



Status-based terms in law

Both the term 'employee' and its broader category (the 'worker') are what are known as 'status terms'. This means that significant consequences are attached to the existence of this status.

Employment law operates on an 'all-or-nothing' principle.

→ If a person meets the criteria for being an 'employee', they are entitled to full protection under employment law. Otherwise, there is generally no protection (apart from the 'minor' provisions for those in a 'worker-like' position).

→ The same applies to the obligation to pay social security contributions under the Social Code (SGB).

Status-based terms in law



Employee status



- Protection against dismissal
- Health protection
- Holiday entitlement
- Protection of working hours
- Minimum wage
- Anti-discrimination law
- and much more

mandatory law



Gathering of Evidence and Evaluative Analysis I

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

...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.** ...

When assessing the status of a potential employee, the prevailing views (in particular the dominant view) focus on the evidence pointing to a relationship of dependence.



Gathering of Evidence and Evaluative Analysis II

An overall assessment of the individual aspects must show that the person subject to the duty is in a position of dependence.

The assessment depends on the legal and factual options available to the person bound by the obligation.

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

...⁶ **If the actual performance of the contractual relationship indicates that it constitutes an employment relationship, the designation in the contract is irrelevant.**

→ As there is a risk of circumventing employment law, the assessment is based on the actual circumstances in the light of the contractual options.



Mandatory legal form

Problems arise when the designation is incorrect; three scenarios are conceivable:

1. Both parties mean the correct thing (e.g. both mean 'employee'). → falsa demonstratio non nocet
2. Both parties are mistaken and intend to be so (e.g. both want the other party to be self-employed)
[Digression: This scenario is the most common, as a self-employed person is not subject to compulsory social security and pension insurance; see the Eismann ruling of the Federal Court of Justice (BGH) of 4 November 1998 (NJW 1999, 218).]
3. One party wishes to be something other than what is stipulated in the contract (the person bound by the contract wishes to be an employee).

→ In all such scenarios, a different legal status may NOT be assumed to the detriment of the employee.



Mandatory protection

No opt-out from employment law!

The protection afforded to employees is not optional; in other words, the parties cannot deprive the person performing the service of the protection afforded by labour law.

→ A non-employee may be declared to be an employee. In this respect, they are not deprived of mandatory protection, but are granted further protection (unilaterally mandatory law).

This is because Section 611a(1), sixth sentence, of the German Civil Code (BGB) applies only in the event of a concealed employment contract.



Indications of personal dependence (prevailing view) I

- **Prescribed working conditions (time, place and nature of work), cf. [Section 611a\(1\), second sentence, of the German Civil Code \(BGB\)](#)**

- Comprehensive reporting obligations
- No share in turnover
- No employees of their own
- No control over pricing or advertising
- No independent customer acquisition
- No liability for staff and overheads
- Work carried out exclusively for one employer
- Obligation to accept all work assignments



Indications of personal dependence (prevailing view) II

- Application of collective agreement provisions
 - Participation in works council elections
 - Deduction of income tax and social security contributions
 - Continued payment of wages in the event of illness
- From a legal theory perspective, this is partly incorrect. The criteria on THIS SLIDE are not elements of the factual definition of the term 'employee', but rather consequences of the status of an employee.
- However, it is reasonable to take them into account as an aid to interpretation within the declaration of intent under Sections 133 and 157 of the German Civil Code (BGB).

**Are e-sports
players
employees?**

09



I. An increasing number of people are engaging in e-sports not merely as a leisure activity, but also as a means of earning an income, which raises the question of how this activity should be classified under employment law.



II. Neither the definitions of e-sport established by the legislator nor the definitions found in legal literature are suitable for determining a general technical definition of e-sport.



III. Although the legal classification of an activity under Section 611a of the German Civil Code (BGB) is a case-by-case decision, abstract statements regarding the employee status of esports players can be made by grouping similar cases together.



IV. The activity of an esports player represents a hybrid of the activities of a sportsman and a teleworker, with the result that the case law specific to these occupational groups is, in part, transferable to esports.



V. Despite the lack of geographical boundaries to their work and the freedom to make decisions regarding performance during competitions, professional esports players are generally employees of their clan.



VI. When classifying semi-professional esports players under employment law, distinguishing between a contract of exchange and a partnership under company law presents particular difficulties.



VII. Amateur esports players are generally not employees. However, the covert provision of remuneration may be an indication of an intention to enter into a legally binding relationship and thus of a contract of exchange, which, subject to the further conditions of Section 611a of the German Civil Code (BGB), is to be classified as an employment contract.



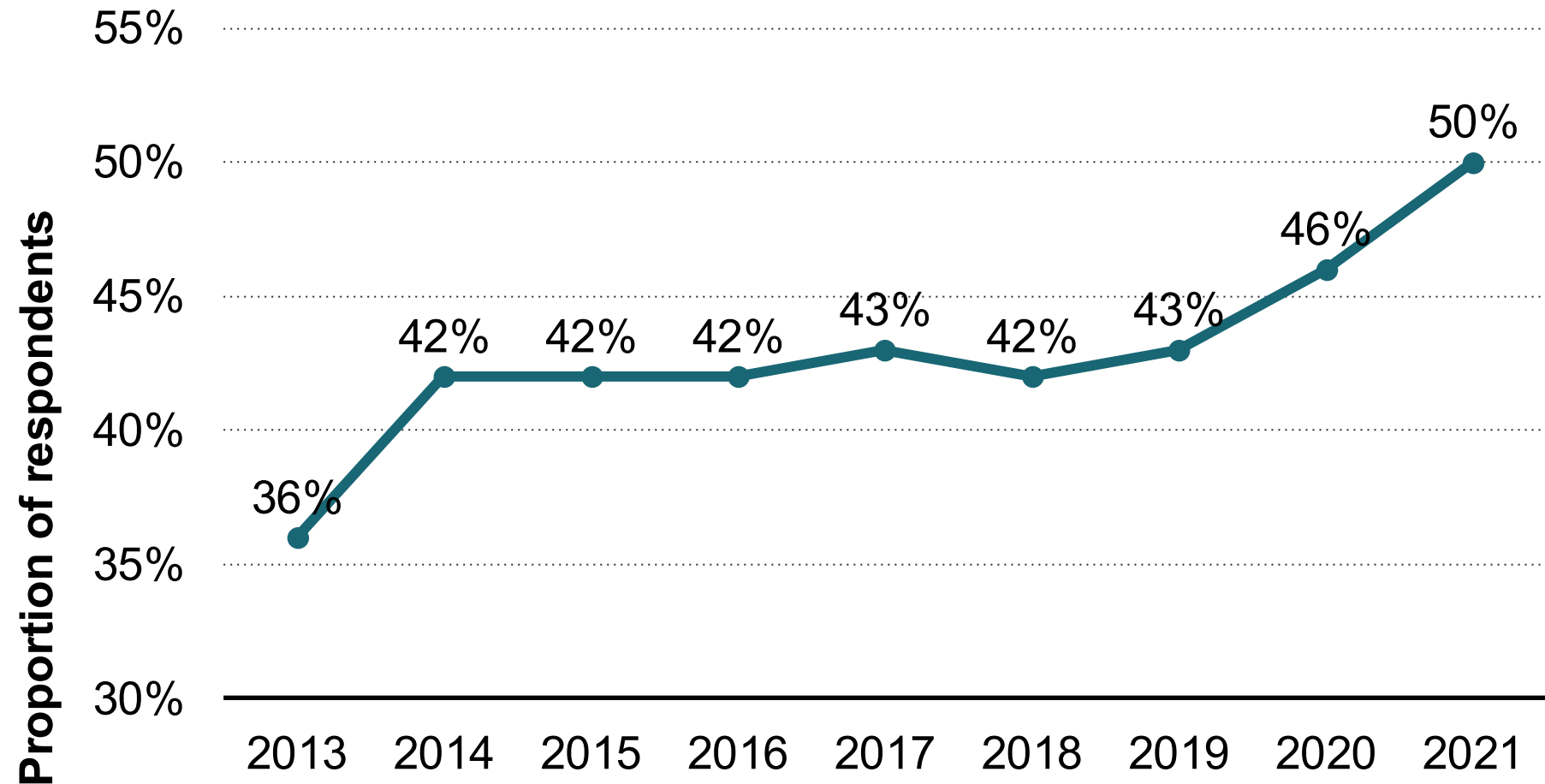
1. Thesis

I. An increasing number of people are no longer engaging in e-sports merely as a leisure activity, but also as a means of earning a living, which raises the question of how this activity should be classified under employment law.



Number of gamers in Germany

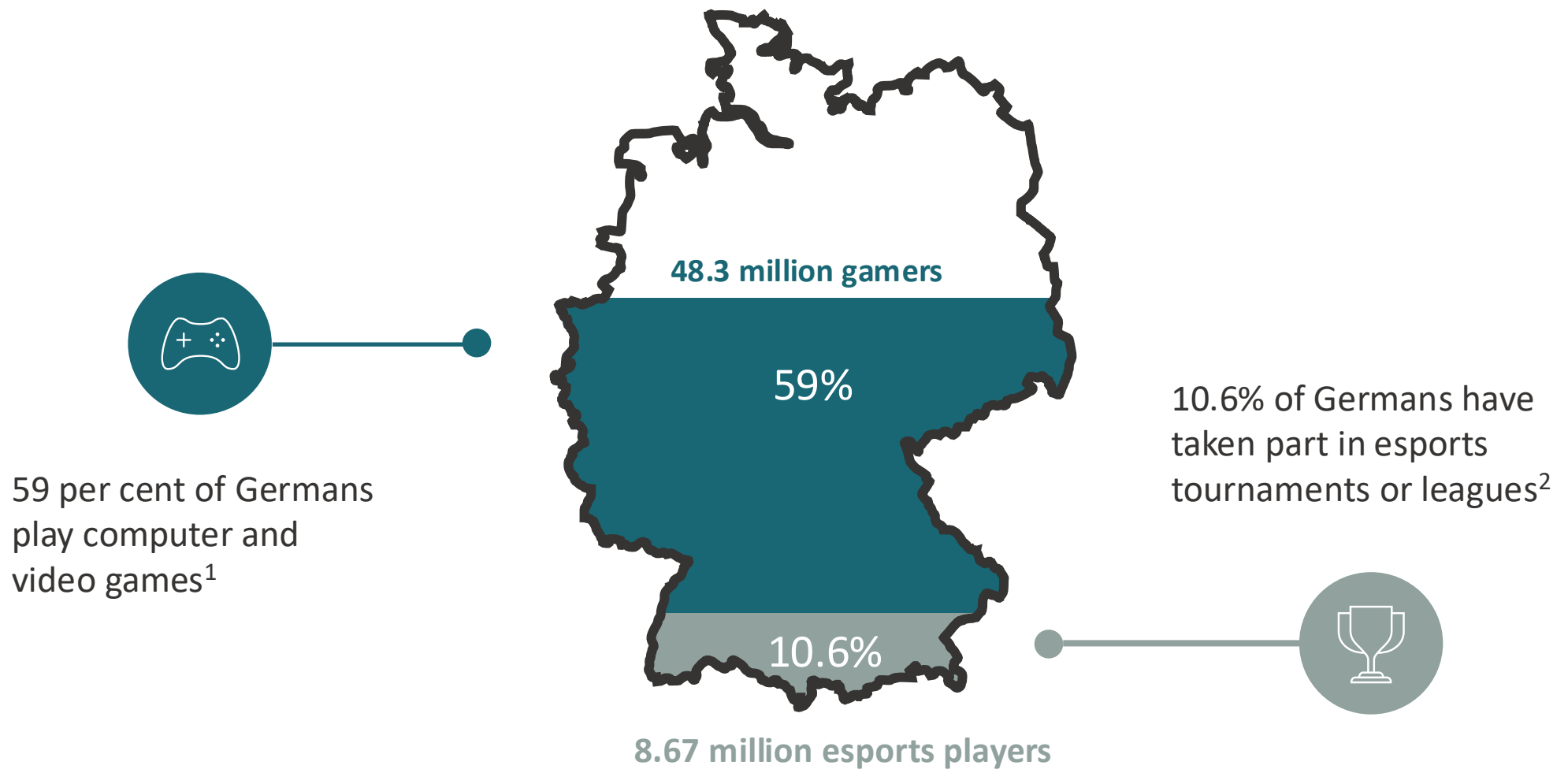
Proportion of computer and video gamers in Germany from 2013 to 2021



1. Statista, proportion of computer and video game players in Germany from 2013 to 2021.

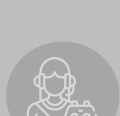


Number of e-sports players in Germany



1. game, Focus on eSports, p. 39.

2. game, Market Data, <https://www.game.de/marktdaten/rund-6-von-10-deutschen-spielen-games-2/>.



2. Thesis

Neither the definitions of e-sports established by the regulator nor the definitions found in legal literature are suitable for establishing a general technical definition of e-sports.

An intuitive definition of eSports



eSports is competition between people using a computer game.





Definitions provided by the standards body

Re: Section 22(5) of the Regulation on the Organisation of Betting (BeschV)

“

eSports, for the purposes of these regulations, is defined as direct competition between human players using suitable video and computer games on various devices and digital platforms, in accordance with established rules. Performance in eSports is determined by the interplay of purposeful operation of input devices in direct response to the game action displayed, coupled with tactical mastery of the overall game situation. The activity relates to video games which, in their structure and mode of operation, meet the requirements for performance assessment, do not leave success in the game predominantly to chance, and provide a reproducible gaming framework for comparing performance between players.

122 words

”

Re: Section 15(3) of the Racing Lottery Regulations

“

Competitions in which participants must demonstrate various specific motor and mental abilities, such as excellent hand-eye coordination, rapid reaction times and exceptional stamina, good spatial awareness, as well as forward-thinking and lateral thinking.

30 words

”

Conclusion of the explanation of the term 'eSports'

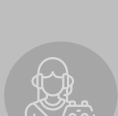


“

eSports is the authorised competition between people using a computer game to compare non-productive, cognitive or physical performance.

”

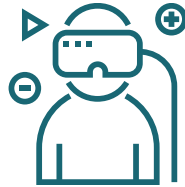
18 words



Activities recorded



Individual esports players
(1v1)



Virtual reality gaming



Team e-sports player
(2v2)



Team e-sports
player (5v5)



Professional



Team e-sports player
(6v6)



Amateur



Regular player



Team leader



Amateur



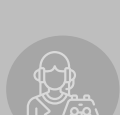
Semi-professional



Mobile gaming



Substitute



3. Thesis

Although the classification of an activity under labour law pursuant to Section 611a of the German Civil Code (BGB) is a decision made on a case-by-case basis, abstract statements regarding the employee status of e-sports players can be made by grouping cases together.

Methodological basis for the formation of case groups



“ Typological concept of the employee

There is **no single characteristic**, out of the multitude of possible characteristics, **which must be present as an indispensable requirement** in order to speak of personal dependence. Nor is there any characteristic of dependence that is not also occasionally found among the self-employed. It is therefore **unavoidable**, for reasons of practicality and legal certainty, **to define dependent employment typologically**. [...] This has led to the Senate's case law – which has been gradually developed and consolidated through numerous cases – recognising **radio and television staff as employees**, in so far as they base their social existence on the fact that they contribute their labour to the production of the broadcasters' radio and television programmes.¹

”

“ Case grouping

The Federal Labour Court (BAG) has stated on several occasions that **non-programme-related work in broadcasting organisations can generally only be carried out within the context of an employment relationship**. Insofar as this might be regarded as establishing a binding legal rule, the Senate does not adhere to it. In reality, that statement **was not a legal principle** in the sense that the absence of programme-related duties on the part of a broadcasting employee would automatically establish their status as an employee, rendering it unnecessary to assess the employee status of non-programme-related staff against the general criteria. **Rather**, the statement in question is to be understood merely **as** an indication based on **empirical evidence**: non-programme-creating staff are more likely to meet the criteria for employee status than is to be expected of programme-creating staff.²

”

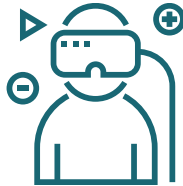
1. Federal Labour Court (BAG), AP BGB § 611 Dependency No. 34, under II. 3.

2. Federal Labour Court (BAG), AP BGB § 611 Dependency No. 125, para. 19.

Career profiles in eSports



Individual esports players
(1v1)



Virtual reality gaming



Team eSports player
(2vs2)



Team e-sports player
(5v5)



Professional



Team eSports player
(6vs6)



Amateur



Regular player



Amateur



Team leader



Semi-professional



Mobile gaming



Substitute



Career profiles in eSports

Composition



Individual eSports
player
(1v1)



Team eSports player
(5v5)

Level of professionalism



Professional



Semi-professional



Amateur



Amateur

Role



Team leader



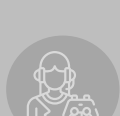
Regular player



Substitutes



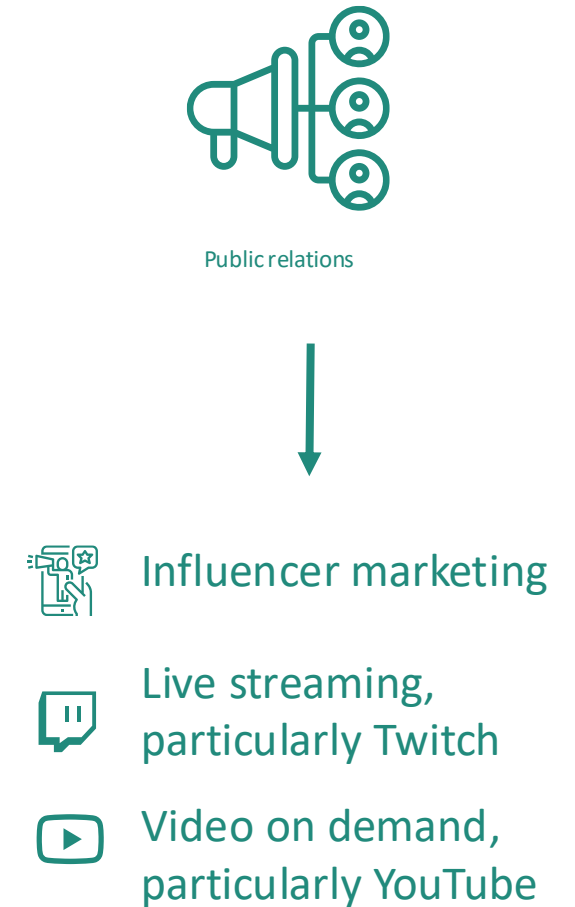
Stand-in



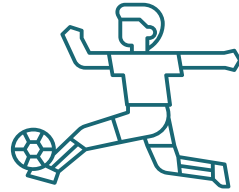
4. Thesis

IV. The work of an e-sports player represents a hybrid of the work of a sportsman or sportswoman and that of a teleworker, with the result that the case law specific to these occupational groups is, in principle, applicable to e-sports.

The nature of e-sports players' work



Comparability of e-sports with other job profiles



(Professional) athletes

The typical activities of an e-sports athlete are, as with traditional athletes:



Training



Competition



Public relations



Remote workers

The typical activities of an esports player include, as with a remote worker:



Working on an electronic device



Working without a fixed workplace

Case law specific to professional athletes



(Professional) athletes

Work as a distinguishing feature:

The Federal Labour Court (BAG) distinguishes between professional sport and leisure activities on the basis of the criterion of work.

Key statement from the Federal Labour Court (BAG):

Sport can constitute work if the athlete is primarily pursuing their own economic interests and, in doing so, is simultaneously serving the economic interests of the club.

Criticism of the BAG's distinction:

The distinction is dogmatically misplaced and should be made on the basis of the intention to be legally bound.

Applicability to e-sports:

In principle, this seems obvious; however, the approach is already to be rejected on legal grounds in the context of sport.

Assessment of the obligation to follow instructions:

With regard to professional footballers, the assessment of the required degree of personal dependence is unusual.

Key findings of the Federal Labour Court

Approximately 20 hours of training, tactical discussions and matches per week are not sufficient to establish that a player is subject to instructions if amateurs are treated in the same way.

Criticism of the BAG's assessment:

All four criteria for being subject to instructions are met, which generally points to personal dependence.

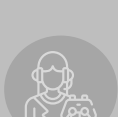
Applicability to esports:

An application to e-sports is unlikely, as the BAG's ruling is likely attributable to the fact that amateur football should not be burdened with the obligations of employment law.



5. Thesis

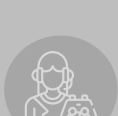
Despite the lack of geographical boundaries to their work and the freedom to make decisions regarding their performance during competitions, professional esports players are generally employees of their clan.



Definition of a professional esports player



A professional esports player is someone who essentially earns their living from this activity.





Guidelines on the place of work:

Guidelines on the physical place of work:

In principle, eSports can be conducted entirely virtually and are therefore not tied to a specific location.

Specific instructions:

- Participation in offline competitions
- Public relations (exhibition matches, trade fairs, interviews, etc.)

Implied instructions:

Assessment is based on the objective recipient's perspective:

- Installation of the hardware by the employer at the player's premises (particularly if it cannot be easily relocated)
- In any case, the player must be based at a location where the hardware is available

Requirements regarding the virtual place of work:

A requirement to be present in an online lobby may have a similar effect of tying the employee to a specific location as the requirement to be at a physical workplace.

Interpretation of the term 'location' in Section 611a(1)(2) of the German Civil Code (BGB):

- **Wording:** 'Place' has hitherto meant a physical location; however, a change in the literal meaning of a word in response to real-life circumstances is a common linguistic process known as 'porosity'.
- **Background:** The provisions of Section 611a of the German Civil Code (BGB) were developed with the 20th-century factory worker in mind, although the provision itself dates from 1 April 2017.
- **Purpose:** The protection of digital work is intended just as much as the protection of conventional work.

Alternatively: Classification as an indicator of integration into modern work organisation

Professional esports players are bound by instructions

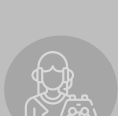


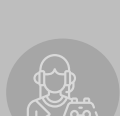
Instructions for implementation:

Instructions given by the team leader during the game do not constitute a declaration of intent, as neither the players nor the clan have any financial or legal interest in them.

Reason:

- otherwise, the player risks facing consequences under employment law if they deviate from these instructions due to the course of the game
- Impairment of the players' performance, as they would be unable to react to the situation



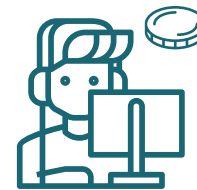


6. Thesis

When classifying semi-professional esports players under employment law, distinguishing between a performance contract and a partnership arrangement under company law presents particular difficulties.



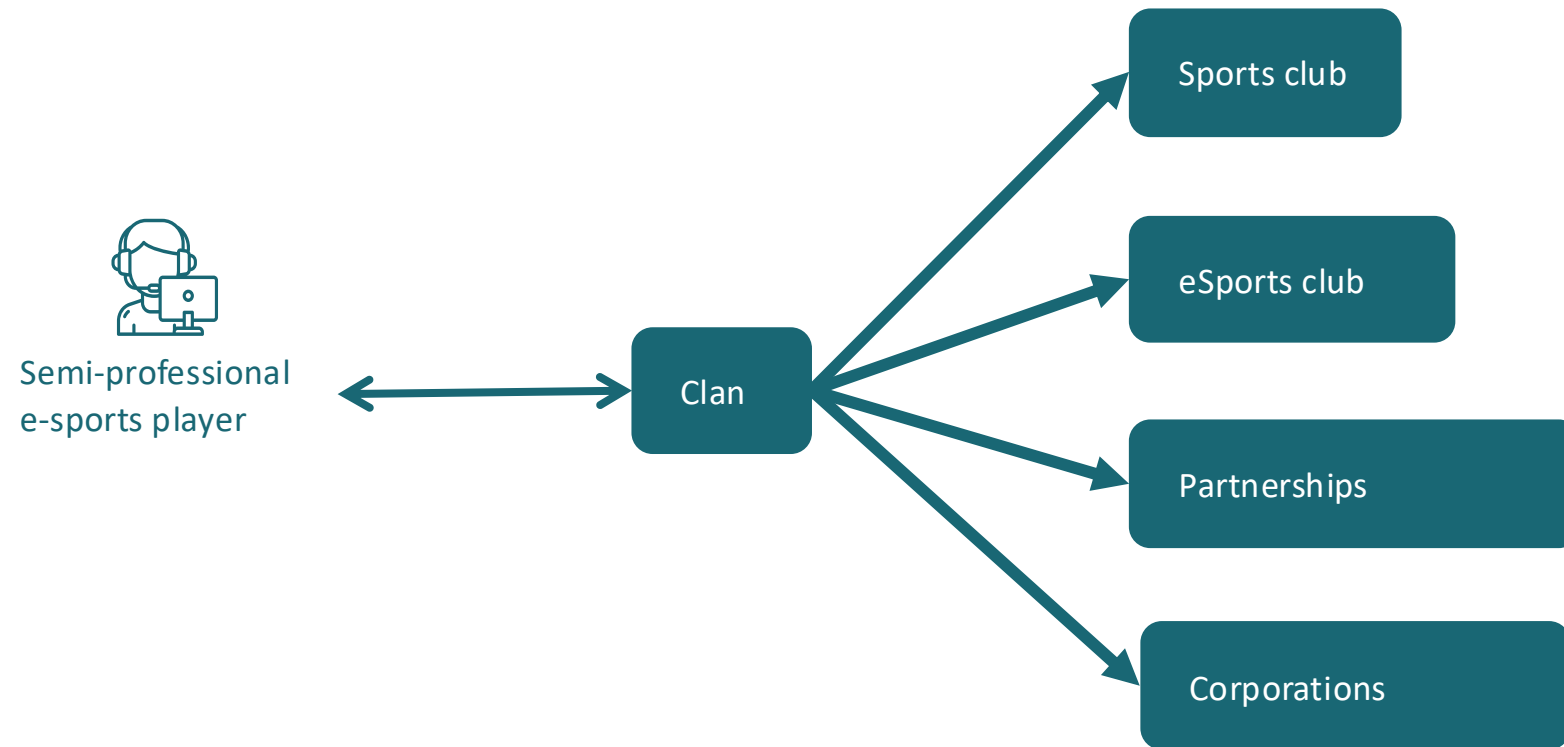
Definition of a professional esports player



A semi-professional e-sports player is someone who earns remuneration from this activity that goes beyond a mere allowance for expenses, but is not sufficient to cover a substantial part of their living expenses.



Overview of the clan's legal forms





Sports clubs

eSports club

Partnerships

Companies



eSports club

Partnerships

Companies

Sports clubs

Club membership

Exchange agreement



Distinction according to the Federal Labour Court

Personal dependence must go beyond the dependence already established by club membership.

Critical assessment:

As a rule, neither the articles of association, the general duty to support, nor the general duty of loyalty of a sports club give rise to an obligation to perform in sport.

Distinction based on the contractual partner criterion



Multilateral =
shareholder
cooperation



Bilateral =
exchange contract

Consequence: at the very least, the 'question of whether' there is a duty to participate in sporting activities as a member must be established by a multilateral agreement (in the articles of association) or by a resolution of the club.



Contribution pursuant to Section
706(3) of the German Civil Code (BGB)



or exchange agreement?

Partnerships

Sports clubs

eSports clubs

Companies

Distinction based on the contractual partner criterion:



Multilateral = contribution by partners



Bilateral = exchange contract



7. Thesis

Amateur esports players are generally not employees. However, the covert payment of remuneration may be an indication of an intention to enter into a legally binding relationship and thus constitute a contract of exchange which, subject to the further conditions set out in Section 611a of the German Civil Code (BGB), is to be classified as an employment contract.





Definition of an amateur e-sports player



An amateur e-sports player is someone who does not receive any remuneration for this activity, but may receive an expense allowance.



Amateurs and pseudo-amateurs

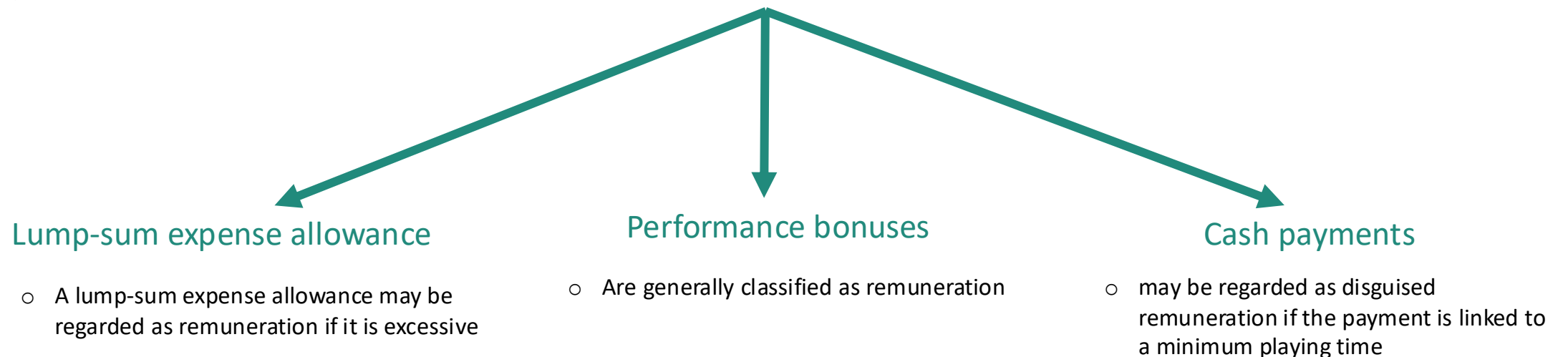


Principle:

Amateurs are not employees, as there is no contract under private law.

Exception:

If the players are paid hidden remuneration, this may indicate an intention to enter into a contract under private law.



Theses



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II. Neither the definitions of e-sport established by the legislator nor the definitions found in legal literature are suitable for determining a general technical definition of e-sport.



III. Although the legal classification of an activity under Section 611a of the German Civil Code (BGB) is a case-by-case decision, abstract statements regarding the employee status of esports players can be made by grouping similar cases together.



IV. The activity of an esports player represents a hybrid of the activities of a sportsman and a teleworker, with the result that the case law specific to these occupational groups is, in part, transferable to esports.



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VII. Amateur esports players are generally not employees. However, the covert provision of remuneration may be an indication of an intention to enter into a legally binding relationship and thus of an exchange contract, which, subject to the further conditions of Section 611a of the German Civil Code (BGB), is to be classified as an employment contract.