



Legal issues – V

Civil law – all intellectual property law

The organiser "commits" an exploitation.

- Arena spectators → Right of public performance (Section 19 (4) UrhG)
- Stream or TV → Right to broadcast to the public (Section 20 UrhG)
- Video on demand → Right of public access (Section 19a UrhG)

Licence terms typically only allow limited commercial use.

- Players are generally allowed to stream free of charge
- Organisers may not

(P): The publisher is responsible for drafting the licence terms



Legal issues – VI

Civil law – entire intellectual property law

Are players' ancillary copyrights pursuant to Section 73 of the German Copyright Act (UrhG) considered a performance of a work in publicly held competitions?

Pros: Differentiation by genre

- (-) in sports simulations that "only" realistically replicate real events, or first-person shooters that require skill and quick reactions rather than strategic thinking → performance capability (-)
- But possibly (+) in real-time strategy games → high complexity and tactical depth

Cons: inherent in the game, no artistic interpretation/creative freedom → finality as in sport



Legal issues – VII

Public law

(P): eSports = sport?

- Non-EU foreigners (visa) → Section 4 (1) Residence Act (Sections 22, 23 Employment Regulation)
"New": Section 22 No. 5 of the Employment Regulation → Term "eSports" used in law for the first time
- Federal/state subsidies
- Privileged treatment of non-profit activities in tax law (Section 52 (2) No. 21 AO and Section 67a AO)
- Old BFH (physical exercise)
- New BFH (physical activity exceeding the usual level, characterised by externally observable exertion or by artistic movement attributable to personal skill)



Legal issues – VIII

Public law

(P): Transmissions

- Protection of minors (Section 4 JMStV: no distribution or provision of access to content harmful to minors)
- Broadcasting and media law (Sections 7, 8 RStV → Advertising: separation and recognisability requirement)
 - Two forms: split screen and cross-fading
 - Recognisability in in-game advertising?
- Broadcasting licence pursuant to Sections 20 et seq. RStV for linear information and communication services (for simultaneous reception by the general public) based on a broadcast schedule
 - Exception: no regularity, no more than 500 users, no journalistic or editorial design



Legal issues – IX

Public law

(P): eSports venue

- as an arena for players (Section 33i GewO – amusement arcade licence)
- Access for young people (-) → Section 6 (1) JuSchG
- as an arena for spectators (probably licence-free)
- Section 7 JuSchG – events harmful to minors? → **(P):** USK not binding

(P): Tax law → Where?

(P): Social law → Section 7 SGB IV?

(P): Gambling on sports betting? (GlüStV currently contrary to European law)



Legal issues – X

Criminal law

- Compliance regulations → Section 299 of the German Criminal Code (bribery)
- Betting fraud?
 - Sports betting fraud pursuant to Section 265c StGB
 - Fraud pursuant to Section 263 StGB
- Money laundering pursuant to Section 261 StGB?
- Doping law? → Section 4 Anti-Doping Act

Introduction
into
employment
law

08



Employment relationship

Formation

It is now generally accepted that the employment relationship arises through the conclusion of a 'standard' contract.

The parties are referred to as the employer and the employee.

As with almost all reciprocal contracts, the key factor in characterising the type of contract is the principal obligation, which does not lie in the obligation to pay.

- This consists of the employee's obligation to perform work.
- Problems may arise in distinguishing this from other forms of contract.



Definition of an employment contract

Normative approach

Section 611a of the German Civil Code (BGB) – Employment Contract

(1)¹ An **employment contract** obliges the employee to **perform work** in **the service** of another person, **subject to instructions and determined by that other person, in a relationship of personal dependence**.² The right to issue instructions may relate to the content, performance, time and place of the work.³ A person is subject to instructions if they are not, in essence, free to organise their work and determine their working hours.⁴ The degree of personal dependence also depends on the nature of the work in question.⁵ In order to determine whether an employment contract exists, an overall assessment of all the circumstances must be carried out.⁶ If the actual performance of the contractual relationship indicates that it constitutes an employment relationship, the designation in the contract is irrelevant. ...

(2) The employer is obliged to pay the **agreed remuneration**.

The most difficult aspect of distinguishing between employment and other arrangements concerns the element of subordination. Whilst the criterion is undisputedly necessary, how it is defined and when it applies is, however, a matter of legal dispute and difficult to ascertain in practice.



Checklist for determining employee status

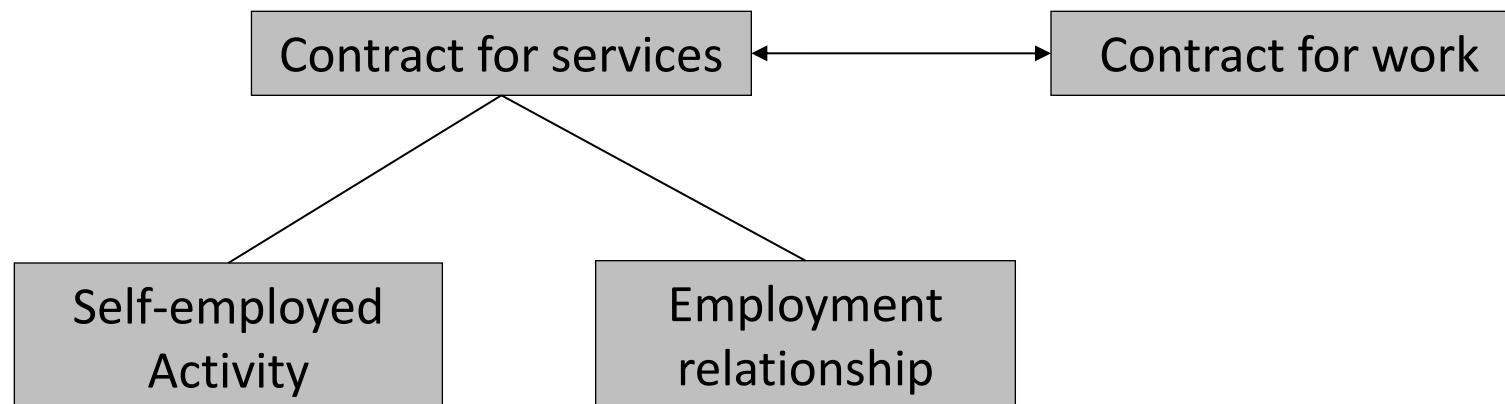
1. Contract under private law
(Distinction from civil servants [judges and soldiers are treated as equivalent to civil servants], statutory obligations to perform work [e.g. prisoners] and family members working in the business [see Sections 1353 and 1619 of the German Civil Code (BGB)])
2. Obligation to provide services
(Distinction from a contract for work and services pursuant to Section 631 of the German Civil Code (BGB))
3. For remuneration
(Distinguished from a contractor within the meaning of Section 662 of the German Civil Code (BGB);
NOTE: Section 612 of the German Civil Code (BGB))
4. Dependency
(Distinction from self-employed persons)



Distinctions according to the prevailing view

The contract must be aimed at the performance of services.

In other words, the obligation is to perform the work, not to achieve a specific result.





Distinction from a contract for work and materials

Case: Patient P visits his family doctor to be treated for a cold.

→ Contract for services (as no specific result is required) → specifically: Section 630a of the German Civil Code (BGB)

Case: Patient P visits cosmetic surgeon A to undergo breast augmentation or six-pack implantation.

→ Contract for work and services, as a specific result is required → also Section 630a of the German Civil Code (BGB)

Which type of contract applies in each case?



Distinction from an employment contract

Distinguishing this from a self-employed service contract presents not only practical difficulties but also has significant legal consequences.

- In particular, the status of an employee entails the presumption of an employment relationship in accordance with Section 7 of Book IV of the Social Code (SGB IV).
- The applicability of employment law as such, with all the rights of protection afforded to employees, depends on this.
- In some cases, there is an attempt to conceal the true status (so-called 'bogus self-employment').



Definition of an employee

A key concept in employment law is that of an employee.

→ An employer is anyone who employs at least one employee.

Employee (pursuant to Section 611a of the German Civil Code (BGB)):

An employee is a person who, under a contract governed by private law, is obliged to perform work for another person (the employer) whilst being subject to the employer's instructions and external control, in a relationship of personal dependence.

(P): subject to instructions = working under the direction of another = personal dependence

→ Result of unfortunate legislation summarising previous case law.



Distinction from the term 'employee'

The term 'employee' is used increasingly frequently in more recent legislation, where it is predominantly used as an umbrella term that also encompasses 'workers'.

E.g.: Section 7 of Book IV of the Social Code (SGB IV), Section 6(1) of the General Equal Treatment Act (AGG)

Section 7 of Book IV of the Social Code (SGB IV) – Employment

(1)¹ **Employment is work carried out in a non-self-employed capacity**, in particular within an employment relationship. ² **Indications of employment include carrying out work in accordance with instructions and being integrated into the work organisation of the person giving those instructions.**