

**ONLINE GAMING AND SUSTAINABILITY:  
A SOCIAL CHALLENGE FOR PRIVATE LAW\***

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**Abstract**

The author analyses, with regard to the E-sports industry, the interaction between the virtual world and the real world, considering the two dimensions of the same world, because the former affects the latter. Starting from this point, it can be seen that, when looking at the E-sports industry, there are the same social sustainability problems as in traditional industry sectors. From these conclusions, the author proposes to find a solution to the social divide in the E-sports industry as well.

**Keywords:** E-sports, social sustainability, industrial policies, legal solutions.

Summary: 1.Introduction; 2.E-sports: to be or not to be (Sport), that is the question; 3.E-sports and Social sustainability 4. Social sustainability policy in the E-sports industry; 5. Conclusions.

**1.Introduction.**

The concept of what is real and what is not is often overlapping nowadays, not least in view of the imminent arrival of the Metaverse, which has put new cards on the table regarding the different dimension of the world as we have known it to date.

It might sound like science fiction, but in fact the many-universe theory is already known in the field of physics, but how does it work? Scientists claim that there are many parallel universes outside of the one we know in time and space in which we live<sup>508</sup>. The basis of this theory can be found in Plato's thought with his "World of Ideas", who argued for the existence of a different world in the Hyperuranium, which lives in action but is separate from ours.

Finally, we can argue that the concept of a virtual world or metaverse are neither more nor less than the evolution of human thought, which has much older roots. Follows that it could be stated that the Metaverse is a one of world of Multiverse's theory.

So, if we assume that there are many parallel universes other than the one we know, are they real, virtual or alternative? And what are the consequences in our world?

The answer at first sight might be that understanding the nature of these different worlds is not important, because the real goal is to verify whether or not they exist, but how? The way might be to find evidence of their existence in our world.

Answering these questions is not easy because one can arrive at different solutions depending on the different points of observation of the phenomenon.

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\*This paper should be read together with the essay written by my colleague Giorgia Bevilacqua, entitled "Online Gaming and Sustainability: A Social Challenge for International Human Rights Law"; as both provide a comprehensive overview of the topic.

<sup>508</sup> Hugh Everett III was the first Scientist, who proposed the many-worlds theory in 1957, see Everett, H., 1957, 'Relative State Formulation of Quantum Mechanics', *Review of Modern Physics*, 29: 454-462

If what is virtual is not real, it should mean that what happens in the virtual world has no effect in our world, but does it? What is the interconnection between real and virtual worlds?

The fields in which this topic can be addressed are many, but one out of all is significant: e-sports. They are a clear demonstration of how virtual and real are indeed two different worlds but not so autonomous from each other. It is also more evident if one look at the spill-over of esports into social life, just to think at their boom, particularly during Pandemic, which is involving the new generations and their future development.

According to recent report of UNICEF “Gaming and the Metaverse” «from 2016 to 2021 the gaming industry’s global revenues grew by more than 50% to reach \$198.4 billion in 2021<sup>22</sup> – roughly four times the size of the global digital, home entertainment market. While this exponential growth was supercharged by social distancing measures introduced during the COVID-19 pandemic, the trend is not likely to change soon. PricewaterhouseCoopers (PwC) predicts that total gaming revenue will grow by 9% annually to reach \$279.4 billion by 2025»<sup>509</sup>. This underlines how the virtual world drives powerful economic interests, which are certainly more real than virtual. This could be understood as a first indication of the legal relevance of esports, because when the social phenomenon has an economic dimension then it must also be considered from a legal point of view in order to avoid gaps in protection.

With this paper we intend to show how what happens in the virtual world has real effects, which should be regulated by law. We will not review the history of esports here, but merely investigate the legal dimension of esports in the real world, also thanks to analyses of their social sustainability.

We’ll analyse the meaning of esports (Section 2), then what is its link with social sustainability (Section 3) and the consequences application in Industry (Section 4). It will be shown how a virtual world is more real than we are yet thinking.

## **2. E-sports: to be or not to be (sport), this is the question.**

What are esports? Are they gaming or sports? Firstly, it is necessary to understand what e-sports are and whether they are different from traditional sports. The answer allows us to frame the nature of this phenomenon as legal or not.

Indeed, if we considered esports to be just a gaming, it would mean that they do not need legal protection and therefore there would be no point in investigating them. There is a fine line between what is legally relevant and what is not, because only in the former case is there a problem with legal protection. However, if esports are legally relevant, it will be possible to prove on the one hand that the virtual world has effects in the real world and on the other hand what their interconnections are.

We have to start with the definition of esports, what they are in substance, considering that until now there isn’t a shared definition of it, just think that in Italy a law draft<sup>510</sup> on E-sports is recently pending in Parliament.

That all being stated, in this section we will compare the various legal sources on the subject and attempt to use the legal interpretative method to provide a solution to this preliminary question, a fundamental step in moving forward in these studies.

In short<sup>511</sup>, esports are a form of competition based on video games, and generally take the form of organised, multiplayer, videogame competitions that are played either individually or as teams.

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<sup>509</sup> Unicef recommendations, 2020, p. 12

<sup>510</sup> The reference is to the draft law entitled “*Disciplina degli sport elettronici o virtuali (e-sport) e delle connesse attività professionali ed economiche*”.

<sup>511</sup> This paper recalls what has already been analysed in an article “*Approaching the Legal Issues Surrounding Social Sustainability in Electronic Sports*”, written together with my colleague Giorgia Bevilacqua in *Rassegna di diritto ed economia dello sport*, 2022, no. 2, p. 277-301.

Whether esports offer a new way of considering sport depends on the legal method that is used to interpret the concept. In order to legally define a new phenomenon, several interpretative methodologies<sup>512</sup> can be adopted and it is necessary to verify which method is the most correct.

If we look at the decision of the European Court of Justice in 2017<sup>513</sup>, this seems to have used the literal interpretation method. The Court was questioned on the non-applicability of Article 132, para. 1, let. m) of Directive 2006/112 (providing for exemption from VAT) to duplicate bridge, as this was to be considered a sport; accordingly, the Court tried to give a definition of sport.

The preliminary question to be resolved was the qualification of duplicate bridge as a sport. The Court commented thus: «What are the essential characteristics an activity must have to be a “sport” within the meaning of Article 132(1)(m) of Directive 2006/112 [...]? In particular, must an activity have a significant (or not insignificant) physical element that is relevant to its outcome or is it sufficient that it has a significant mental element that is relevant to its outcome?»<sup>514</sup>. The Court concluded by stating that duplicate bridge cannot fall under the concept of traditional sport because there is no prevalent physical activity. Consequently, if we accept the Court’s interpretation, esports should be excluded from the general concept of traditional sport and instead be qualified as video games. It is important to note that this judgement concerns the notion of sport in a particular area, but cannot be considered valid in general; nor is it to be accepted that some physical aspect is the only principal element characterising sport.

We reach the same conclusion if we take the definition of sport in Art. 2 of the European Sports Charter, which defines sport as «any form of physical activity which, through organised or unorganised participation, has as its objective the expression or improvement of physical and mental condition, the development of social relationships, or the achievement of results in competitions of all levels»<sup>515</sup>.

It seems that the characteristics of sport are physical activity and competition. With this definition, it already seems possible to distinguish sport from video games, as the latter apparently lack both characteristics. If physical activity and a competitive spirit are missing, then we are not in the area of sport, but are dealing with a different form of activity. Can this statement be considered generally valid, though?

Really, it is not enough to verify the presence or absence of these elements in the activity in order to qualify or disqualify it as a form of sport; rather, its concrete function must be analysed (we may recall that there are Olympic sports that lack any prevalent physical activity: such as skeet shooting, archery, and so on).

Indeed, at the international level (see UNESCO – International Charter for Physical Education, Physical Activity and Sport), at the European level (Art. 165, para. 1 and 2 TFEU), and at the national level (see Art. 2 of the implementing decrees 36 and 37 of the enabling L. no. 86 of 8 August 2019) there is no unambiguous definition of sport; instead, in all of these one looks at the function of sport.

Here the *analogia iuris* method comes into play, thanks to which it is possible to verify whether esports can be recognised as having the same function as sport.

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<sup>512</sup> There is the method of *analogia iuris*, by which the concept of sport can be widely applied in reverse, and there is literal interpretation, by which the application is closed to similar cases, which are strictly connected to the typical case of law. See P. PERLINGIERI, *Il diritto civile nella legalità costituzionale*, Napoli, 2020, v. II, p. 357: «L’argomento analogico realizza un’interpretazione di una disposizione, o di più disposizioni esistenti, estendendone l’operatività in misura diversa secondo le direttive insite nel sistema ordinamentale. Esso – sia nell’analogia strettamente intesa, quella *legis*, sia nell’analogia con ricorso ai principi, quella *iuris* – presuppone l’individuazione di una *ratio* e quindi di un principio che ha una sua possibile sfera di applicazione oltre la specifica ipotesi normativa. (Analogical interpretation makes an interpretation of one or more rules and extends their applicability according to the internal guidelines of the legal system. In its twofold guise of *analogia legis* and *analogia iuris*, it presupposes the identification of a principle, which may also be extended beyond the specific case provided for in the rule)»; L. TULLIO, *Analogia tra eguaglianza, ragion d’essere e meritevolezza*, Perlingieri G. e M. D’Ambrosio (ed.s), in *Fonti, metodo e interpretazione*, in ADP, 2017, p. 101.

<sup>513</sup> Corte giust., 26 ottobre 2017, *The English Bridge Union Limited c. Commissioners for Her Majesty’s Revenue & Customs*, c. 90716, in [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>514</sup> Corte giust., 26 ottobre 2017, cit., available at [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>515</sup> Available at [www.coe.int](http://www.coe.int).

First of all, it should be underlined that applying the *analogia iuris* method does not mean that it is possible to apply *regula iuris* without the limit, for which there are the criteria that lead us to determine what constitute cases and what do not. The interpreter «evaluates, filters, selects, models according to his own culture, his own sensibility, in order to construct the case and thus fix the *regula iuris* of the concrete case»<sup>516</sup>.

This means that «legal interpretation is not conceivable in the “abstract”, but only in relation to a case or set of cases, with reference to which one considers that (or preferably, one asks whether) a certain legal rule is applicable»<sup>517</sup>.

In light of the above, one must first understand what is meant by the function of sport. The function<sup>518</sup> of sport is the embodiment of sporting values, which are: solidarity, education, health (understood as the development of the individual), competitiveness, non-discrimination, and inclusion. These functions of sport do not indicate how they can be achieved, which means that the concept of sport must be understood more broadly.

Although esports can be defined within the same broad field as traditional sports, there remain considerable differences between them, such as equipment, and the degree of physicality. While the lack of any substantial physical element may lead us to separate esports from traditional sport, we come to a different conclusion if we use the method of *analogia iuris*, by which we look at the embodiment of sporting values. It can therefore be said that esports share the same values as traditional sports, even if they embody them in different ways and with different tools. We might take football as an example, where alongside the played game there is also a digital version, and many football clubs have invested in eTeams (in Italy and worldwide), so much so that the major traditional football teams also have ePartners. The growth of the sector has been exponential, with FIFA inaugurating the FIFA e-World Cup in 2021<sup>519</sup>, and, at the national level, the eFootball Italia Cup<sup>520</sup> dating from 2019. FIFA is the international organisation responsible for the management of major football competitions, and with regard to the values of sport, its role does not change in the virtual dimension; the only things that change are the tools it uses to fulfil its tasks.

Accordingly, it would be better to say that esports and sport are in a relationship that goes from the general to the particular.

The proof is given by the abovementioned EP Resolution, which «considers that esports and sport are different sectors, not least because the video games used for competitive gaming or esports are played in a digital environment and belong to private entities that enjoy full legal control and all exclusive and unrestricted rights over the video games themselves»<sup>521</sup>. It «believes, however, that both sectors can complement and learn from each other and promote similar positive values and skills, such as fair play, non-discrimination, teamwork, leadership, solidarity, integrity, antiracism, social inclusion and gender equality»<sup>522</sup>.

Therefore, given that esports tend to share the same values (functions) as traditional sport, we should bear those values in mind when dealing with esports, and use them as a benchmark when assessing their social sustainability.

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<sup>516</sup> G. FILANTI, *Interpretazione, nuova retorica e fattispecie*, in C. Cicero e G. Perlingieri (ed.s.), *Liber amicorum per Bruno Troisi*, I, Napoli, 2017, p. 515.

<sup>517</sup> G. D'AMICO, *L'insostituibile leggerezza della fattispecie*, in *Ars interpretandi*, 2019, 1, p. 54. On the same issue see E. BETTI, *Interpretazione della legge e degli atti giuridici*, Milano, 1949, p. 124.

<sup>518</sup> L. DI NELLA, *Il fenomeno sportivo nell'ordinamento giuridico*, Napoli, 1999.

<sup>519</sup> See on [www.fifa.gg](http://www.fifa.gg).

<sup>520</sup> See on [www.esportsitalia.com](http://www.esportsitalia.com).

<sup>521</sup> Whereas n. 28, EP Resolution of 10 November 2022 on esports and videogames, available at [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>522</sup> Whereas n. 29, EP Resolution, cit.

### 3. E-sports and Social sustainability.

The link between esports, social sustainability and human rights is also valid at the national level, though this connection requires some explanation. Taking what has been said above about esports (Section 2) to be valid, here we will focus on how they are also socially sustainable according to domestic legal systems. First of all, it is necessary to clarify that the general sustainable principle is not clearly expressed in the Italian constitution, but can be found in some of its articles. We are referring to the three different interlinked pillars of sustainability<sup>523</sup>, which can be argued to receive attention in Art. 3 It. Const. in regard to social sustainability, Art. 41 It. Const. in regard to economic sustainability, and, recently, in the new form of Art. 9<sup>524</sup> It. Const. in regard to environmental sustainability<sup>525</sup>.

Even though we focus on social sustainability within a particular field (esports), the basic problem to be solved is the legal relevance of this principle in the Italian legal system. It is evident that the principle of social sustainability could be considered an evolution of another principle, and one that is expressed in all constitutions, i.e. the principle of equality.

The problem would thus seem to have been solved; however, the equality principle is only a part of the principle of social sustainability, and does not give us a complete indication of it. In fact, another element that characterises the principle of social sustainability is inclusion, which has a broader and different meaning from that of equality<sup>526</sup>.

So to say that esports is a particular sector of sport, and must therefore respect principles of the Italian Constitution such as equality, only partially resolves the main issue.

Comparison with other European countries may help us: France, for instance, which has taken a different approach to esports.

French legislators recognized the legal value of esports with articles 101 and 102, l. 7 October 2016, regarding «Events organization and pro-players protection» which must be read together with the Code du Sport and civil rights (Arts. 7 to 16 of French civil code). It might seem that the problem of social sustainability of esports would be solved; this is not totally true, however.

The common point between the Italian and French legal systems is the legal basis of the principle of sustainability, with reference to its social pillar. Both express the principle of equality in their Constitutions, and, as mentioned above, this is the origin of the modern concept of social sustainability. Nonetheless, this does not give us a full recognition of it at national level. In fact, if the difference between Italy and France is the legal recognition of esports, the common condition is the lack of a full legal provision for social sustainability.

If, therefore, there is a general lack of an express rule regarding the principle of social sustainability at the national level, a violation of human rights in esports in particular may occur. In order to solve this issue, we have to think from the perspective of a unitary legal system and the plurality of its legal sources<sup>527</sup>. It follows that even in the absence of an express norm at national level on a certain topic, international and European law and principles must be applied in the national legal system, cf. article 10 of Italian Constitution.

Principles alone, however, are not enough, and concrete measures to make esports socially sustainable are also lacking here. It is therefore up to private sector actors to find a solution.

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<sup>523</sup> For a historical reconstruction of the meaning of the sustainability principle see, among others, C. CALLIESS, *Generationengerechtigkeit im Grundgesetz: Brauchen wir einen Artikel 20b GG?*, in *Berliner Online-Beiträge*, 2009, n. 54, p. 7 ss.

<sup>524</sup> l. cost., 11 febbraio, 2022, n.1 «Modifiche agli articoli 9 e 41 delle Costituzioni in materia di tutela dell'ambiente», available at [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it).

<sup>525</sup> See M. LADU, *Oltre l'intangibilità dei principi fondamentali: la revisione «silenziosa» dell'art. 9. Cost.*, in *federalismi.it*, 2023, n.1, p. 39 ss.

<sup>526</sup> One only has to look at the goals of social development to realise that equality is only one of them, while inclusion includes them all, available at [www.sdgs.un.org](http://www.sdgs.un.org).

<sup>527</sup> P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazioni*, Napoli, 2020.

#### 4. Social sustainability policy in the E-sports industry.

The still unsolved problem is how to make esports socially sustainable from a practical point of view, because while in theory they are a unique space for inclusion, in practice an inclusive esports ecosystem is not yet a reality.

In almost all European countries there are national esports associations, whose statutes are mainly governed by the regulations of the national federations to which they belong, and otherwise refer to the general values of the sport. For instance, in Italy there is FIDE<sup>528</sup> (Federazione Italiana Discipline Elettroniche), which, as the representative for Italy, last year defined the participation in the World Esports Championship Bali 2022 for eFootball (Konami).

In reality, there are still no concrete measures to solve the problem of the social sustainability of esports, and this could mean a violation of human rights in this field.

The first mention we get of discrimination and human rights comes in the Swiss Federation Statute for esports.

Reading Article 1 of the EFSF Statute, we see phrases such as the «promotion of human rights»<sup>529</sup> and the «prohibition of discrimination and equality»<sup>530</sup>, but the tools to realise them are missing. In fact, even if the Swiss Federation Statute for esports has introduced this clause «in order to declare its voluntary initiative to promote human rights protection under international human rights instruments which have entered into force in Switzerland, this means that the SESF will never be held responsible for compensating any pecuniary or non-pecuniary damages to the victims; instead, it only declares its voluntary intention to create a “sufficient regime” to safeguard the human rights of esports players in Switzerland»<sup>531</sup>.

The express provision against discrimination mentioned above is a step towards the social sustainability of esports, but it is not enough.

How can this be avoided?

In modern digital cultures a shift of more and more activities into the virtual dimension is inevitable. This shift, however, should never imply the loss of protection and security. In the absence of dedicated rules, social sustainability in the esports ecosystem may be reached through a correct method of interpretation of traditional sporting values and fundamental legal principles (see sections 2; 3.1 and 3.2). In turn, this interpretation process will positively influence legislative and policy measures and industry practice.

We must also consider social sustainability in esports companies, where it can be applied internally and externally. By «internally» we mean the internal policy of esports companies (e.g., programmers, developers, managers) while by «externally» we mean the company’s activities towards third parties (e.g., players, followers, users).

The activities of the esports industry and its dealings with third parties entail compliance with legal sources (at all levels: international, European and national – see above) so that the balance between these activities and legal limits<sup>532</sup>, including public order, remains appropriate. This is possible because esports companies act as ordinary companies, and they are in reality private entities. Here again, one could adopt the method already used to verify the compatibility of the exercise of private autonomy with the legal system<sup>533</sup>. That

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<sup>528</sup> Available at [www.fide.gg](http://www.fide.gg).

<sup>529</sup> Art.1.6 SESF: «The SESF shall strive to promote the respect and protection of all human right conventions which are ratified by Switzerland».

<sup>530</sup> Art. 1.7 SESF: «Acts of discrimination of any kind or forms on account of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason are strictly prohibited».

<sup>531</sup> See T. SHINOHARA, *The Protection of Esports Players against the Use of Doping Substances and Methods under the European Convention on Human Rights: The Swiss Example*, in *International Journal of Esports*, 2021, 1, p.8.

<sup>532</sup> For a particular focus on this issue in the field of sport, see E. MAIO, *Clausola compromissoria e meritevolezza nel sistema di giustizia sportiva*, Napoli, 2020.

<sup>533</sup> See P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità*, Napoli, 2020.

is, if the company's activity both in its external and internal policies is not contrary to the legal limits, this will be proof of compliance with the principle of social sustainability.

Considering all the above, it is necessary to better understand how esports companies can realise social sustainability in their internal policies. These may include policies that are already being used in other industries, such as new notions about leadership, new roles to support the various functions of a company, or the help of AI to check internal social policies.

As regards non-profit organisations, more attention is already being paid to the social sustainability of esports. For instance, the organization of reference in Italy is IIDEA<sup>534</sup>, which does not have its own social policy but which, as a partner of ISFE, refers to the latter's proposals<sup>535</sup> for ways to fight the sexual abuse of minor online (e.g., parental control, support of the development of technologies that can deal with sexual abuse in a legal way, etc.). It is clear that these are only suggestions to the European Commission's proposal for a regulation establishing rules to prevent and combat child sexual abuse. If these suggestions were to be accepted by the European Commission and the latter were to publish the regulation, they would be applied directly in each member State and would offer the greatest possible protections for minors, representing a concrete further step towards the social sustainability of esports.

A general focus on the enforcement of socially sustainable measures enables the achievement of many SDGs, not only those most obviously related to the health aspect (SDG3) of esports, but also others, such as SDG 5 (gender equality), SDG 8 (decent work and economic growth), SDG 9 (Industry, Innovation and Infrastructure), and SDG 10 (reduced inequalities).

#### 4. Conclusions.

It is now possible to give an answer to the previous question. It can be said that it makes no sense to consider the virtual and real worlds two different worlds, which are not interconnected, because it is true that what happens in the virtual dimension cannot be touched, but its effects are in both dimensions, and the proof of this is the phenomenon of esports, the consequences of which are in fact legally, economically and socially valid. If a virtual event has real consequences, it needs legal regulation, so it does not matter that it is not a physical phenomenon, as we understand it. It can be argued that these are two different dimensions of the same world, and this has been demonstrated by the phenomenon of esports, which is considered virtual but has real-world consequences, as one wonders if they are sustainable and how. We analysed how there is a problem of social sustainability in the esports industry and tried to find a solution in the policy adopted by industry actors.

It is clear that still talking about the difference between traditional sports and esports does not make sense, because it is not the nature of the event that makes it legal or not, but its effects.

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<sup>534</sup> See [iideassociation.com](http://iideassociation.com).

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