

# CALL OF DUTY: THE YET UNKNOWN BATTLEFIELDS OF EU COMPETITION LAW AND ESPORTS



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## I. INTRODUCTION

Electronic sports (“esports”) or professional video gaming is taking the world (of sports) by storm. Since the first chess game was developed for computers in the 1950s, competitive video games have evolved, and now sell out world-leading venues such as the Staples Center, and are being taught in schools and universities. Most importantly, esports has become an industry in its own right, with a global annual revenue estimated at \$1.5 billion in 2019. So far, this relatively new yet booming sector has not received much antitrust attention. In an era where “big tech” is scrutinized more than ever by antitrust regulators and the organization of traditional sporting events is an increasingly fertile ground for antitrust litigation, this will no doubt change soon.

In this paper, we discuss the core areas where EU Competition law is most likely to challenge existing practices in esports.

With structures and actors similar to traditional sports, esports is widely expected to raise analogous antitrust issues. However, the very status of esports as “sports” under Union law is contested. Moreover, it is important to consider the differences in terms of how traditional sports and esports are organized. In particular, the absence of sports governing bodies in the traditional sense as well as the fundamental role played by game publishers and their IP rights in shaping virtually all aspects of the esports value chain means that the competition-IP interface is likely to play a very prominent role in future antitrust enforcement in this sector.

## II. THE ESPORTS INDUSTRY

In a nutshell, esports can be described as a competition between human players (two or more individuals or teams) within the framework of a video game.<sup>2</sup> The first computer games were created soon after the development of the first modern computers and the first video games tournaments took place in the early 1970s in the United States. An increasingly beloved (teenage) pastime in the 1980s, esports evolved to its current professional status and popularity with the boom in internet connectivity in the 1990s.

Esports can be broadly divided into the following genres:

- *first-person shooters* are weapon-combat focused and allow the player to experience the game from the perspective of the player character (protagonist). Prominent first-person shooter games on the esports circuit are Counter Strike, Call of Duty and Halo;
- in *real-time strategy* (“RTS”) games, players aim at controlling areas of a map by resource gathering and base building and ultimately destroying opponents’ assets. This includes civilization building

<sup>2</sup> See a detailed discussion in Holden, Kaburakis & Rodenberg, *JLas* Vol. 27, No. 1, 2017, p. 46 et seq. as well as Abanazir, *E-Sport and the EU: the view from the English Bridge Union*, *The International Sports Law Journal* (2019), 18:102-113.

games (such as the Age of Empires series) and war simulations (Warcraft). The *Multiplayer online battle arena* (“MOBA”), an established subgenre of RTS, are games between two teams in which each team member controls a single game character. MOBA games focus less on managing assets and more on developing the abilities of the game characters, where the player has the same goal of destroying the base of the opponents while protecting their own. One of the most popular esports games, League of Legends, belongs to this genre, as well as World of Warcraft;

- *fighting games* are based on close combat of on-screen characters. Examples include Mortal Kombat and Super Smash Bros;
- *sport simulations* simulate traditional sports, like EA Sports’ FIFA (football) and NHL (ice hockey);
- *battle royales* are survival games where the goal is to be the last person or team standing, having eliminated all other competitors. Popular battle royale games include Fortnite and PlayerUnknown’s Battleground;
- *digital collectible card games*, allow players to acquire game pieces (cards, avatars, icons) into a personal collection with the ultimate goal of defeating an opponent. Hearthstone is one of the most popular games of the genre.

The emergence of (free) media platforms and online streaming services like YouTube and Twitch has enabled the creation of an ever-growing international audience, estimated at about 500 million in 2020. Nowadays, collegiate esports tournaments are commonplace, esports competitions are selling out landmark sports venues like the Staples Center in Los Angeles or the O2 in London, and the International Olympic Committee has even debated their possible incorporation into future Olympic events.

The large audiences have also boosted revenue, which mainly comes from advertising and brand investment. Over the last decade, esports has experienced year to year revenue growth of up to 40 percent. The largest markets worldwide in terms of income are the U.S., Canada, and China. However, Europe is quickly catching up with an expected growth in revenue of 300 percent between 2019 and 2023 and an expected increase in audience of 23 percent, with Germany being a key growth market.

This growth might be even steeper due to the Covid-19 pandemic as traditional sports events are brought to a halt and crowded arenas unlikely to return very soon. By contrast, the esports industry is better equipped to go remote and is set to increase its share of the revenue pie during the crisis. In fact, traditional sports are trying to capitalize on the popularity of esports during the lockdown and some have temporarily replaced their leagues with esports competitions – for example, over one million viewers tuned in to watch La Liga’s FIFA 20 esports tournament.

The esports ecosystem has evolved together with its economic growth and its actors have grown in sophistication. As with “stick and ball” sports, each game is organized as a competition between professional players who are members of a team usually specializing in a single game. Similar to “traditional” sports teams, esports teams organize coaching, sponsorship contracts, travels and pay players’ salaries. The professional players compete in tournaments and leagues arranged by organizers and held in sold out arenas. These tournaments and leagues are broadcast to viewers by online streaming services and through online platforms. Advertisements are run in order to promote products and brands to the viewers. In the largest esports competition, DOTA 2: The International, the prize money for each member of the winning team can top the prize money for winning an ATP Grand Slam. Sponsorship and advertising account for approximately 60 percent of the total revenue in the esports sector.<sup>3</sup> Over time, a gambling industry has also evolved around esports. However, sports governing bodies such as federations and associations, which play a crucial role in traditional sports, are only just emerging.

Instead, the decisive actor for each game is its developer or publisher, who enjoys intellectual property (“IP”) protections on most of its aspects. Based on these IP rights, publishers can, first of all, establish and change the rules of the game at their own discretion. They also tend to have the final say on infringements of rules and dispute resolution. Second, publishers (can) control who access their intellectual property, e.g. which teams and players<sup>4</sup> are allowed to compete in their game and who can organize, broadcast and distribute tournaments, as well as how and where. In many ways, it can be argued that the publishers combine the roles of sports governing bodies and league organizers in traditional sports. They set the rules and determine who can participate in the game.

<sup>3</sup> See <https://gimegatrends.com/articles/esports-market-in-europe-predicted-to-reach-e670m-by-2023-as-germany-leads-the-way/>.

<sup>4</sup> E.g. <https://www.sportbusiness.com/news/konami-blocks-two-laliga-players-from-charity-fifa-20-tournament/>.

### III. THE “SPECIFICITY” OF ESPORTS

In order to identify potential EU competition law issues of esports, it is necessary to analyze whether esports can be considered “sports” at all within the meaning of Union law. This is a key legal issue since case-law from the EU courts shows that the “specificity” of sport must be taken into account when applying EU antitrust rules.

In 2009, the amended Treaty on the Functioning of the European Union (“TFEU”) enshrined this principle and explicitly recognized the “specificity of sport” in its Article 165. This provision states that the Union shall take “account of the specific nature of sport.” The European Commission defines the “specificity of sports” as the “inherent characteristics of sport which set it apart from other economic or social activities” and also states that sport “makes an important contribution to the European Union’s strategic objectives of solidarity and prosperity.”<sup>5</sup>

As far as EU competition law is concerned, it is important to point out that a core “specific” element of sports contradicts the standard assumption that market operators aspire to a monopolistic position as the ultimate indicator of success. In sport, an actor (whether club, team or individual) cannot be successful without its competitors. The rivalry itself is what attracts the audience, especially in team sports. Real Madrid generates much more revenue from playing archrival Barcelona or Liverpool than from playing a second-tier team. Sports rivals will therefore have a long-term interest in each other’s sporting skills and economic viability in order to ensure a balanced competition with an uncertain result. Consequently, successful competitive sports require not only adherence to a common set of rules but also a certain degree of economic cooperation between rivals (instead of unbridled economic competition, which is the ideal in traditional markets).

Moreover, the EU has recognized the important societal role of sport in health, education, active citizenship as well as social inclusion, integration, the fight against racism and violence etc.<sup>6</sup> In order to maintain these functions of sport, the EU has more than once recognized the specificity of sport and has pledged to take it into account “in its actions under the various Treaty provisions.”<sup>7</sup>

However, the specificity doctrine does not exempt sports from antitrust enforcement: the European Court of Justice (“ECJ”) has established that “the practice of sport is subject to Community law (...) in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.”<sup>8</sup> Nevertheless, in order to cater to the “specificity” of sports and their societal role, the ECJ introduced “sporting rules,”<sup>9</sup> i.e. rules that ensure the “organisation and proper conduct of competitive sport,” an additional mandatory proportionality test embedded within the general prohibition of anti-competitive agreements in Article 101(1) TFEU was given.

Acknowledging this high risk of legal uncertainty,<sup>10</sup> the European Commission has published a non-binding categorization of organizational sporting rules as follows:<sup>11</sup>

- (i) organizational rules that are likely to comply with EU Competition law, i.e. rules that are inherent and proportionally necessary to the organization of sport:
  - selection criteria for sport competitions;
  - anti-doping rules;
  - “at home and away rule”;

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<sup>5</sup> European Commission, White Paper on Sport, COM(2007) 391 final, p. 2 et seq.

<sup>6</sup> *Idem.* p. 3 et seq.

<sup>7</sup> European Council’s Declaration on the specific characteristics of sport, December 2000 (Nice Declaration), para. 1.

<sup>8</sup> C-36/74, *Walrave*, ECLI:EU:C:1974:140, para 4, confirmed in C-13/76, *Donà*, ECLI:EU:C:1976:115 and C-415/93, *Bosman*, ECLI:EU:C:1995:463, settled case law.

<sup>9</sup> C-519/04, *Meca-Medina*, ECLI:EU:C:2006:492, paras. 40 et seqq.

<sup>10</sup> Many national competition authorities have adopted the approach of the ECJ, see EC Final Report on Specificity of Sport, 2016 page 34-39.

<sup>11</sup> European Commission, Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport, COM(2007) 391 final, 2.2.1.

- rules on transfer periods;
  - nationality clauses for national teams;
  - licensing requirements for clubs, i.e. rules on financial management and stability;
  - rules concerning multiple ownership of clubs.
- (ii) organizational rules that are less likely to comply with EU Competition law, i.e. rules that have been found not to be inherent and proportionally necessary to the organization of sport; these rules could be justified under Article 101(3) TFEU:
- rules on agent licensing;
  - limitation of the legal challenge of decisions taken by sports association;
  - transfer fees for expired contracts;
  - rules limiting the employment of foreign players.
- (iii) other connected commercial activities that are unrelated to the “specificity” of sport and undoubtedly fall within the scope of EU Competition law:
- ticketing arrangements;
  - joint selling of media rights;
  - joint buying of media rights.

With many of the above-mentioned features present also in the esports ecosystem, it becomes necessary to determine whether esports should be categorized as “sports” within the meaning of Union law. Though the jury is still out, we believe that esports are unlikely to enjoy the privileged position of traditional sports and may therefore be more at risk to antitrust enforcement.

The ECJ has noted that the competitive core of an activity cannot be considered sufficient to define that activity as “sport.” In the context of VAT exemptions, the Court has determined that what sets apart sports from other purely economic activities is “a not negligible physical element.” This led the Court to reject a claim that bridge amounts to a “sport.”<sup>12</sup>

Whether a “not negligible physical element” is specific to esports is questionable. Undoubtedly, esports are based on fine motor skills and hand-eye coordination, just like Olympic disciplines like archery or shooting. However, the basic difference between esports and archery or shooting lies in the fact that the physical element in esports does not impact the “real” world where they take place, only the virtual world. Some legal commentators argue that the physical element inherent in sports requires that “the actual physical element produces the outcome”; accordingly, the fact that real-life actions produce effects in the virtual world would be insufficient to establish a meaningful “physical element” in esports.<sup>13</sup>

It has also been argued that esports generate fewer societal benefits than traditional sports, and that esports competitions focus on consumption and profit maximization rather than on positive externalities like social integration or cultural preservation. Furthermore, a number of esports involve (virtual) violence and success is measured in terms of “annihilating” the opponent. According to the critics,<sup>14</sup> this may contribute to a rise of violent conduct in real life and poor mental health of players, thus distancing esports even further from the positive cultural and social impact attributed to traditional sports.

<sup>12</sup> C-90/16, *The English Bridge Union v. Commissioners for Her Majesty's Revenue & Customs*, ECLI:EU:C:2017:814.

<sup>13</sup> Abanazir, *The International Sports Law Journal* (2019), 18:107.

<sup>14</sup> *Idem*. 18:110.

All in all, we think it is unlikely that esports will be deemed to amount to “sport” under EU Competition law and enjoy the “privileges and “specific” justifications of restrictive conduct that are available to normal sports. Rather, esports would be treated as any other economic activity and as such be fully scrutinized under EU Competition law, including its selection criteria for gamers, anti-doping rules, or any licensing requirements for clubs. This does not mean however that such aspects of the game will automatically be deemed anti-competitive and prohibited. Rule-making bodies outside sports in a narrow sense may also have a legitimate interest in organizing such ancillary aspects in order to protect the integrity of the game, and the European courts are likely to confer such bodies a certain margin of discretion in this respect.<sup>15</sup>

But where rule-making powers are used to foreclose competition, antitrust enforcers will stand prepared to intervene and may show even less deference than to traditional sports governing bodies.

## IV. DEFINING THE RELEVANT MARKET

The definition of the relevant market is key to any competitive assessment, as it sets the framework for measuring the competitive forces at play and whether a market actor holds a dominant position. Absent market power or other market failures, the self-disciplining mechanisms of the free market will ensure efficient outcomes.

In traditional sports, the markets have been defined around a single type of sport, with even narrower markets for specific activities like event organization, broadcasting, and transfers of players.<sup>16</sup> There is much to suggest that the same approach will be taken in esports and that narrow product markets will be delineated for a particular game.

Indeed, similarly to conventional sports, esports competitions are organized for individual games and players also tend to specialize in one game only. What is more, studies have shown<sup>17</sup> that viewers are unlikely to switch between esports given the attachment to specific teams and/or players and the complexity of learning new rules in order to be able to follow the game. Further, most viewers seem to watch a particular game being played in order to enhance their own skill at playing that same game. Moreover, the publisher, as the rule setter and holder of the key IP rights, will wield significant influence over access to this market.

The market for a single game can be further sub-divided into various vertical markets depending on specific activities – organization of competitions, broadcasting, teams, transfers of players, advertisement, viewers, viewer/user data, and selling the game outside of professional competitions.

In the end, however, the exact market definition will depend on a case by case analysis that must be informed by economic analysis considering features such as network effects and the multi-sided nature of these markets (spectators and advertisers). In addition, it is important not to lose sight of the strong link to the market for the sale of the games where publishers arguably do fiercely compete with each other, not least in the innovation space.<sup>18</sup> Is this rivalry sufficient to ensure that the conduct of the publisher and other market agents within the ecosystem of a particular esports is guided by efficiency considerations? In this sense, given the relatively short-lived nature of most video games, any market power in esports will often be transitory and gone in the blink of an eye when compared to established traditional sports like football.

In terms of geographical markets, it can be easily argued that markets are worldwide, as with online streaming there was never a need for the award of national television contracts. However, narrower geographical markets can be defined where streaming is geo-blocked or in jurisdictions which have different regulations that impact on the market, as well as depending on the geographic scope of tournaments (regional, national, European etc.).

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<sup>15</sup> See, as regards the rule-setting by professional association, C-309/99, *Wouters*, ECLI:EU:C:2002:98 and, specifically in a sports context, C-519/04, *Meca-Medina*, ECLI:EU:C:2006:492.

<sup>16</sup> European Commission, Case AT. 40208, *International Skating Union's Eligibility Rules*, para. 85 et seq. with further references.

<sup>17</sup> Miroff, *Tiebreaker, An Antitrust Analysis of Esports*, *Columbia Journal of Law & Social Problems* 52 (2), 2019, 198, 204.

<sup>18</sup> European Commission, Case in M.7866 – *Activision Blizzard/King*.

## V. SPECIFIC ISSUES AROUND IP RIGHTS

Any use of a video game is subject to the intellectual property rights of the publisher that has developed it. While in conventional sports, the powerful governing bodies (like UEFA in football) might control the organization of events, but they do not have the possibility of going so far as banning individuals from playing football or basketball in their backyard or water polo in their own pool. By contrast, any game publisher could forever ban anybody from ever playing their games.

It can be (and has been) argued that publishers of video games hold “absolute power” over their products and will by definition hold monopoly over the game also when played professionally.<sup>19</sup>

As mentioned, in esports, there are typically no governing bodies that approve of the organization of events like in traditional sports: this role is filled by the intellectual property right holders. Not only organizers, but virtually all downstream actors (players, teams, broadcasters, viewers, advertisers) depend on the publishers for permission to use the respective IP rights in order to be active on the respective downstream markets. This means that IP rights holders can easily control access to the market as well as the conduct of all downstream actors in ways that may raise abuse of dominance issues (Article 102 TFEU). In Union law, the existence of an IP right cannot as such infringe competition law. However, competition law can be applied to curtail the exercise of such rights if the effect is to restrict competition, in particular where antitrust enforcement is not deemed to put incentives to innovate at risk.<sup>20</sup>

Moreover, some fear that publishers will have both incentives and the ability to vertically integrate and reduce business opportunities for third parties in the downstream markets.<sup>21</sup> Vertical integration is often a source of efficiency gains. However, the issue becomes more complex if publishers instead of granting licenses e.g. to independent organizers and broadcasters, decide to set up “walled gardens” where they take up these activities exclusively on their own. Competition regulators have struck down analogous practices in traditional sports,<sup>22</sup> which suggests that esports publishers may also face legal challenges if they go down this route. At the same time, publishers may argue that a “walled garden” approach is an efficient way to guarantee the uniform image of the product and stay true to the publishers’ creative vision, as well as to reward innovation (publishers invest heavily in game creation),<sup>23</sup> and should therefore amount to a perfectly legitimate business strategy.

In any event, the inevitable friction that will arise between different market actors along the esports value chain as the industry matures is likely to lead to legal challenges concerning matters such as:

- excessive licensing fees;
- refusal to grant licenses;
- exclusivity agreements;
- price discrimination; and
- tying and bundling of services offered at different levels of the market.

Again, such conduct should arguably not be seen as *per se* abusive and might be justified in esports based on considerations (e.g. incentives to innovate) that play less of a role in traditional sports. In the end, regulators and courts must assess each case on its own merits.

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<sup>19</sup> Abanazir, *The International Sports Law Journal* (2019), 18:109.

<sup>20</sup> See e.g. T-201/04, *Microsoft v. Commission*, EU:T:2007:289.

<sup>21</sup> Miroff & Tiebreaker, *An Antitrust Analysis of Esports*, *Columbia Journal of Law & Social Problems* 52 (2), 2019, 190.

<sup>22</sup> See European Commission, Case AT. 40208 - *International Skating Union's Eligibility Rules*.

<sup>23</sup> A leading listed game publisher like Electronic Arts reported an R&D intensity (R&D spend as a percentage of net revenue) in 2019 of 29 percent, which is very high by any standard. See the company's 2019 Form 10-K Annual Report, page 35. See also Miroff & Tiebreaker, *An Antitrust Analysis of Esports*, *Columbia Journal of Law & Social Problems* 52 (2), 2019, 212, 213.

## VI. CONCLUSION

Once a grassroots movement, the seemingly unstoppable revenue growth of esports, combined with the gatekeeper role played by publishers, is bound to attract the attention of antitrust regulators and create legal disputes involving competition law claims.

Esports are different from traditional sports, and perhaps not “sport” at all in the legal meaning of the term. Accordingly, though existing case-law regarding traditional sports will no doubt be invoked by analogy, we anticipate that antitrust enforcement will largely revolve around the competition-IP interface, where experiences from other innovation-driven industries may prove at least as relevant.

In any event, competition law is likely to have a significant impact on the organization of the emerging esports ecosystem (or ecosystems) and on how publishers and other market actors in this industry interact with each other. As in other nascent markets, legal certainty is a scarce resource, but companies must start weighing up competition law risks as part of their decision-making process.





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