The relevant issue has primarily been whether general non-specific payments remunerate performers for these activities and, if so, whether article 17 OECD MC covers the income. As explained above, a case-by-case analysis will be necessary. Courts often establish the answer to these questions based on the content of the contractual agreements, and on whether the activities are linked to an actual performance.²⁰⁵ The case law on article 17 OECD MC reveals that the attribution of income should consider not only the performances, but also the period of preparation and training (pre-season and “on-call” periods). The same goes for participation in press conferences and promoting the sponsor of the club.²⁰⁶

5.3.1.2.3 Business income

69. Alternatively, Esports players can be engaged as independent contractors. They can act as independent services providers and conclude civil contracts upholding their freelance status. Under this arrangement, the remuneration of an Esports player based on a civil contract may consist of fixed and variable components. A long-term contract should provide for a periodic basic salary, a fixed based salary, the amount of which is independent of the results of the player. The Esports player can also receive additional payments related to the participation with the team in certain tournaments or competitions.²⁰⁷

As a rule, income from business activities carried on in a form of an enterprise or as a self-employed person performing professional services is taxable under article 7 OECD MC applicable to business profits. This would mean that only the residence state would be able to tax the professional Esports player’s income unless a permanent establishment was deemed to exist under the requirements set

²⁰⁴ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 21.

²⁰⁵ L.A. R. TOPETE, “Analysis of the Case Law on the Scope of Article 17 of the OECD Model: Issues Resolved and Yet to Be Resolved”, *Bulletin for International Taxation* 2017, Vol.71, No. 3/4, 8.

²⁰⁶ See the decisions in the US: USCA, 17 Sept. 1982, *Stenkowski v. Comm.*, 690 F 2d 46 (1982) and CAC, 16 Mar. 1989, *Paul L. Newman v. Franchise Tax Board*, 256 Cal. Rptr. 503 (Cal. App. 1989); in the Netherlands: GH, 10 June 2003, 01/03822; and the Dutch HR, 9 Feb. 2007 in 40.465 (2007); 40.604 (2007); and 41.478 (2007).

²⁰⁷ K. TETLAK, *International Taxation of Sportsmen*, Amsterdam, IBFD Doctoral Series, 2014, Vol. 30, 150.

out by article 5 OECD MC. However, it is unlikely that an Esports player would meet the threshold to establish a permanent establishment²⁰⁸ due to the context of their performance in different international Esports events, and the temporary presence in the source state. Nonetheless, as stated earlier, article 17 OECD MC explicitly indicates that is an exception to article 7 OECD MC, which means that the income earned by the player in connection to the performance, will be taxable in the source state.²⁰⁹

Regarding the ancillary income, the same approach will be used as for Esports players contracted as employees. Again, a case-by-case analysis should be done based on the timing of the income-generating event and the nature of the consideration for the payment of the income. The difference is here that the income, not covered under article 17 OECD MC, will be covered by article 7 OECD MC in an independent contractor situation, as opposed to article 15 OECD MC in an employment situation. However, the result is likely the same for ancillary income not falling under the scope of article 17 OECD MC. In an independent contractor setting, the ancillary income, not covered by article 17 OECD MC, is dictated by article 7 OECD MC which requires the player to meet the permanent establishment threshold set out in art. 5 OECD MC. Given their limited presence in the source state of performance during a tournament, it is very unlikely Esports players would meet this threshold and be subject to taxation in the source state. This will result in no taxation in the state of performance and an exclusive taxation by the residence state.²¹⁰ In this independent contractor setting it is common for Esports players to interpose a personal management company. As previously stated, the OECD specifically addresses this situation and will still consider any income paid to the Esports player connected to their public performance in scope for application of article 17 OECD MC.²¹¹

5.3.2 Allocation of income to article 17 OECD MC

70. Article 17 (1) OECD MC is a rule that aims at preserving the source country entitlement to tax a certain type of income. In addition to the subjective requirement that the relevant income must be derived by the taxpayer “from” the exercise of his “personal activities” as a “sports person”, there is

²⁰⁸ OECD Commentary on Article 17, Para. 6.

²⁰⁹ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 22.

²¹⁰ *Ibid.*

²¹¹ *Supra* No. 61

the objective requirement that the activity must be “*exercised in the other Contracting State*”. To determine the extent of the tax right of the source state, a two-step analysis is necessary.²¹² Since the items of income that can be assigned to the player’s performance have been discussed, the question remains where the place of performance is in the context of Esports.

5.3.2.1 Place of the “performance”

71. Regarding the place where a certain performance of a sportsperson takes place, article 17(1) OECD MC itself does not contain any indication. As a result, Article 17 OECD MC is missing a clear sourcing rule. Due to the lack of proper guidance, a hint has been introduced into the OECD commentary of 2014 on the provision, and that is a reference to paragraph 1 of the Commentary on article 15 OECD MC.²¹³ The Commentary on article 15 OECD explains that the employment is exercised in the place where a person is physically present when performing the work for which remuneration is received.²¹⁴ Drawing conclusions by analogy for the purpose of article 17 OECD MC, the source state is the state in which the sportsperson is physically present, personally performing an activity as such.²¹⁵ Now remains the question on how article 17 OECD MC should be applied in the context of Esports, more specially in offline and online tournaments.

5.3.2.2 The place of performance in the context of Esports

5.3.2.2.1 Offline tournaments and events

70. When applying article 17 OECD MC to Esports players, the most intriguing questions is where their activity is performed. In general, an Esports tournament involves many countries all of whom wish to tax in some capacity. To determine which country has tax jurisdiction, the place of

²¹² A. CORDEWENER, “Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons” in G. MAISTO (ed.), *Taxation of Entertainers and Sportspersons Performing Abroad*, Amsterdam, IBFD, 2016, 114.

²¹³ OECD Commentary on Article 17, para. 9.2.

²¹⁴ OECD Commentary on Article 15, para. 1.

²¹⁵ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries – Global Topics - 3. Source State Taxing Rights”, *Global Tax Treaty Commentaries IBFD 2016* (Accessed on 6 April 2021).

performance of the Esports player will play a manifest role. This location will depend on whether the tournament is played online or offline.²¹⁶

In case of offline tournaments, the determination of the state in which the competition takes place is a relatively easy exercise. As Esports players will play against each other on a live location in front of spectators, the Esports players are physically present and personally performing the gaming activities in the country where the tournament is held. In accordance with article 17 OECD MC, the source state is the state where the tournament takes physically place. The income related to the game performance of the Esports player is taxable in the state where the tournament takes place (source state), with relief provided by the residence state of the player in the form of an exemption or credit.

5.3.2.2.2 Online tournaments and events

71. By contrast, in case of Online tournaments, the question where the activities are performed is a difficult consideration. For example, the FACEIT Pro Series: Apex Legends is an international online Esports tournament in which 16 professional teams from different countries take a chance of winning the weekly \$5.000 prize pool. After 8 weeks, an additional \$10.000 will be awarded to the highest ranked team.²¹⁷

If the players of the teams connect from their respective homes, where are the activities performed for such online tournament? The place from which the players take part in the event? The state in which the Esports players/teams are tax resident? The state in which servers of the Esports game platform are located? The state where the tournament organiser/game publisher is tax resident? Several outcomes are possible, but the question is to what extent these outcomes correspond to the existing principle as formulated in article 17 OECD MC. According to Dr. TENORE, there are three specific outcomes that are worth analysing more closely.²¹⁸

²¹⁶ *Supra*. No. 34.

²¹⁷ See: [FACEIT Pro Series - Liquipedia Apex Legends Wiki](#). (Accessed on 7 April 2020).

²¹⁸ M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 7 April 2021).

72. The first solution is based on the place in which the Esports players are physically present while taking part in the Esports tournament. As stated above, one of the pillars of article 17 OECD MC is the physical presence on the territory of the other contracting state. A good example you can find is the film industry where different jurisdictions may be involved as far as income of the actor is concerned. Under article 17 OECD MC such income is taxable in the state where the performance related to the movie production takes place (where the scenes of a movie were shot), but not in the state where the movie is made public later through the media (in the cinema hall).²¹⁹ This reasoning can be substantiated by the fact that no physical performance is exercised on territory of the state where the movie is made public through media. For the purposes of article 17 OECD MC, the source state is the state in which the sportsperson is physically present, personally performing an activity as such.²²⁰

A second solution can be found in the state of residence of the tournament organiser, considering that it pays or distributes the prize money. This outcome is not in line with the idea behind article 17 OECD MC. As confirmed by the legal doctrine, the state in which the payment is made or the residence state of the entity making the payment is irrelevant. The source state is determined based on the place where the income-generating activities are physically exercised or to which the income is attributable and not by whom the payment is made or from where the money flows.²²¹

A third solution, which was suggested by Dr. TENORE, can be found in the state of residence of the game publisher. As the game is owned by the game publisher and the player performs his gaming activities through the videogame (owned by the publisher), the place where the game platform is operated, which may coincide with the state where the publisher is resident, could be regarded as the place of performance for purposes under article 17 OECD MC. From this reasoning, the game could be regarded as the “virtual stadium” where Esports players deliver their performance, and where the game publishers give permission to broadcast the video game so the public can watch the game

²¹⁹ Ibid, A. CORDEWENER, “Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons” in G. MAISTO (ed.), *Taxation of Entertainers and Sportspersons Performing Abroad*, Amsterdam, IBFD, 2016, 115.

²²⁰ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries – Global Topics - 3. Source State Taxing Rights”, *Global Tax Treaty Commentaries IBFD 2016*, 9. (Accessed on 7 April 2021).

²²¹ Ibid.

virtually.²²² This reasoning is new and enlightening but is currently not in line with logic which has driven the drafting of article 17 OECD MC.

73. Based on the previous views from the legal doctrine and the logic behind article 17 OECD MC, the first solution, based on the place of the physical exercise, seems to be preferable for the time being. First and foremost, this solution is more compatible with the principle of physical presence inherent in the wording of article 17 OECD MC, which refers to personal activities as such carried on in the other contracting State. The provision assumes that the sportsperson or entertainer is entering the territory of the other contracting state, although this should not necessarily be done to entertain the public of that state. This is the situation for online gaming where Esports players merely indirectly reach their audience through their online performance.²²³ The same counts for entertainers appearing on a “virtual stage”. As suggested by the legal doctrine, in such cases article 17 (1) OECD must be applied by analogy with article 15(1) OECD MC, focusing on the place of the actual performance and not where the product is made public later through the media. This view is already applied by national tax authorities in cases of movie actors and studio musicians.²²⁴ In addition, this solution appears to be consistent with the logic that led to the drafting of the provision that was thought to relate to entertainment activities in a non-digitised world that did not consider forms of online entertainment such as Esports.²²⁵

74. Accordingly, based on the place of the physical exercise, in case of Esports players participating in an online tournament connecting from their homes, leads to the conclusion that the prize money and salaries, related to this performance, are exclusively taxable in the state of the physical presence which generally coincides with the state of residence. By contrast, in case of offline Esports

²²² M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 7 April 2021).

²²³ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries – Global Topics - 3. Source State Taxing Rights”, *Global Tax Treaty Commentaries IBFD* 2016, 9. (Accessed on 7 April 2021).

²²⁴ A. CORDEWENER, “Tax Treaty Issues Related to Qualification, Allocation and Apportionment of Income Derived by Entertainers and Sportspersons” in G. MAISTO (ed.), *Taxation of Entertainers and Sportspersons Performing Abroad*, Amsterdam, IBFD, 2016, 115.

²²⁵ M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport* 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 7 April 2021).

tournaments, the income will be taxable in the state where the tournament takes place (source state).²²⁶

5.3.3 Attribution of income to states

75. Once the amount of income attributable to article 17 OECD MC has been calculated, the next step in determining the tax consequences of an Esports players income is to attribute the income between the various jurisdictions in which the public performances occurred.²²⁷ Just as with traditional sports, Esports players will obtain income in connection with activities performed in more than one country. In 2014 the OECD recognised the need to clarify the rules for the apportionment and allocation of income to a particular source. In the commentary it suggests that basic salary should be allocated based on the number of working days spent in each state, unless otherwise agreed.²²⁸

Where the remuneration, received by the Esports player employed by a team, covers various activities to be performed during a period, in the absence of any indication that the remuneration or part of it should be allocated differently, to allocate that salary based on the working days spent in each state in which the Esports player has been required, under his employment contract, to perform those activities.²²⁹ This approach requires a determination of the overall number of “working days”, although this may not always be easy to determine, it is confirmed in case law.²³⁰ This approach has been accepted in decisions of Belgian courts regarding professional cyclists, who also analysed the relevance of (team and individual) training within the general framework of the underlying contractual obligations.²³¹ Esports players are generally in a source state for a few days to participate in a tournament (offline), and these days are well documented by organisers, press, etc. The number

²²⁶ Ibid.

²²⁷ R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 21-22.

²²⁸ OECD Commentary on Article 17, para. 9.2.

²²⁹ Ibid.

²³⁰ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries – Global Topics - 4. Method of Taxation”, *Global Tax Treaty Commentaries IBFD* 2016, 4-5. (Accessed on 9 April 2021).

²³¹ Circ. AFZ No. 2/2012 dd 27/04/2012 (AFZ/2012-0288); See also in BE: Rb. Hasselt 27 December 2007, FJF, No. 2008/93, as confirmed by the decision of HvB Antwerpen 31 March 2009, reported by P. HINNEKENS, “Bezoldiging sportbeoefenaars: hoe verdragsvrijstelling toepassen?”, *Fisc.* 2009, Vol. 307, 5; HvB Gent 25 February 2014, reported by S. VAN CROMBRUGGE, “Berekening vrijstelling van internationaal actieve wielrenner”, *Fisc.* 2014, Vol. 365, 7.

of days method is probably the most suitable method to distribute a player's salary among the source states.²³²

The income earned by Esports players being engaged as independent contractors, also likely pertains to public performances in multiple jurisdictions. The discussion about this attribution is the same as in the employer relationship. The income should be attributed between source states in which the player engaged in a public performance, based on the number of days spent in each state, unless another method would be considered more appropriate.²³³

76. However, states may still apply different criteria for the allocation of income. For example, the attribution of the income based on the ratio of the number of tournament days spent in the state compared to the total number of tournament days in the year. Another option is splitting the income based on the number of performances in the state compared to the total number of performances in the year, i.e., a per tournament basis, or apportionment in proportion to the scope of activities carried out in each state. These differences in methods can result in double taxation of those parts of income that are assigned simultaneously, but differently, to two or more states.²³⁴

6. The Proposed Tax Treatment of International Esports players

6.1 The need for new tax solutions for International Esports players

6.1.1 Difference in tax treatment between online and offline gaming

77. The structure and wording of article 17 OECD MC make source taxation of Esports players complex and ineffective, especially in the case of international online Esports events involving numerous of participants from different jurisdictions. As discussed, there is a substantial difference in the tax treatment between online and offline gaming.²³⁵ Since article 17 OECD MC is based on the principle of taxation in the state where the activities are physically performed, Esports players

²³² R. ESAU, “International tax aspects of esports – Part two”, *GSLTR*, 2020/14, Vol. 11, No. 22, 21-22.

²³³ *Ibid*, 22-23.

²³⁴ J. ROELEVELD and K. TETLAK, “Article 17: Entertainers and Sportspersons - Global Tax Treaty Commentaries – Global Topics - 4. Method of Taxation”, *Global Tax Treaty Commentaries IBFD* 2016, 4. (Accessed on 9 April 2021).

²³⁵ *Supra* No 74.

participating in online tournaments, who are not physically present in the other jurisdiction, will generally not be caught by the exception entailed in the provision. This income is exclusively taxable in the state of residence. By contrast, in case of offline gaming, Esports players are in principle taxable in the state where the gaming activities are physically performed, which is the state where the tournament takes place.

Therefore, it is arguable whether the requirement of physical presence, which is inherent to article 17 OECD MC, justifies such a different tax treatment. This different in tax treatment is the result of the application of the existing international tax rules. As confirmed by Dr. TENORE, the current concept of source, entailed in article 17 OECD MC, based on the requirement of physical presence, reveals a shortfall of the provision in relation to the new forms of online entertainment, such as Esports.²³⁶ In this context a parallel could be drawn with the allocation rules of profits under the permanent establishment in article 7 OECD MC in the context of digital activities. Digital companies such as Facebook and Google, do not need to have such permanent establishments (“PEs”) to sell their services and products to customers. Without the physical presence of such PEs in the state of the consumers, no corporate taxation is possible under the current article 7 OECD MC. But with the new Unified Approach proposed by the OECD in the Inclusive Framework, a solution seems to be found.²³⁷

6.1.2 Issues of double non-taxation

78. In case of Online Esports tournaments issues of double non-taxation may raise. This can occur insofar as the lack of taxation in the state of source would be combined with nil or extremely low tax in the state of residence of the Esports player. In 2010 the OECD Committee discussed the suggestion that article 17 OECD MC should be deleted and that no specific rule should apply to income derived

²³⁶ M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 9 April 2021).

²³⁷ M. KLOOTWIJK and D. MOLENAAR, “Sportspersons, entertainers and taxing the digital economy”, *GSLTR* 2021/09, Vol. 12, No. 1, 41-44; HONGLER and P. PISTONE, “Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy”, *Journal Articles & Papers IBFD* 2015, 15; OECD/G20 Base Erosion and Profit Shifting Project, “Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint”, *OECD* 2020, 7-10.

from the activities of entertainers and sportspersons.²³⁸ However, a vast majority of the OECD member states decided to keep the article. One of the main reasons of keeping the article was because sportspersons with high income could circumvent taxation by moving their residence to a tax haven.²³⁹ This argument relates back to the origin of the article with the aim to counter tax avoidance behaviour and non-compliance. The OECD is even taking a confident stance by stating that sportspersons cannot avoid a taxation of their income in the performance state by moving to a tax haven or employing a star company because generally there are no tax treaties with such jurisdictions.²⁴⁰ Nevertheless, the research in this thesis reveals otherwise, as article 17 OECD MC allows for double-non-taxation in context of online Esports. The current concept of source entailed in article 17 OECD MC, based on the requirement of physical presence, reveals a shortfall of the provision in relation to Esports.

79. Practice has shown that professional Esports players make clever use of article 17 OECD MC to avoid withholding tax in the source state. In the guise of the “Spanish Exodus”, many Spanish and French professional Esports players, Youtubers and influencers have moved their fiscal residence to Andorra. The alleged sole reason for their moving has been the low taxation and favourable fiscal climate of the Principality of Andorra.²⁴¹ Based on the place of physical performance, Spanish Esports players, who play Online tournaments and connect from their homes in Andorra, will only be taxable on the prize money and salaries in the state of physical presence, which generally coincides with the state of residence (Andorra). By moving their tax residence to Andorra, they avoid a corporate income tax rate of 25% and a personal income tax rate up to 55% in Spain. On the contrary, they will only be exposed to a maximum corporate tax rate of 10% and a maximum personal income tax rate of 10% on their salaries and prize money. The same path is also taken by French Esports players who move their tax residence to the luxurious low-taxed Principality of Monaco. The bloodletting of article 17 OECD MC will in the future give rise to further frustration among tax

²³⁸ OECD (2019), "Issues Related to Article 17 of the OECD Model Tax Convention", in *Model Tax Convention on Income and on Capital 2017*, OECD Publishing, Paris, 2.

²³⁹ D. MOLENAAR, “New Options to Restrict Article 17 for Artistes and Sportsmen”, *Intertax* 2016, X, Volume 44, Issue 12, 974-975.

²⁴⁰ J. THIEDE and S. TRENCSIK, “International - For the Good of the Game? A Comparison of the Taxation of Sportspersons and Sports Organizations outside of and during Major Sporting Events”, *World Tax Journal* 2017, Vol. 9, No. 4, 638-639.

²⁴¹ See [Why Did Spanish Esports, Youtuber Influencers Move To Andorra? Low Tax? Think Again.](#) (Accessed on 12 April 2021).

authorities of various countries, while Esports players will continue to use this strategy for as long as the article allows. In the light of the above, an adjustment of the current international tax rules is imperative.

6.1.3 Risk of excessive and double taxation

80. The opposite can also happen where professional Esports players run the potential risk of excessive or even double taxation. The practical problem of the special allocation rule, contained in this article, has already been questioned several times in jurisprudence and legal doctrine.²⁴² Practice has revealed that this problem also occurs in the context of online gaming, where Esports players face a withholding tax for online tournaments and competitions. Some states may seek to impose a withholding tax at source on prize money and salaries paid to non-resident Esports players.²⁴³

Consultation with several practical experts has revealed that US tournament organisers always withhold 30% withholding tax on prize money, regardless of whether the tournament takes place online or offline. For offline tournaments there is no problem with the application of article 17 OECD MC since the US as source state has tax jurisdiction. Nevertheless, in the case of online tournaments, the US is misappropriating its tax jurisdiction. Since the place of performance determines the allocation of the taxing right, the US incorrectly applies article 17 OECD MC in the case of online Esports tournaments. Dr. MOLENAAR confirms this practice but states that it is generally difficult to get through to a major American tournament organiser and to arrange an exemption. As an alternative, he argues that it is possible to file a tax return from the US tax authorities afterwards, but this procedure appears to be very cumbersome, expensive, and time-consuming. Prevention of double taxation in the state of residence of the Esports player should also not be allowed since in the case of online tournaments, the exception entailed in article 17 OECD MC will not apply. The related prize money and salaries are then exclusively taxable in the state of residence.

²⁴² D. MOLENAAR, “New Options to Restrict Article 17 for Artistes and Sportsmen”, *Intertax* 2016, X, Volume 44, Issue 12, 973.

²⁴³ See for example: [For esports players and leagues, standards around earnings and taxes remain ambiguous - The Washington Post](#), (Accessed on 12 April 2021).

81. As states are becoming more aware of when this Esports competitions will take place within their borders, Esports players can no longer operate under the radar. The more these competitions start to become visible, the more states will begin to enforce withholding tax upon the players.²⁴⁴ Not only in the US but also the Chilean tax authorities have started targeting Esports players. In September 2017, a ruling was announced to clarify that income earned by non-resident professional Esports players was subject to a 35% withholding tax insofar as the income was derived from the participation in an online competition. Again, the application of a withholding tax would be in breach of article 17 OECD MC, and therefore refundable by the source state if the treaty contains a provision along article 17 OECD MC. Dr. TENORE shares Dr. MOLENAAR's opinion and states that Esports players are very often reluctant to activate refund procedures that may be costly, burdensome, and lengthy. To overcome such difficulties, it is common practice in the Esports industry that prizes are agreed in Net, considering the possible application of source tax.²⁴⁵

6.2 Adapting article 17 OECD MC Model to Esports as a part of the digitalisation

6.2.1 Elimination of the persisting difference in the tax treatment of online and offline gaming

82. Based on the above analysis, the author concludes that a change of the current international tax rules is preferable. First, the change should be aimed at eliminating the persisting difference in the tax treatment of online and offline gaming with a view to achieving tax neutrality regardless of whether Esports are played online or offline.²⁴⁶

A solution could be, for example, by adjusting the commentaries on article 17 OECD MC. As the commentaries on article 17 OECD MC include many new examples of how the article should be applied in certain specific situations²⁴⁷, the OECD could add clarification on how article 17 OECD

²⁴⁴ Ibid.

²⁴⁵ M. TENORE, "Esports and tax, how the OECD Model Tax Convention applies to player's income", *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 13 April 2021).

²⁴⁶ Ibid.

²⁴⁷ OECD 2014 Report on the issues related to Article 17 of the Model Tax Convention, [report-article 17-model-tax-convention.pdf](#). (Accessed on 13 April 2021).

MC can be applied in a digital context. As the reasoning based on the place of the physical performance creates a difference in tax treatment between online and offline gaming, it may be recommendable to look at the new international taxation framework set forth in the Report on Pillar one Blueprint. The Report recognises that in an increasingly digital age, taxing rights can no longer be exclusively determined by reference to physical presence.²⁴⁸ With this approach in mind, it might be interesting to look at the previously suggested second and third solution in this thesis.

83. Conform the second solution, the state of residence of the tournament organiser will have tax jurisdiction, considering that it pays or distributes the prize money.²⁴⁹ Although this reasoning is pragmatical and not in line with the current OECD commentary and legal doctrine, this solution seems to be the easiest and the least complex. The tricky point in the context of online Esports is locating the place of performance. For digital activities such as Esports, the physical presence and the place where the Esports player is physically present, cannot be determined materially. The state of residence of the payer can possibly replace the place of performance and might be the best way to allocate the taxing rights. This is a pragmatic solution but however this criterion is already being applied in the OECD MC under article 16 OECD MC.

Although article 16 OECD MC does not explicitly indicate the criterion for determining the sourcing of fees, its context provides for shared allocation of taxing powers to the residence state of the company in the framework of a bilateral scope, which characterises the residence state of such a company as being the source of the payments made to the director.²⁵⁰ In this context, the place of activity and more in general, the place of physical presence of the director, is irrelevant, as the provision applies to situations in which the company receiving the services, meets the residence requirement in a state other than the residence state of the director who receives the payment of the fees.²⁵¹ The commentary on article 16 OECD MC gives a justification of why the criterion of the resident state of the payer of the income is specially used. The commentary indicates that it might

²⁴⁸ OECD 2020, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, 64.

²⁴⁹ *Supra* No. 72.

²⁵⁰ P. PISTONE, "Article 16: Directors' Fees – Global Tax Treaty Commentaries, Global Topics – 3. Source State Taxing Rights", *Global Tax Treaty Commentaries IBFD* 2021, 6. (Accessed on 9 April 2021).

²⁵¹ *Ibid.*

sometimes be difficult to ascertain the income where the services of the director are performed. To this end, the provision treats the services as performed in the state of residence of the company.²⁵²

In the case of online gaming and Esports, it is often difficult to determine where the activities of the Esports player take place, and how to allocate the income related to these activities. A pragmatic solution is to give tax jurisdiction to the resident state of the payer of the income, which is usually the residence state of the tournament organiser. According to Dr. TENORE, policy wise this solution makes sense because the income might be taxable in the state where the game publisher is tax resident.

84. The same can be said for the third solution, which is based on the state of residence of the game publisher. Owners of the games have a tremendous amount of power within the Esports industry and play an important link in the money stream. Also, under the existing place of performance interpretation it can be argued that the state of residence of the game publisher qualifies as the source state under article 17 OECD MC. Since the Esports player performs his activities through the game, the place where the game platform is operated, which may coincide with the state where the publisher is resident, can be regarded as the place of performance for purposes of article 17 OECD MC.²⁵³ Moving the tax right from the Esports player's state of residence to the state of residence of the tournament organiser or game publisher (source state), could probably solve the issue of double non-taxation.

85. Nevertheless, it is still wise to wait with the amendment or update of article 17 OECD MC until the proposals from the inclusive framework, that are currently still under consideration by the OECD, have a definitive outcome. Adapting the existing international tax rules to the existing phenomenon of Esports will require some effort. As Dr. ROELEVELD mentioned, adapting legislation to specific situations often fraught with problems. Therefore, it is necessary to make informed decisions as the Esports industry will also change and evolve, and the legislation must be able to embrace this. However, this analysis has clearly exposed the pain points of article 17 OECD MC towards Esports

²⁵² OECD Commentary on Article 16, para. 1.

²⁵³ M. TENORE, "Esports and tax, how the OECD Model Tax Convention applies to player's income", *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 13 April 2021).

and the associated digitisation. Therefore, it is appropriate to look for a modern and better-defined article 17 OECD MC.

6.3 Alternative solution in the context of sharing and gig economy platforms

86. To avoid double non-taxation of prize money that could arise in case of online tournaments, a change in the current international tax rules is necessary. In this respect, a compromised alternative solution can be found in the context of the growth of sharing and gig economy platforms. Recently, the OECD released its Model Rules for reporting of data by platform operators with respect to sellers in the sharing and gig economy.²⁵⁴ Under these rules, digital platform operators would be required to collect specific information including the income realised by sellers offering accommodation, transport, and certain other personal services through their platforms and to report the information to tax authorities. The aim is to prevent a proliferation of reporting regimes at an individual jurisdiction level and promote standardisation.²⁵⁵

At the same time, online gaming and streaming activities, carried out through online gaming platforms may, not always be visible to tax administrations or self-reported by the Esports players. In line with this new model rules, Dr. TENORE suggested a good alternative solution. This would be the enhancement of exchange of information with the introduction upon Esports promoters and platform operators across different jurisdictions of reporting obligations concerning the identity of the Esports players and the prize money paid to them. In this manner, the state of residence would be facilitated to exercise its taxing right and/or to counter double non-taxation relative to foreign winnings of its own tax residents.²⁵⁶

²⁵⁴ OECD (2020), *Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy*, OECD Publishing, Paris, 41.

²⁵⁵ Ibid. 5-7.

²⁵⁶ M. TENORE, “Esports and tax, how the OECD Model Tax Convention applies to player’s income”, *Lawinsport*, 2020; https://www.lawinsport.com/sports/item/esports-and-tax-how-the-oecd-model-tax-convention-applies-to-players-income?category_id=152. (Accessed on 13 April 2021).

6.4 Future considerations: Taxation of Esports under the Inclusive Framework

87. It should be noted that proposed updates of the OECD MC in the inclusive framework of BEPS, surrounding the challenges arising from the digitalisation of the economy, will have a significant impact on the taxation of certain income streams within the Esports industry.²⁵⁷ Amount A creates a new taxing right for digital services and consumer-facing businesses, allocating a share of global residual profit to market countries using a formulaic approach applied at a group or segment level, irrespective of local physical presence. The report also found that Online gaming falls within the scope of both automated digital services and consumer-facing business.²⁵⁸ According to the report, three specific incomes are relevant to online gaming services, namely advertisement, media rights and the microtransaction revenue earned by the game publishers. Different sourcing rules will be used for these three income streams.²⁵⁹ In case of the advertising revenue, the sourcing rule will be the jurisdiction of the ordinary residence of the viewer of the advertisement. This can be determined based on a few indicators such as the user profile information, the jurisdiction of the geolocation of the device of the viewer at the time of display or the jurisdiction of the IP address of the device of the viewer at the time of display.²⁶⁰ For microtransaction revenue earned by the game publishers, the sourcing rule for revenue from Digital Content Services applies. Here, the same indicators are also used, such as user profile information, billing address of the purchaser etc.²⁶¹

88. As demonstrated above, these proposals currently, being investigated by the OECD, will have a significant impact on companies involved in every aspect of the Esports industry. The new tax rules will give source states the chance to tax the online earnings of the game publishers, promoters and even Esports players (revenues out of streaming's and social media).²⁶² Nevertheless, it is noticeable that these new tax rules for the digital economy only seem to focus on the major income streams within the Esports industry, namely sponsorship, advertising, media rights, game publisher fees, and

²⁵⁷ OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en>.

²⁵⁸ Ibid. 25-30.

²⁵⁹ Ibid. 90.

²⁶⁰ Ibid. 73.

²⁶¹ Ibid. 78.

²⁶² M. KLOOTWIJK and D. MOLENAAR, “Sportspersons, entertainers and taxing the digital economy”, *GSLTR* 2021/09, Vol. 12, No. 1, 42.

merchandise and ticket sales. This will only have an indirect influence on the earnings of the Esports players as these income streams are initially monetised by the game publishers and tournament organisers and subsequently paid to players in the form of prize money and the player's salaries.²⁶³

89. However, the income that falls within the scope of article 17 OECD MC, and which has a direct connection with the performance of the Esports players in the source state, is not directly targeted by the new tax rules of the inclusive framework. As stated before, in the context of online tournaments, Esports players will only be taxable in the state where they are physically performing, which is most often their residence state. The states of the viewers and the tournament organisers will not have a taxing right under the current taxing rules of article 17 OECD MC. In the view of the new taxing rules of the inclusive framework this perception might be strange as most of the Esports earnings are generated on the territories of these states. article 17 OECD MC allows Esports players to move their residence to low tax jurisdictions. Of course, this leads to resentment in the states of the viewers and the organisers who want to withhold source tax from the payments of foreign Esports players.²⁶⁴

90. In the light of the above, it can be argued that article 17 OECD MC and the principle of the place of the physical performance must be adapted or changed in the context of online gaming. A few solutions have already been proposed in this thesis, but according to the author, further in-depth research is needed. For this, the principles proposed in the Pillar One Report could be a further guideline for a possible new approach of article 17 OECD MC. Rather than starting from the place of physical performance, it is necessary to consider where the revenue is effectively generated and where the substance comes from.

However, this approach will also have some practical implications in the context of Esports. For example, it will be rather difficult to enforce the criterion of the state where the viewers of the tournament are located into practice. This might lead to complex situations such as for example a Belgian Esports player who participates from his apartment, located in Antwerp, in an online tournament organised by a UK resident company. Since thousands of people would watch the tournament online from Spain, Spain would have a right to tax the Esports player's earned income.

²⁶³ R. ESAU, "International tax aspects of esports – Part two", *GSLTR*, 2020/14, Vol. 11, No. 22, 18.

²⁶⁴ M. KLOOTWIJK and D. MOLENAAR, "Sportspersons, entertainers and taxing the digital economy", *GSLTR* 2021/09, Vol. 12, No. 1, 42.

Neither the UK company could apply withholding tax, nor the Belgian player could pay the tax in Spain if he is not subject to the obligation to file a Spanish return. Practically, such an enforcement of this tax would become complex.

7. Conclusion

90. Turning from a social phenomenon into a billion-dollar industry, Esports transformed from a niche to a booming business. With the increasing money streams and turnover, the tax aspect will only increase in the future. Whereas tax law always tries to address the tax challenges that arise from digitalisation, it cannot by nature keep up with growing speed and complexity of the Esports industry. A single international Esports event can involve participants from multiple jurisdictions competing in a source state, while being simultaneously broadcast to various countries around the world. From a tax perspective, this creates a significant risk of double taxation or double non-taxation without the proper allocation of taxing rights using international tax treaties. The rise of Esports and its complex taxation provided the impetus for analysis of the current international tax rules. As a result, this thesis examines whether the current international tax rules fit to address the booming phenomenon of Esports. This question is answered based on several sub-questions.

First, the important question is raised whether Esports can be considered as a sport under the current international tax regulations. Research in this thesis has shown that professional Esports players will be classified as entertainers or sportspersons under article 17 OECD. Contrary to the approach from an EU legal perspective and the view of the IOC, the OECD seems to adopt a broader approach to the concept of a ‘sportsperson’. The author is of the opinion that both online and offline professional Esports players need to be considered as sportspersons under article 17 OECD MC. This reasoning is also confirmed by the legal doctrine, as Esports has a lot of common with traditional sports, requiring preparation and training, and an organised competition.²⁶⁵ In many countries Esports is already treated as a sport for tax purposes. In addition, Belgium follows this trend, as the Minister of finance confirmed that professional Esports players must be considered as sportspersons under article 17 OECD MC.²⁶⁶ It is the author's belief that this trend will only increase in the future. Furthermore,

²⁶⁵ *Supra* No. 56.

²⁶⁶ See [Een e-sporter is een sporter in ons land — Steven Mathei \(stevenmathei.be\)](#), (Accessed on 17 April 2021).

the analysis reveals that the concepts of an ‘entertainer’ and a ‘sports person’ need to be clarified and renewed in line with the digitalisation. Confusion associated with the interpretation of these terms should be limited. Therefore, it is appropriate to include Esports in the commentary.

Secondly, this thesis gives an answer on how the income of the Esports player must be taxed in a cross-border context. Income earned by the Esports player connected to his public performance is governed under article 17 OECD MC. Any income earned by the Esports player not connected to his public performance, as well as any income earned by non-performing employees is governed by article 15 OECD MC in the case of an employment relationship, and article 17 OECD MC if they are engaged as independent contractors.

After applying the current international tax rules on the income that is closely related to the performance of the professional Esports players, it is examined whether issues could arise under the application of article 17 OECD MC. This question is closely related to the place of performance in the context of Esports. Article 17 OECD MC is based on the principle of physical presence on the place of the performance. In case of offline gaming, Esports players are in principle taxable in the state where the performance is physically exercised, which will be the state where the tournament takes physically place. By contrast, Esports players competing online, who are not physically present in the other jurisdiction, will generally not be caught by the exception entailed in the provision. Based on the views of the legal doctrine and the logic behind article 17 OECD MC, Esports players participating in an online tournament connecting from their homes leads, the income related to this performance is exclusively taxable in the state of the physical presence. This place generally coincides with the state of residence of the player. As a result, a different tax treatment between online- and offline gaming arises.

In case of Online Esports tournaments issues of double non-taxation may arise. This can occur insofar as the lack of taxation in the state of source would be combined with nil or extremely low tax in the state of residence of the Esports player. Practice has shown that professional Esports players make clever use of article 17 OECD MC to avoid withholding tax in the source state by moving their residence to low tax jurisdictions. The opposite can also happen where professional Esports players run the potential risk of excessive or even double taxation. This problem occurs in the context of online gaming where Esports players face a withholding tax for online tournaments and competitions. Some states may seek to impose a withholding tax at the source on prize money and salaries paid to non-resident Esports players. The incorrect application of article 17 OECD MC leads to excessive or

even double taxation, as the residence state of the Esports player should not provide a relief because the exception entailed in article 17 OECD MC will not apply.

91. The structure and wording of article 17 OECD MC makes source taxation of Esports players complex and ineffective, especially in the case of international online Esports events involving numerous of participants from different jurisdictions. Thus, a substantial difference in the tax treatment between online and offline gaming arises. Therefore, it is arguable whether the requirement of physical presence, which is inherent to article 17 OECD MC, justifies such a different tax treatment. This difference is in any case the result of the application of the existing international tax rules. As a consequence, the current concept of source entailed, in article 17 OECD MC, based on the requirement of physical presence, reveals a shortfall of the provision in relation to Esports.

Based on the analyse and issues identified in this thesis, the author concludes that an adjustment or change of the current international tax rules is preferable. First, the change should be aimed at eliminating the persisting difference in the tax treatment of online and offline gaming with a view to achieving tax neutrality regardless of whether Esports are played online or offline. According to the author, it is recommended to clarify or adjust the commentaries on article 17 OECD MC on how it can be applied in a digital context such as online gaming. Hence, it may be advisable to look at the new international taxation framework set forth in the Report on Pillar one. The Report recognises that in an increasingly digital age, taxing rights can no longer be exclusively determined by reference to physical presence.

In line with this approach, the author believes a solution can be found in the state of residence of the tournament organiser since he pays or distributes the prize money. Although this might be a pragmatical solution, it is probably the simplest and the least complex. As established, it is often difficult and complex to determine where the activities of the Esports player are performed and how the income, related to these activities, should be allocated. Therefore, it is interesting to look for a criterion that can possibly replace the place of performance. The state of residence of the payer might be the best way to allocate the taxing rights. Removing the tax jurisdiction to the resident state of the payer, which is usually the residence state of the tournament organiser seems to be a simple and practical good solution. This criterion is already being applied in the OECD MC under article 16.

Another solution could for example be to keep the criterion of the physical presence on the place of performance but to adjust its interpretation in the case of online gaming. Since the Esports player

performs his activities through the game, the place where the game platform is operated, which may coincide with the state where the publisher is resident, could be regarded as the place of performance for purposes of article 17 OECD MC. As the owners of the games, game publishers have a tremendous amount of power within the industry and play an important role in the money stream. Moving the tax jurisdiction to the state of residence of the tournament organiser could probably solve the issue of double non-taxation. In this respect, a compromised alternative solution might be found in the context of the growth of sharing and gig economy platforms. Since online gaming carried out through online platforms is not always visible to tax authorities, an enhancement of the exchange of information between Esports promoters, platform operators and the state of residence of the player can facilitate the taxing right and/or counter double non-taxation relative to foreign winnings of its own tax residents.

92. Nevertheless, it should be noted that the proposed updates of the OECD MC in the Inclusive Framework of BEPS will have a significant impact on companies involved in every aspect of the Esports industry. The income that falls within the scope of article 17 OECD MC, and which has a direct connection with the performance of the Esports players in the source state, is not directly targeted by the new tax rules of the inclusive framework. However, the proposed principles could be a further guideline for a possible new approach of article 17 OECD MC. Rather than starting from the place of physical performance, it is necessary to consider where the revenue is effectively generated and where the substance comes from.

The author knows that this approach is ground-breaking and hopes that the Inclusive Framework/OECD will pick up these introduced issues which arise from the application of article 17 OECD MC. Accordingly, the OECD has the aim to implement the final agreement about the Unified Approach with a Multilateral Instrument at once in all tax treaties of the participating states, it becomes interesting to watch if Esports may follow in the slipstream of these developments and comes to comparable solutions for its problems. Adapting the existing international tax rules to the existing phenomenon of Esports will require some effort. It is necessary to make informed decisions as the Esports industry will change and evolve, and the legislation must be able to embrace this. However, this analysis has clearly exposed the pain points of article 17 OECD MC towards Esports and the associated digitalisation. To conclude, it is appropriate to look for a modern and better-defined article 17 OECD MC.

Appendix

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Summary

Turning from a social phenomenon into a major industry where top gamers around the world battle each other, creating a huge spectator sport, and attracting bigger sponsors, Esports transformed from a niche to a serious booming business. With the increasing money streams and turnover, the tax aspect will only increase in the future. A single international Esports event can involve participants from multiple jurisdictions competing in a source state, while being simultaneously broadcast to various countries around the world. From a tax perspective, this creates a significant risk of double taxation or double non-taxation without the proper allocation of taxing rights using international tax treaties. The rise of Esports and its complex taxation provided the impetus for analysis of the current international tax rules. As a result, this thesis examines whether the current international tax rules fit to address the booming phenomenon of Esports. This question is answered based on several sub-questions.

First, the important question is raised whether Esports can be considered as a sport under the current international tax regulations. Research has shown that professional Esports players will be classified as entertainers or sportspersons under article 17 OECD MC. Contrary to the approach from an EU legal perspective and the view of the IOC, the OECD seems to adopt a broader approach to the concept of a ‘sportsperson’. This reasoning is also confirmed by the legal doctrine, as Esports has a lot of common with traditional sports, requiring preparation and training, and an organised competition. In many countries Esports is already treated as a sport for tax purposes. Furthermore,

the analysis reveals that the concepts of an ‘entertainer’ and a ‘sportsperson’ need to be clarified and renewed in line with the digitalisation. Confusion associated with the interpretation of these terms should be limited.

Secondly, the research gives an answer on how the income of the Esports player must be taxed in a cross-border context. Income earned by the Esports player connected to his public performance is governed under article 17 OECD MC. Any income earned by the Esports player not connected to his public performance, as well as any income earned by non-performing employees, is governed by article 15 OECD MC in the case of an employment relationship, and article 17 OECD MC if they are engaged as independent contractors.

After applying the current international tax rules on the income closely related to the performance of the professional Esports players, it is examined whether issues could arise under the application of article 17 OECD MC. In case of offline gaming, Esports players are in principle taxable in the state where the performance is physically exercised, which will be the state where the tournament takes place. By contrast, Esports players competing online, who are not physically present in the other jurisdiction, will generally not be caught by the exception entailed in the provision. Based on the views of the legal doctrine and the logic behind article 17 OECD MC, Esports players participating in an online tournament connecting from their homes leads, the income related to this performance is exclusively taxable in the state of the physical presence. As a result, a different tax treatment between online- and offline gaming arises.

In case of online gaming issues of double non-taxation may raise. This can occur insofar as the lack of taxation in the state of source would be combined with nil or extremely low tax in the state of residence of the Esports player. Practice has shown that professional Esports players make clever use of article 17 OECD MC to avoid withholding tax in the source state by moving their residence to low tax jurisdictions. The opposite can take place where professional Esports players run the potential risk of excessive or even double taxation. Some states may seek to impose a withholding tax at the source on prize money and salaries paid to non-resident Esports players. The incorrect application of article 17 OECD MC leads to excessive or even double taxation, as the residence state of the Esports player should not provide a relief because the exception entailed in article 17 OECD MC will not apply.

The structure and wording of article 17 OECD MC makes source taxation of Esports players complex and ineffective, especially in the case of international online Esports events. Thus, a substantial difference in the tax treatment between online and offline gaming arises. This difference is in any case the result of the application of the existing international tax rules. Consequently, the current concept of source entailed in article 17 OECD MC, based on the requirement of physical presence, reveals a shortfall of the provision in relation to Esports. Based on the analyse, an adjustment or change of the current international tax rules is preferable.

First, the change should be aimed at eliminating the persisting difference in the tax treatment of online and offline gaming with a view to achieve tax neutrality regardless of whether Esports are played online or offline. A solution can be found in the state of residence of the tournament organiser since he pays or distributes the prize money. As established, it is often difficult and complex to determine where the activities of the Esports player are performed and how the income related to these activities should be allocated. The state of residence of the payer might be the best way to allocate the taxing rights.

Another solution could for example be to keep the criterion of the physical presence on the place of performance, but to adjust its interpretation in the case of online gaming. Since the Esports player performs his activities through the game, the place where the game platform is operated, which may coincide with the state where the publisher is resident, could be regarded as the place of performance for purposes of article 17 OECD MC. In this respect, a compromised alternative solution might be found in the context of the growth of sharing and gig economy platforms. An enhancement of the exchange of information between Esports promoters, platform operators and the state of residence of the player can facilitate the taxing right and/or counter double non-taxation relative to foreign winnings of its own tax residents.

Nevertheless, it should be noted that the proposed updates of the OECD MC in the Inclusive Framework of BEPS will have a significant impact on the Esports industry. The income that falls within the scope of article 17 OECD MC, and which has a direct connection with the performance of the Esports players in the source state, is not directly targeted by the new tax rules of the inclusive framework. However, the proposed principles could be a further guideline for a possible new approach of article 17 OECD MC. Adapting the existing international tax rules to the existing phenomenon of Esports will require some effort. This thesis has clearly exposed the pain points of

article 17 OECD MC towards Esports and the associated digitalisation. To conclude, it is appropriate to look for a modern and better-defined article 17 OECD MC.