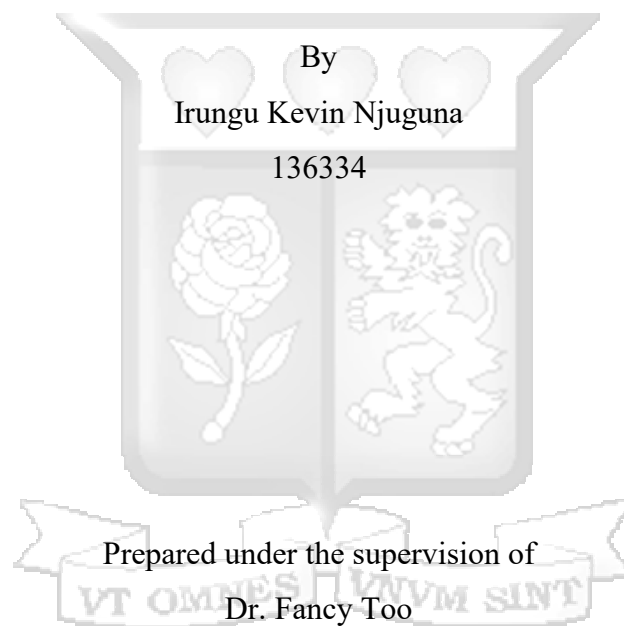


**The Rise of Esports and its untapped potential ought to be recognised and regulated by the Kenyan Government**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School



Prepared under the supervision of  
Dr. Fancy Too  
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**Declaration**

I, IRUNGU KEVIN NJUGUNA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

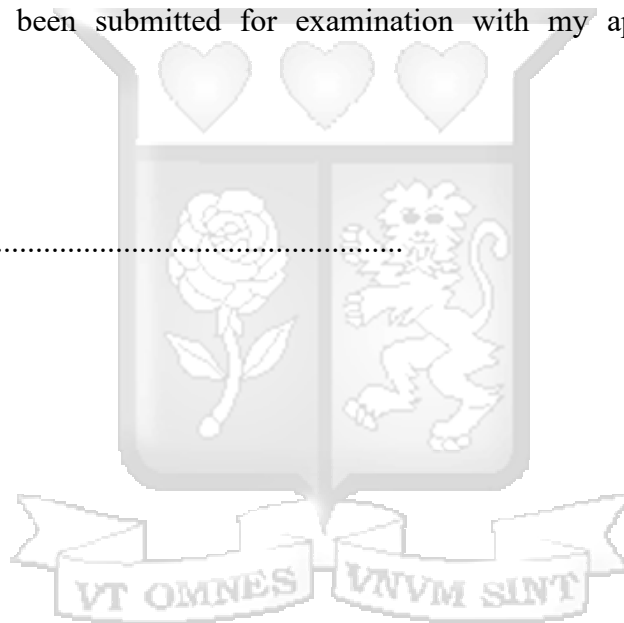
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Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Dr. Fancy Too



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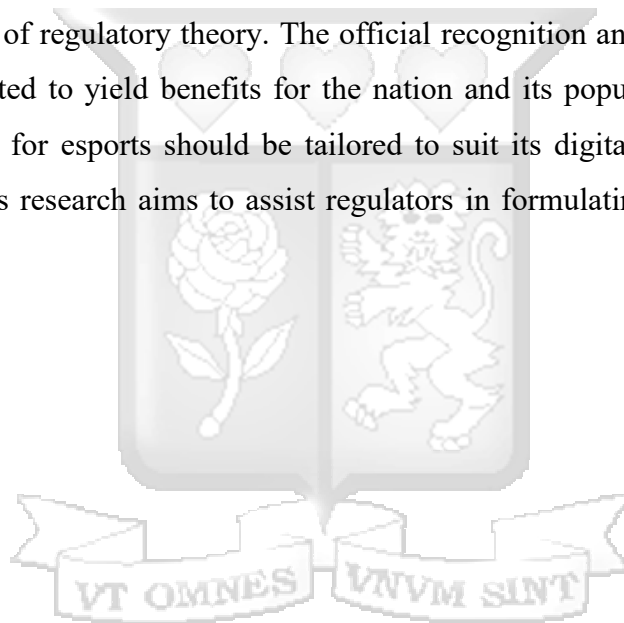
I would also like to extend my appreciation to my friends, whose encouragement throughout this endeavour was invaluable. Their unwavering support motivated me to persevere.

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## **Abstract**

Esports represents an emerging phenomenon characterised by organised competitive video gaming. With a global market valuation of approximately 4 billion U.S dollars, this economic significance has spurred numerous countries to formally acknowledge and regulate esports. Kenya is urged to emulate these actions to capitalise on the associated advantages. This investigation undertakes a critical analysis of the defining characteristics of a sport. By examining these characteristics, the study aims to determine whether esports can be appropriately classified as a sport within this established framework. Additionally, it evaluates the potential economic and societal gains that Kenya could realise by officially endorsing esports and investigates the successful regulatory models for esports implemented in countries like South Korea. The research methodology employed doctrinal legal research within the framework of regulatory theory. The official recognition and regulation of esports in Kenya are anticipated to yield benefits for the nation and its populace. Furthermore, the regulatory framework for esports should be tailored to suit its digital nature, distinct from traditional sports. This research aims to assist regulators in formulating effective regulatory structures for esports.



### **List of Abbreviations**

PUBG - Player Unknown Battle Ground

KRA - Kenya Revenue Authority

SARS - South Africa Revenue Services

WHO - World Health Organisation

KeSPA - Korean Esports Association

SWF - Social Welfare Function



### **List of legal instruments**

Sports Act (No. 25 of 2013).

Constitution of Kenya (2010).

Income Tax Act (Cap 470).

Game Industry Promotion Act (South Korea).



## 1.0 INTRODUCTION

### 1.1 Background

The annual revenue in the sports sector in Kenya is estimated to reach about 9.5 billion Kenyan shillings by 2023.<sup>1</sup> This number can rise exponentially to as high as 25 billion Kenyan shillings<sup>2</sup> with the introduction of a new ‘sport’ named esports. Esports is a 21st Century phenomenon whereby organised competitive video game tournaments are the main agenda.<sup>3</sup> The first official video game competition took place on October 19, 1972 at Stanford University which led to the gradual rise of esports to where it is now.<sup>4</sup>

Can esports really be considered as an actual sport? To some people, sitting in front of a monitor and playing video games is not the image that comes to mind when a person thinks of a proper athlete. Instead, an image of someone who may be idle and lacks athletic abilities is usually the stereotype that is bestowed.<sup>5</sup> However, some people believe it is indeed a sport.<sup>6</sup> For the purposes of this study the Kenyan definition of a sport is, “all forms of physical or mental activity which, through casual or organised participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels”<sup>7</sup>. Based on the aforementioned definition, a compelling case can be made for classifying esports as a sport. While esports may necessitate a lesser degree of physical exertion compared to traditional sports, it's noteworthy that activities like chess, which require even less physical output, are

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<sup>1</sup> Statista, Sports and outdoors-Kenya, (<https://www.statista.com/outlook/dmo/ecommerce/toys-hobby-diy/sports-outdoor/kenya> on 8 March 2023.

<sup>2</sup> Ian Mugo Wanyeki, ‘A handful of pro-gamers is putting Kenya on the global esports map’ Quartz, November 11th 2021. <https://qz.com/africa/2088089/pro-gamers-are-putting-kenya-on-the-global-esports-map> on 8 March 2023.

<sup>3</sup> AJ Willingham, ‘What is eSports? A look at an explosive billion-dollar industry’ CNN, August 27th 2018, (<https://edition.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html>) on 8 March 2023.

<sup>4</sup> Florian Larch, ‘History of eSports: How it all began’ ISPO, August 19th 2022, (<https://www.ispo.com/en/markets/history-esports-how-it-all-began#:~:text=Brief%20history%20of%20eSports,the%20eSports%20competitions%20became%20mainstream>) on 8 March 2023.

<sup>5</sup> Daniel Kane, Brandon D. Spradley, ‘Recognizing ESport as a sport’, The Sport Journal, (<https://thesportjournal.org/article/recognizing-esports-as-a-sport/>) on 8 March 2023.

<sup>6</sup> Stan Usovich, ‘Esports are real sports’, Esport Scholar, August 5th 2022. <https://www.esportscholar.com/blog/esports-real-sports#:~:text=Esports%20have%20already%20been%20formally,its%20status%20as%20a%20sport> on 8 March 2023.

<sup>7</sup> Section 2(1) Sports Act (No. 25 of 2013).

already recognized as sports within Kenya's sporting landscape..<sup>8</sup> Furthermore attributes like teamwork, strategy, skill and of course competition are involved in esports, attributes that other renowned sports like football and basketball also have.<sup>9</sup>

Numerous countries in the world like South Korea, United States, Finland, Denmark, Italy, Ukraine and even South Africa just to mention a few consider esports as an official sport.<sup>10</sup> By 2022, the esports industry had a tremendous value of \$1.44 billion worldwide.<sup>11</sup> In Kenya, esports has not yet been classified as an official sport.<sup>12</sup> Nonetheless, many Kenyans are involved and partake in this novel sport at a rapid rate, players like Brian Diang'a and law graduate Sylvia Gathoni are representing Kenya internationally through esports.<sup>13</sup> At the same time there are upcoming esports organisations in Kenya like Pro Series Gaming (PSG) that host and organise competitive video game tournaments with a prize pool going all the way to 1 million Kenya shillings.<sup>14</sup> Kenya was ranked the eighth most popular gaming hub in Africa in 2019 with the local market expected to reach \$118 million in 2022 up from \$63 million in 2017, according to PwC.<sup>15</sup> Concurrently pro-gamers like Brian Diang'a earn around 50,000 Kenya shillings per month,<sup>16</sup> of which it has surpassed the minimal value for tax exemption which is 24,000 Kenya shillings.<sup>17</sup> These monetary figures would raise the

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<sup>8</sup> 'Sports in Kenya', Embassy of the Republic of Kenya in the Russian Federation Official website <https://kenemb.ru/en/page/sports-in-kenya.html> on 8 March 2023.

<sup>9</sup> 'Is ESport a Sport? Countries Where ESports is Considered a Sport' ESports.net <https://www.esports.net/wiki/guides/is-esports-a-sport/> on 8 March 2023.

<sup>10</sup> 'Is ESport a Sport? Countries Where ESports is Considered a Sport' ESports.net <https://www.esports.net/wiki/guides/is-esports-a-sport/> on 8 March 2023.

<sup>11</sup> 'eSports market size' fortune business insights, September 2022. <https://www.fortunebusinessinsights.com/esports-market-106820> on 8 March 2023.

<sup>12</sup> 'Sports in Kenya', Embassy of the Republic of Kenya in the Russian Federation Official website <https://kenemb.ru/en/page/sports-in-kenya.html> on 8 March 2023.

<sup>13</sup> Ian Mugo Wanyeki, 'A handful of pro-gamers is putting Kenya on the global esports map' Quartz, November 11th 2021. <https://qz.com/africa/2088089/pro-gamers-are-putting-kenya-on-the-global-esports-map>

<sup>14</sup> Tim Mworira, 'Zambian Gamer Wins Ksh 1M Mortal Kombat Tournament' Kenya Buzz, April 18th 2018. <https://www.kenyabuzz.com/lifestyle/pro-series-gaming-mortal-kombat-xl-tournament-review/#:~:text=5000%20won%20the%20Pro%20Series,a%20whopping%20Ksh%201%20million> on 8 March 2023.

<sup>15</sup> Ian Mugo Wanyeki, 'A handful of pro-gamers is putting Kenya on the global esports map' Quartz, November 11th 2021. <https://qz.com/africa/2088089/pro-gamers-are-putting-kenya-on-the-global-esports-map> on 8 March 2023.

<sup>16</sup> AFP, 'Esports: Kenyan gamers face uphill battle to make their mark', Business Daily, May 24th 2022. <https://www.businessdailyafrica.com/bd/corporate/technology/esports-kenyan-gamers-face-uphill-battle-to-make-their-mark-3825684> on 8 March 2023.

<sup>17</sup> Kenya Revenue Authority, <https://www.kra.go.ke/individual/filing-paying/types-of-taxes/payee> on 8 March 2023.

country's revenue substantially and if left unregulated it would likely cause problems like money laundering or tax evasion.<sup>18</sup>

## 1.2 Problem Statement

Esports, the competitive playing of video games, has garnered substantial global popularity in recent years<sup>19</sup>, prompting several countries around the world to establish legal frameworks for its regulation and development<sup>20</sup>. Notably, Kenya lacks such a legal framework despite evidence of local participation.<sup>21</sup> This poses a question as to why Kenya has not yet followed suit bearing in mind the benefits other countries derive from official recognition and regulation of this particular sport. This research therefore aims to explore the feasibility of recognising and regulating esports as a legitimate sport in Kenya and evaluating the potential of esports as a viable source of government revenue.

## 1.3 Research objectives

1. Analyse the essential elements required for officially recognizing an activity as a legitimate sport in Kenya.
2. Analyse the potential economic and social benefits of officially recognizing and regulating esports in Kenya.
3. Assess the effective regulatory frameworks for esports by examining successful strategies implemented in other countries.
4. Explore actionable recommendations for fostering the growth and development of esports in Kenya.

## 1.4 Research questions

1. What critical elements should be present in an activity for it to be recognised as a sport in Kenya?

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<sup>18</sup> James Chen, Money Laundering: What It Is and How to Prevent It, Investopedia, June 29 2022.

<https://www.investopedia.com/terms/m/moneylaundering.asp> on 8 March 2023.

<sup>19</sup> Rohit Showale, 'eSports Statistics In 2024 (Viewers, Growth & Forecast)', Demandsage, January 18 2024, <https://www.demandsage.com/esports-statistics/#:~:text=From%20about%20435%20million%20viewers,cross%20640%20million%20in%202025>. On 6th Feb 2024.

<sup>20</sup> Giulio Coraggio, Esports Laws of the World, dlapiper.

<sup>21</sup> AFP, 'Esports: Kenyan gamers face uphill battle to make their mark', Business Daily, May 24th 2022. <https://www.businessdailyafrica.com/bd/corporate/technology/esports-kenyan-gamers-face-uphill-battle-to-make-their-mark-3825684>

2. To what extent can the official recognition and regulation of esports contribute to economic growth in Kenya, considering factors such as job creation, foreign investment, and tax revenue?
3. What are the effective regulatory frameworks for esports, and what successful strategies have been implemented in other countries to address the unique challenges of governing the industry?
4. What concrete recommendations can be implemented to support and promote the development of esports in Kenya?

### **1.5 Hypothesis**

The official recognition and regulation of esports as a sport in Kenya presents compelling social and economic benefits. These include the potential for increased job opportunities, fostering youth engagement, and the enhancement of international relations.

### **1.6 Justification**

This study would potentially aid legislators with information required to regulate the esports industry. State bodies like the Kenya Revenue Authority, Sports Board and even the National & County Assemblies would benefit from reading this study. With the economic potential esports holds, this study would be beneficial to prospecting investors who are willing to take a chance in investing in upcoming esports athletes in Kenya. This study would also assist any academic or non-academic researchers trying to learn more about esports in Kenya since it is an addition to the literature pool.

### **1.7 Literature Review**

#### **1.7.1 What elements constitute e-sport to be regarded as a sport**

Currently, there is no universal definition of a sport. However, for the sake of this research we will use the definition envisioned by the Kenyan Sports Act which states, “all forms of physical or mental activity which, through casual or organised participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels”<sup>22</sup>. Authors like Daniel Kane and Brandon D. Spradley break down the elements piece-by-piece in a Sports journal.<sup>23</sup>

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<sup>22</sup> Section 2(1) Sports Act (No. 25 of 2013).

<sup>23</sup> Daniel Kane and Brandon D. Spradley, 'Recognizing ESports as a Sport' The Sport Journal, 11 May 2017, <https://thesportjournal.org/article/recognizing-esports-as-a-sport/> on 8 March 2023.

The first element to determine is physical exertion, which is achieved by analysing an individual's basal metabolic rate<sup>24</sup>. Since the metabolic rate could be used to determine exertion, a connection could be made via how the metabolic rate is affected when playing video games.<sup>25</sup> Authors like Stan Usovicz stated that actions that require fine motor skills, hand eye coordination, sharp reaction time and communication would lead to physical exertion<sup>26</sup>.

The second element is that the activity can be casual or organised. The actual act of playing video games in itself is casual, however, the games can be played competitively in organised esports tournaments. For example, Player Unknown Battlegrounds (PUBG) is a famous multiplayer online game and many people play this game. Some play it as a casual activity but some play it on a competitive level. Hence, PUBG itself is not an esports. However, when it is played as a tournament, the whole event is esports which involves playing PUBG. Same as cricket or kabaddi, both of them can be played casually among friends as a street-based game but when played on a competitive level, it becomes sports as per a Mental Health and Human Behaviour Journal<sup>27</sup>.

The third part of the definition deals with a person or team that competes against another person or team competitively. Depending on which game is being played, a person can enter a contest solo in the cases of fighting games such as Mortal Kombat (a renowned fighting game), or join with a team, playing games such as Apex Legends (an online first person shooter game).<sup>28</sup>

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<sup>24</sup> Daniel Kane and Brandon D. Spradley, 'Recognizing ESports as a Sport' The Sport Journal, 11 May 2017, <https://thesportjournal.org/article/recognizing-esports-as-a-sport/> on 8 March 2023.

<sup>25</sup> Daniel Kane and Brandon D. Spradley, 'Recognizing ESports as a Sport' The Sport Journal, 11 May 2017, <https://thesportjournal.org/article/recognizing-esports-as-a-sport/> on 8 March 2023.

<sup>26</sup> Stan Usovicz, 'Esports are real sports' Esport Scholar, 5 August 2022, <https://www.esportscholar.com/blog/esports-real-sports#:~:text=Esports%20have%20already%20been%20formally,its%20status%20as%20a%20sport.> On 8 March 2023.

<sup>27</sup> Thakur, Pranjali Chakraborty; Sharma, Manoj Kumar; Sagar Kommu, John Kumar1; Anand, Nitin, 'Esport Is It a Sport or Clinical Entity?' Journal of Mental Health and Human Behaviour, May 29, 2021, [https://journals.lww.com/mhnb/fulltext/2021/26020/esport\\_is\\_it\\_a\\_sport\\_or\\_clinical\\_entity.11.aspx#:~:text=The%20common%20psychological%20issues%20found,and%20lowered%20psychological%20well%2Dbeing.](https://journals.lww.com/mhnb/fulltext/2021/26020/esport_is_it_a_sport_or_clinical_entity.11.aspx#:~:text=The%20common%20psychological%20issues%20found,and%20lowered%20psychological%20well%2Dbeing.) On 7th Feb 2024.

<sup>28</sup> Daniel Kane and Brandon D. Spradley, 'Recognizing ESports as a Sport' The Sport Journal, 11 May 2017, <https://thesportjournal.org/article/recognizing-esports-as-a-sport/> on 8 March 2023.

### 1.7.2 What are the benefits of recognizing esports in Kenya

Esports can be beneficial to Kenya as a nation in various ways such as increased revenue obtained from taxing, employment opportunities and improvement of player well-being among others.<sup>29</sup> Esports can also offer a career breakthrough for Kenyan youths. Stoyan Todorov argues that esports athletes generate income from a plethora of income being paid salaries, competing in tournaments with prize pools, branding rights, streaming, and other sponsorships<sup>30</sup>. The likes of Brian Diang'a also known as 'The Beast' for whom gaming was a means of liberation from the harsh reality of poverty in the slums of Nairobi<sup>31</sup>. With his dedication as a gamer, he was able to get recognition from Safaricom's Blaze Youth Network<sup>32</sup> and be its ambassador.<sup>33</sup> Authors like Ronny Lusigi strongly believe that esports will open new career pathways following the current age of digital platforms.<sup>34</sup>

Esports can be a source of revenue to the government through taxation from the proceeds esports athletes obtain while participating. The esports industry generates a significant amount of revenue that has the potential to substantially increase the country's overall income. According to PwC, the local market is expected to reach \$118 million in 2022 up from \$63 million in 2017<sup>35</sup>. Additionally, the state has a duty to impose tax where it deems necessary as seen in the Kenyan Constitution<sup>36</sup>. Furthermore, another reason to tax regulate esports is to hinder the possibilities of money laundering through virtual gaming sites, where ill-gotten

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<sup>29</sup> Baz Nijjar, 'Gaming and esports can have a positive impact on your wellbeing', Global Education Supplies and Solutions, <https://www.gesseducation.com/gess-talks/articles/gaming-and-esports-can-have-a-positive-impact-on-your-wellbeing> on 8 March 2023.

<sup>30</sup> Stoyan Todorov, 'How Much Do Esports Players Make' Esports Grizzly, 27 March 2022, <https://www.esportsgrizzly.com/blog/how-much-do-esports-players-make/#:~:text=Esports%20players%20make%20money%20by,%2C%20streaming%2C%20and%20other%20sponsorships>. on 8 March 2023.

<sup>31</sup> Richard Wanjohi, 'The Rising Star of the Creator Economy', The Elephant, April 6 2023, <https://www.theelephant.info/analysis/2023/04/06/esports-the-rising-star-of-the-creator-economy/> on 15 January 2024.

<sup>32</sup> 'Safaricom Launches a new platform designed for the Youth', Safaricom, May 27<sup>th</sup> 2016, [Safaricom Launches New Platform Designed For Youth](#) on 6<sup>th</sup> May 2024.

<sup>33</sup> Richard Wanjohi, 'The Rising Star of the Creator Economy', The Elephant, April 6 2023, <https://www.theelephant.info/analysis/2023/04/06/esports-the-rising-star-of-the-creator-economy/> on 15 January 2024.

<sup>34</sup> Ronny Lusigi, 'Why esports should be part of President Ruto's digital jobs initiative', Nation, January 31, 2024, <https://nation.africa/kenya/sports/talkup/why-esports-should-be-part-of-president-ruto-s-digital-jobs-initiative-4508714> on 7 feb 2024.

<sup>35</sup> Ian Mugo Wanyeki, 'A handful of pro-gamers is putting Kenya on the global esports map' Quartz, November 11<sup>th</sup> 2021. <https://qz.com/africa/2088089/pro-gamers-are-putting-kenya-on-the-global-esports-map> on 8 March 2023.

<sup>36</sup> Article 209 of Kenyan Constitution (2010).

money is converted into gaming currency, then back into real, usable, and untraceable “clean” money as argued by author James Chen<sup>37</sup>.

Esports can also be a way of improving international relations with other nations. Kenyan author Douglas Okwatch avers that Kenya has recently joined Egypt, Tunisia, Morocco and South Africa in Africa’s esports league<sup>38</sup>.

#### **1.7.4 What areas of esports should be regulated drawing lessons from other countries**

One of the ways that comes to mind immediately after thinking about regulation of esports is through tax regulation. In 2018, the online gaming market in Kenya was estimated to be worth twenty-four million U.S. dollars, which has increased to an estimate of fifty-five million U.S. dollars in 2023<sup>39</sup>.

In South Africa, professional gamers and esports athletes are cognizant of the tax implications associated with their competition earnings, whether in monetary or non-monetary forms. It is imperative for team managers to guarantee full compliance with South African tax regulations for both themselves and their esports athletes<sup>40</sup>. Furthermore, the South African Revenue Service (SARS) issued a guide on the Taxation of Professional Sports Clubs and players to provide its view on the tax results suitable to such persons<sup>41</sup>.

Protection of Intellectual property is also a key concern to be regulated. Esports differs from traditional sports with the fact that the games played in esports tournaments are protected by Intellectual Property. In South Korea for instance, the government put in place various

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<sup>37</sup> James Chen, Money Laundering: What It Is and How to Prevent It, Investopedia, June 29 2022.

<https://www.investopedia.com/terms/m/moneylaundering.asp> on 8 March 2023.

<sup>38</sup> Douglas Okwatch, ‘Online gaming and e-sport culture gains momentum in Kenya’, Africa Renewal, 10 August 2023, <https://www.un.org/africarenewal/magazine/august-2023/online-gaming-and-e-sport-culture-gains-momentum-kenya> ,on 8 January 2024.

<sup>39</sup> Natalie Cowling, ‘Kenya online social games market value 2014-2023’, Statista, Sep 22, 2023,<https://www.statista.com/statistics/558015/kenya-socila-online-games-market-value/> on 18 December 2024.

<sup>40</sup> Staff Writer, ‘Professional gamers and eSports players need to register for tax in SA’, Business Tech,13 January 2019,<https://businesstech.co.za/news/wealth/293052/professional-gamers-and-esports-players-need-to-register-for-tax-in-sa/> on 8 March 2023.

<sup>41</sup> Staff Writer, ‘Professional gamers and eSports players need to register for tax in SA’, Business Tech,13 January 2019,<https://businesstech.co.za/news/wealth/293052/professional-gamers-and-esports-players-need-to-register-for-tax-in-sa> on 8 March 2023.

strategies like technical protection of game products, designation of institutions that deal with intellectual properties as well as educating the public on intellectual property rights.<sup>42</sup>

The South Korean statute of Game Industry Promotion Act (No. 15378, Feb. 21, 2018), as well as the Act on Promotion of E-Sports (Act No. 18778, Jan. 18, 2022), provides a legal framework on how South Korea tackles issues that deal with esports regulation. It not only provides legislation on Intellectual Property but also issues such as consumer protection, game ratings and even penalty provisions for defaulters.<sup>43</sup>

## 1.8 Methodology

### Doctrinal Legal Research methodology

The doctrinal legal research methodology entails a research conducted on legal propositions by analysing any existing statutory provisions and case law applicable<sup>44</sup>. The main issue in this research methodology is, what does the law say regarding a particular issue<sup>45</sup>. Doctrinal legal research mainly uses data from primary and secondary authoritative sources, for instance statutes, laws, judicial decisions and other legal texts.<sup>46</sup> An authoritative source is a source of data that takes precedence over other sources due to the authority it holds<sup>47</sup>.

Due to the doctrinal legal research methodology's emphasis on analyzing primary legal sources, the process of conducting established research becomes more streamlined, leading to a greater degree of predictability in the research outcomes<sup>48</sup>. The doctrinal approach lacks a sufficient framework to effectively tackle emerging issues as it presumes that the law functions in an objective doctrinal isolation rather than within a social context. Law does not function independently but within the societal framework, influencing and being influenced by society. Legal professionals may require skills beyond doctrinal or library-based research

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<sup>42</sup> Article 13, Game Industry Promotion Act (South Korea).

<sup>43</sup> Article 1, Game Industry Promotion Act (South Korea).

<sup>44</sup> Neha Dahiya, 'All about doctrinal and non-doctrinal research', iPleaders, September 25 2021, <https://blog.iplayers.in/all-about-doctrinal-and-non-doctrinal-research/> as at January 2024.

<sup>45</sup> Salim Ibrahim Ali, Dr. Zuryati Mohamed Yusoff, Dr. Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' University of Utara Malaysia, <https://www.ijtrd.com/papers/IJTRD6653.pdf> as of January 2024.

<sup>46</sup> Amrit Kharel, Doctrinal Legal Research, ReadCube.

<sup>47</sup> 'Authoritative Sources', US Legal, <https://legalresearch.uslegal.com/authoritative-sources/> as at January 2024.

<sup>48</sup> Salim Ibrahim Ali, Dr. Zuryati Mohamed Yusoff, Dr. Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' International Journal of Trend in Research and Development, <https://www.ijtrd.com/papers/IJTRD6653.pdf> as of January 2024.

to ensure their research is pertinent and applicable to a broader audience<sup>49</sup>. With regards to my paper, I shall employ the doctrinal legal research methodology in researching the laws that govern esports in other countries to determine whether they can be applicable in Kenya.

## **1.9 Chapter Breakdown**

This first chapter introduces the problem statement: despite evident participation, esports still exists on the fringes. By outlining the research objectives and questions, the study clarifies its intentions and sets the stage for tackling the problem statement. It will explore the justification: why this matters and its potential impact on Kenya. We'll also unveil the hypothesis guiding our inquiry. To navigate this uncharted territory, the research methodology is laid out. This involves the tools and techniques used to gather and analyse data, ensuring a reliable approach. Finally, we'll delve into the literature review, examining existing research on esports and related fields to build upon existing knowledge.

Chapter Two: Shifts its focus on the theoretical framework, which is a structured representation of existing theories and concepts that serve as a foundation for a research study. It is a crucial element in the research process as it helps researchers to understand the current body of knowledge regarding a specific topic. The theoretical framework for this research will mainly be the regulatory theory as well as the theory on canons of taxation.

Chapter Three: Shifts focus on understanding what constitutes a "sport" in Kenya. The study will meticulously assess established criteria, focusing on key elements like physical exertion and skill, to determine if esports fits the Kenyan standard of a sport. The chapter also focuses on the potential benefits awaiting Kenya upon recognizing and regulating esports. The study also will analyse the potential economic impact, examining avenues for job creation, attracting investment, and generating tax revenue. Beyond economics, we'll explore how esports can contribute to bolstering international relations and empowering youth by fostering valuable skills and career paths.

Chapter Four: Tackles the crucial aspect of regulation. We'll embark on a global study, examining diverse models implemented by countries like South Korea, who have successfully navigated the complexities of regulating esports. By delving into these case

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<sup>49</sup> Amrit Kharel, Doctrinal Legal Research, ReadCube, <https://www.readcube.com/articles/10.2139/ssrn.3130525> as at January 2024.

studies, we'll glean valuable lessons and identify key components for an effective framework. Adapting these components to the specific context of Kenya and ensuring stakeholder needs are addressed will be crucial in formulating a practical and inclusive approach.

Chapter Five: Will bring forth a set of actionable recommendations for policymakers. These clear proposals will offer a roadmap for navigating the process of recognizing and regulating esports in Kenya. The research will also acknowledge potential challenges that may arise during implementation and suggest strategies to overcome them.



## 2.0 CHAPTER TWO

### THEORETICAL FRAMEWORK

#### 2.1 Introduction

A theoretical framework serves as a conceptual lens guiding the researcher's examination of the research topic. It reflects their knowledge base, guides their analysis, and helps them narrow down the vast landscape of possibilities into a manageable and impactful study<sup>50</sup>. In this study the regulatory theory shall be utilised in exploring the intricacies of regulation and how it can be applicable in regulating esports as well as the taxation theory of diversity.

#### 2.2 The Regulatory theory

Matthew D. Adler is the positor for this theory. The regulatory theory is aimed at aiding legal practitioners, students, and those keen on regulation as a cross-cutting theme in the social sciences<sup>51</sup>.

The regulatory theory serves as a framework for analysing the ethical underpinnings of government regulations. It tries to figure out the moral justification for regulation and on morally optimal legal responses<sup>52</sup>. Moreover, regulatory theory has its focus on achieving optimal regulatory outcomes through cost-benefit analysis. It prioritises maximising overall societal welfare by carefully weighing the potential benefits of regulations against their associated costs<sup>53</sup>. Matthew Adler postulates that government intervention is essential to counteract market imperfections such as externalities, information asymmetry, and monopolies. Through regulatory measures, government actors can rectify inefficiencies and safeguard the public interest in the marketplace<sup>54</sup>.

Furthermore, the regulatory theory delves into the application of Social Welfare Functions (SWFs) as a guiding principle for regulatory choices<sup>55</sup>. These functions consider factors like equality, efficiency, and overall societal well-being to assess the impact of regulations on

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<sup>50</sup> Divya Sreekumar, 'What is a Theoretical Framework? How to Write It (with Examples)', Researcher.Life, August 21 2023, <https://researcher.life/blog/article/what-is-a-theoretical-framework-how-to-write-it/>.

<sup>51</sup> Peter Drahos, 'Regulatory Theory, Foundations and applications,' Australian National University Press, 2017, <http://library.oapen.org/handle/20.500.12657/31596>

<sup>52</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 590.

<sup>53</sup> Robin Boadway and Neil Bruce, Welfare Economics, 1984, pp. 263–71.

<sup>54</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 590.

<sup>55</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 594.

various segments of the population<sup>56</sup>. The theory also highlights the importance of citizen deliberation in regulatory decision-making. It raises questions about the role of democratic processes, public participation, and moral criteria in evaluating regulatory policies.<sup>57</sup> With regards to the critics of the regulatory theory, particularly approaches like cost-benefit analysis, may displace citizen deliberation in regulatory decision-making. This critique suggests that relying solely on economic efficiency metrics may undermine democratic processes and public participation in regulatory policies.<sup>58</sup> Another criticism of the regulatory theory comes from a deontological perspective, which emphasises moral duties and rights. Legal scholars like F. Ackerman and L. Heinzerling<sup>59</sup> argue that approaches like cost-benefit analysis may lead to regulatory decisions that violate individuals' moral rights, such as the right not to be put at risk of harm or death.

Matthew Adler points out the limited development of non-welfarist normative accounts within Regulatory Theory. The absence of comprehensive non-welfarist frameworks for evaluating regulatory interventions poses a challenge in addressing ethical considerations beyond welfare maximisation<sup>60</sup>.

Last but not least, the regulatory theory faces criticism for its complexity and conceptual challenges. Providing a clear and illuminating conceptual analysis of regulation is deemed difficult in addition to not having a clear definition of 'regulation'. This may hinder the development of a cohesive theoretical framework for regulatory decision-making<sup>61</sup>.

The regulatory theory can be applicable in identifying and addressing market failures specific to the esports industry, such as issues related to player welfare, match-fixing, doping, and unfair competition practices. Regulatory interventions can aim to correct these market failures to ensure the integrity and sustainability of the esports ecosystem.

The regulatory theory is utilised to optimise regulatory outcomes in esports by balancing efficiency considerations with the welfare of players, teams, and stakeholders. Implementing

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<sup>56</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 594.

<sup>57</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 604.

<sup>58</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 593.

<sup>59</sup> F. Ackerman & L. Heinzerling, 'Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection', 2002.

<sup>60</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 604.

<sup>61</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 590.

regulations that promote fair competition, player safety, and industry growth can enhance overall welfare in the esports sector.

In addition, the regulatory theory discusses the application of Social Welfare Functions to evaluate regulatory decisions in esports, considering factors like player rights, fan engagement, diversity and inclusion, and the economic impact of regulations on the industry. SWFs can guide policymakers in making ethical and socially responsible regulatory choices<sup>62</sup>. In consideration of the diverse interests at play in the esports ecosystem, including those of players, teams, sponsors, fans, and regulatory bodies. The regulatory theory can help in balancing these competing interests to ensure a level playing field and promote the long-term sustainability of esports.

Furthermore, the theory emphasises on citizen deliberation and public participation in the regulatory process. Engagement with players, fans, industry experts, and other stakeholders can enhance transparency, accountability, and legitimacy in regulatory decision-making, aligning with democratic principles advocated by the theory. Lastly, it addresses ethical and democratic concerns in esports regulation, such as player rights, fair treatment, anti-discrimination policies, and the promotion of diversity and inclusion.

In conclusion, applying Regulatory Theory to esports regulation represents a valuable opportunity to tackle the industry's unique challenges and capitalise on its potential. By integrating principles like efficiency, maximising well-being, social welfare functions, and citizen involvement, regulatory frameworks can be designed to foster fair competition, protect players, ensure industry sustainability, and enhance overall esports welfare. As the esports ecosystem evolves, regulatory theory offers a critical lens for policymakers and stakeholders to navigate the ethical, social, and economic complexities of governing this burgeoning sector<sup>63</sup>. Regulatory frameworks should uphold ethical standards and democratic values to ensure a just and equitable esports environment.

### **2.3 Theory on canons of taxation**

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<sup>62</sup> Matthew D. Adler, 'Regulatory Theory', University of Pennsylvania Carey Law School, 2009, 604.

<sup>63</sup> Eric Windholz, 'Governing esports: public policy, regulation and the law', Sports Law E-Journal.

Adam's Smith theory on canons of taxation, delineates on the fundamental principles of taxation that would optimise tax collection and administration in a society<sup>64</sup>. For the purposes of this study we shall focus mainly on the canon of diversity in a tax system. This canon of taxation emphasises the need for a dynamic tax system, composed of various taxes with different characteristics, rather than a rigid system with a single tax<sup>65</sup>. When a tax regime consists of numerous sources, the overall tax burden tends to be spread across different segments of the population, leading to a lower level of incidence for each individual tax<sup>66</sup>. By implementing this approach, the government can achieve greater fiscal stability and mitigate the risks posed by unpredictable fluctuations in tax revenue<sup>67</sup>. Achieving diversity in a tax system typically requires engaging a wider spectrum of the population through various tax mechanisms.

The principle of diversity necessitates tax administrators to establish various avenues for income taxation. Nevertheless, the complex nature of tax legislation and the presence of numerous tax types can impose a burden on tax administrators, raising apprehensions regarding efficiency of tax administration processes<sup>68</sup>. Furthermore, from a psychological standpoint, individuals may exhibit greater resistance towards paying a single high tax compared to the same amount distributed across multiple lower-rated taxes<sup>69</sup>.

This research explores the burgeoning esports industry and its substantial revenue potential. The implementation of a tax system on esports earnings presents an opportunity for the government to access a novel source of tax revenue. This, in turn, would contribute to the diversification of government income streams, lessening dependence on traditional sources. Furthermore, this analysis exemplifies the practical application of the canon of diversity in taxation. This principle underscores the importance of a government fostering a multifaceted revenue base.

## 2.4 Conclusion

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<sup>64</sup> Aveesha Gandhi, 'Canons of Taxation', Acdemia, 2020.

<sup>65</sup> Ritika Muley, 'Canons of Taxation: Meaning, Types and Characteristics', Economic discussions.

<sup>66</sup> Ritika Muley, 'Canons of Taxation: Meaning, Types and Characteristics', Economic discussions

<sup>67</sup> Amber Kotnala, 'Adam Smith's theory on canons of taxation', iPleaders, October 5th 2018.

<sup>68</sup> 'Challenges And Roadblocks In Implementing Tax Reforms', FasterCapital,

<https://fastercapital.com/topics/challenges-and-roadblocks-in-implementing-tax-reforms.html> on 28 March 2024.

<sup>69</sup> Amber Kotnala, 'Adam Smith's theory on canons of taxation', iPleaders, October 5th 2018,

In conclusion, this paper utilizes two primary theoretical frameworks: regulatory theory and the theory of canons of taxation. Regulatory theory provides a structured approach to analyzing the ethical foundations of government regulations. This framework offers valuable insights into the types of regulations governments should implement within the esports industry. The theory of canons of taxation, on the other hand, informs the benefits of employing a diverse tax system. This allows the government to consider esports as a potential source of tax revenue.



### **3.0 CHAPTER THREE**

## **ESSENTIAL ELEMENTS FOR RECOGNISING ESPORTS AS A LEGITIMATE SPORT IN KENYA AND ITS ECONOMIC AND SOCIAL BENEFITS**

### **3.1 Introduction**

In this chapter, we shall critically analyse elements of a sport such as physicality and level of organisation as one of the criteria necessary for an activity to be considered as a sport in Kenya. Additionally examining the usefulness of esports to the Kenyan economy would be beneficial to determine if esports is worth official recognition.

### **3.2 Criteria for Recognizing Esports as a Legitimate Sport in Kenya**

Would it be valid to classify esports as a legitimate sport? For certain individuals, the idea of sitting in front of a screen and engaging in video games may not align with the traditional image of an athlete. The stereotype often associated with esports involves individuals who are perceived as inactive and lacking physical athletic prowess<sup>70</sup>. Nonetheless, there are proponents who argue that esports should be recognized as a sport<sup>71</sup>.

In light of the global diversity in defining the term "sport", this research adopts a nation-specific approach, employing the definition articulated within the Kenyan Sports Act for its framework of analysis. The Sports Act defines a sport as, "all forms of physical or mental activity which, through casual or organised participation, or through training activities, aims at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels"<sup>72</sup>. Furthermore, we can also try to define esports to see if there are any striking similarities between the two definitions. Since there is no Kenyan definition of the term esports we shall use the definition outlined by Marc Leroux-Parra which states, "Esports are video games that are played in a highly organised competitive environment"<sup>73</sup>.

Considering the aforementioned aspects, what are the essential criteria for an activity to be officially recognized as a sport within the Kenyan context? We need to evaluate esports to

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<sup>70</sup> Daniel Kane, Brandon D. Spradley, 'Recognizing ESport as a sport' , The Sport Journal.

<sup>71</sup> Stan Usovich, ' Esports are real sports', Esport Scholar, August 5th 2022.

<sup>72</sup> Section 2, Sports Act (Act No. 25 of 2013).

<sup>73</sup> Marc Leroux-Parra, 'Esports Part 1: What are Esports?' Harvard International Review, 24th April 2020.

determine if it meets the criteria of being classified as a physical activity or mental activity. With regards to physical exertion, esports athletes display feats like fine motor skills, hand eye coordination, sharp reaction time and communication which would lead to physical exertion<sup>74</sup>. One would argue that this level of exertion is not nearly comparable to traditional sports such as football, basketball, hockey and others. However, the intensity of exertion is not a factor in determining what a sport is. This is because games like chess with an even lower exertion than esports is considered as a sport by the Kenyan government<sup>75</sup>. A study found that gamers can burn up to four hundred and forty six (446) calories while playing video games<sup>76</sup>, whereas chess players could only burn up to one hundred and thirty two (132) calories<sup>77</sup>. Esports can also be beneficial to the player's mental wellbeing by allowing individuals to cope with the all round stress of our daily lives. It also creates a sense of accomplishment and belonging<sup>78</sup>.

The next criteria to assess is the level of organisation in these esports tournaments. Prior to analysing organisational structures at the tournament level, it is crucial to examine the level of organisation within individual teams. At the team level, esports typically consist of a manager and a coach. Nevertheless, top-level esports teams frequently employ additional personnel, such as an analyst, assistant coaches, physiologists, and psychologists, whose primary responsibility is to look after the athletes' wellbeing<sup>79</sup>. At the tournament level, event organisers face numerous responsibilities as they carefully consider various factors to ensure the event runs smoothly. The responsibility of the event organisers encompasses securing permission from the video game's publisher, establishing regulations for the esports tournament, including details like competition format and anti-cheating measures, and promoting the event through advertising and marketing<sup>80</sup>. Finally, participating in esports occurs when competitive gaming takes place at an organised level. Conversely, merely playing the games casually without any competitive aspect can be enjoyed by anyone, anytime.

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<sup>74</sup> Stan Usovich, 'Esports are real sports', Esport Scholar, August 5th 2022.

<sup>75</sup> 'Sports in Kenya', Embassy of the Republic of Kenya in the Russian Federation Official website.

<sup>76</sup> 'Playing Online Games is just as effective as exercise for losing weight, experts claim', Diabetes.co.uk, 11 September 2021.

<sup>77</sup> Bulbul Satsangi, 'Does chess burn calories?', Chessklub, <https://chessklub.com/does-chess-burn-calories/> on 28 March 2024.

<sup>78</sup> Stavroula Katsoula-Kavalli, 'Levelling Up Mental Health: Embracing the Power of Gaming on World Mental Health Day', Global Esports, 10 October 2023.

<sup>79</sup> 'Intro to esports teams and organisations', LinkedIn, 27 February 2023.

<sup>80</sup> Angry Titans, 'How to organise an esports tournament - the 5-phase model', Spized, February 28, 2024.

Another aspect that needs inclusion, however not explicitly outlined in the Kenyan definition, is the skill level required. A skill encompasses the understanding, proficiency, and capability to execute a task, cultivated through practice and learning<sup>81</sup>. Becoming a professional gamer demands extensive training, akin to traditional sports. Esports competitors must possess focused attention, accuracy, and performance based on genuine expertise, leaving minimal room for chance. Moreover, achieving success in esports necessitates the development of intricate strategies, the ability to adapt to the dynamic in-game environment, and the cultivation of effective teamwork<sup>82</sup>. Achieving professional status in gaming is highly unlikely without investing countless hours of in-game experience<sup>83</sup>. The degree of skill demanded in esports is pivotal because it distinguishes itself from games predicated on luck or fate.

While Kenya has yet to formally recognize esports as a sport, official recognition has been granted in numerous countries worldwide. South Korea, the United States, Finland, Denmark, Italy, Ukraine, and South Africa are just a few examples of nations that have acknowledged esports' legitimacy as a sport<sup>84</sup>. It is noteworthy, however, that the primary differentiating factor between a game and a sport often hinges on the designation bestowed by the official regulatory bodies within a particular country<sup>85</sup>.

### **3.3 Potential Benefits of Officially Recognizing and Regulating Esports in Kenya**

As the popularity of esports experiences significant growth, it prompts an inquiry into the advantages that this emerging sport provides to a country and its people. Esports has the potential to be advantageous for Kenya on multiple fronts, including enhanced revenue generation, job creation, and the enhancement of player welfare, among other benefits<sup>86</sup>.

The primary advantage that emerges is the potential of esports to elevate the nation's revenue. The revenue generated from the sports sector in Kenya is estimated to reach approximately 1

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<sup>81</sup> Matthew Johns, 'The Difference between skills and abilities', 23rd June 2023.

<sup>82</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

<sup>83</sup> Stan Usovic, 'Esports are real sports', Esport Scholar, August 5th 2022.

<sup>84</sup> 'Is ESport a Sport? Countries Where ESports is Considered a Sport' ESports.net.

<sup>85</sup> Stan Usovic, 'Esports are real sports', Esport Scholar, August 5th 2022.

<sup>86</sup> Baz Nijjar, 'Gaming and esports can have a positive impact on your wellbeing', Global Education Supplies and Solutions.

million U.S. dollars by 2024<sup>87</sup>. In 2023, the entire social online gaming market in Kenya is estimated to be worth 55 million U.S. dollars<sup>88</sup>. The revenue generated solely from esports exceeds that of the entire mainstream sports industry. Furthermore, Kenya has emerged as a frontrunner in the gaming industry within Eastern and Central Africa. According to a report by a gaming industry body in Africa, the nation garnered a substantial revenue of US\$38 million from the gaming sector in the year 2021<sup>89</sup>. This impressive performance positions Kenya as the fourth-largest esports market in Africa, following closely behind South Africa, Nigeria, and Ghana<sup>90</sup>. Taking into account the aforementioned values, the official recognition of esports as a sport would be demonstrably advantageous due to the substantial revenue generated by this industry. Additionally, esports teams share similarities with traditional sports teams with regards to raising revenue, yet notable distinctions exist. A significant difference lies in the methods of revenue generation. While traditional sports teams primarily rely on ticket sales and broadcast rights for revenue, esports teams predominantly derive their income from sponsorships, advertisements, and merchandise sales<sup>91</sup>. The potential increase in revenue that esports offers would help in improvement of infrastructure, reduced poverty rates and attract foreign investment if it is to be taxed by the national government<sup>92</sup>.

Second benefit that esports offers is the increased employment opportunities for the Kenyan youth. Currently, we stand at the precipice of a new era marked by significant technological advancements, with a growing emphasis on digital enterprises. In light of President William Ruto's suggestion to address unemployment in Kenya by promoting digital jobs, the formal integration of esports into the Kenyan economy could be a significant stride towards achieving the President's objective<sup>93</sup>. It should also be noted that esports athletes derive their income from a diverse array of sources, including salaries, prize winnings from tournament competitions, branding rights, streaming revenue, and various sponsorships<sup>94</sup>.

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<sup>87</sup> 'Sports-Kenya' Statista, <https://www.statista.com/outlook/dmo/app/sports/kenya> .

<sup>88</sup> Natalie Cowling, 'Value of the social online games market in Kenya from 2014 to 2023', Statista, Sep 22, 2023,

<sup>89</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

<sup>90</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

<sup>91</sup> Vertex gaming, 'The Business of Esports: Understanding the Economics behind the Games', LinkedIn, 9 July 2023.

<sup>92</sup> Taxes & Government Revenue', The World Bank, <https://www.worldbank.org/en/topic/taxes-and-government-revenue> .

<sup>93</sup> Rony Lusigi, 'Why esports should be part of President Ruto's digital jobs initiative', Nation, January 31 2024.

<sup>94</sup> Stoyan Todorov, 'How Much Do Esports Players Make' Esports Grizzly, 27 March 2022.

Prominent organisations, such as Safaricom's Blaze initiative, are actively engaged in the esports industry not only by employing Kenyan youth as esports ambassadors,<sup>95</sup> but also by hosting esports tournaments that award substantial cash prizes, reaching a total of 100,000 Kenyan shillings<sup>96</sup>. Moreover, notable figures within the Kenyan esports scene, such as accomplished players like Brian Diang'a and law graduate Sylvia Gathoni, have established themselves through their achievements. These individuals serve as exemplary role models for aspiring Kenyan youth seeking to engage in esports<sup>97</sup>. Furthermore, the establishment of esports teams in Kenya has opened up fresh avenues for Kenyan artists, designers, and content creators. These professionals offer creative services like designing team logos, producing video content, and developing merchandise, thereby contributing to the growth of the esports industry in the country<sup>98</sup>.

Esports may be beneficial in improving international relations with other nations. The advancement of technology has led to increased globalisation, uniting individuals from diverse countries and cultures<sup>99</sup>. Esports, stemming from technological progress, further contributes to this globalisation by enabling players worldwide to engage in real-time gameplay on online servers<sup>100</sup>. Nations globally are collaborating to host international esports leagues, such as the Africa Esports League, which includes countries like Kenya, Egypt, Tunisia, Morocco, and South Africa<sup>101</sup>. There are also international competitions that are organised, such as the Olympic Esports Week held in Singapore, the World Esports Championships held in Romania and the Global Esports game in Saudi Arabia<sup>102</sup>. Furthermore, esports has brought about an influx of international investment causing a surge of increased revenue in the industry<sup>103</sup>.

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<sup>95</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

<sup>96</sup> 'Blaze By Safaricom Launches E-Sports Tournament', Safaricom, <https://www.safaricom.co.ke/media-center-landing/press-releases/blaze-by-safaricom-launches-e-sports-tournament>

<sup>97</sup> Ian Mugo Wanyeki, 'A handful of pro-gamers is putting Kenya on the global esports map' Quartz, November 11th 2021.

<sup>98</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

<sup>99</sup> Shakeel Ali, 'The Accelerating Pace of Technological Innovation: Connecting the World and Bringing Us Closer Together', LinkedIn, March 26 2023.

<sup>100</sup> 'The Impact of Globalization on the Gaming Industry', Freshessays, 2024, <https://samples.freshessays.com/the-impact-of-globalization-on-the-gaming-industry.html> .

<sup>101</sup> Douglas Okwach, 'Online gaming and e-sport culture gains momentum in Kenya', Africa Renewal, 10 August 2023.

<sup>102</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

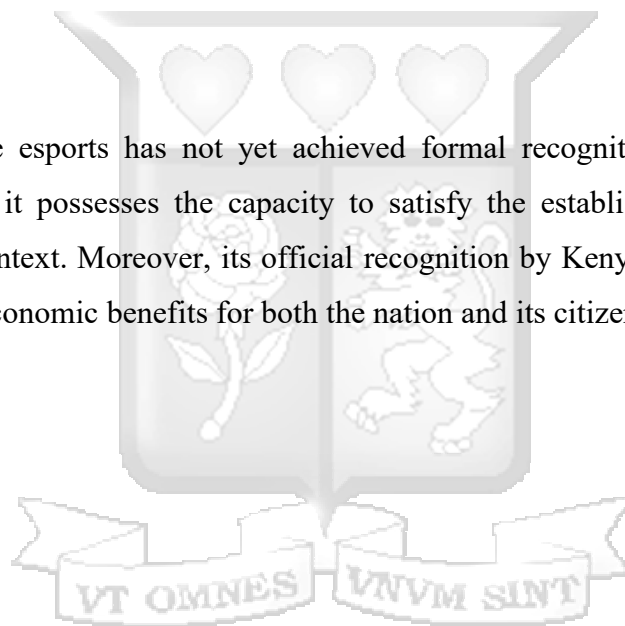
<sup>103</sup> Richard Wanjohi, 'Esports: The Rising Star of the Creator Economy', The Elephant, April 6 2023.

Esports can also be beneficial to the player's wellbeing. It promotes physical health with games like "Just Dance", a game listed in the Olympic Esports Week, requiring movement and acute coordination<sup>104</sup>. Finally, esports contribute to mental well-being by boosting self-esteem and confidence through a sense of accomplishment. Relaxing games can also alleviate stress and anxiety, while personalised challenges provide a sense of progress without negative consequences in case of failure<sup>105</sup>.

A compelling case can be made for the recognition of esports as an official sport within the Kenyan context. Esports not only demonstrably meet the established criteria for such recognition, but also exhibit significant potential for positive societal impact, encompassing both the economic and social spheres, as well as fostering international engagement.

### **3.4 Conclusion**

In culmination, while esports has not yet achieved formal recognition as a sport by the Kenyan government, it possesses the capacity to satisfy the established criteria for sport within the Kenyan context. Moreover, its official recognition by Kenya would demonstrably generate significant economic benefits for both the nation and its citizens.



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<sup>104</sup> Baz Nijjar, 'Gaming and esports can have a positive impact on your wellbeing', Global Education Supplies and Solutions.

<sup>105</sup> Baz Nijjar, 'Gaming and esports can have a positive impact on your wellbeing', Global Education Supplies and Solutions.

## **4.0 CHAPTER FOUR**

### **WHAT AREAS OF ESPORTS SHOULD BE REGULATED, DRAWING LESSONS FROM OTHER COUNTRIES**

#### **4.1 Introduction**

Building upon the prior chapters, it is established that esports qualifies as a sport. However, esports possesses distinctive characteristics that set it apart from traditional sports. These unique attributes of esports necessitate specific regulations governing the industry, different from those of traditional sports.

This section will evaluate the effective regulatory frameworks for esports by analysing successful strategies implemented in countries like South Korea mainly and South Africa. South Korea is selected as a benchmark due to being the first country to formalise and regulate esports, boasting the most proactive laws governing the industry<sup>106</sup>. Similarly, South Africa, as the initial African nation to officially recognize and regulate esports, serves as a valuable model within African standards.

#### **4.2 Intellectual property considerations**

Unlike traditional sports, which are typically governed by public rules and accessible to all participants, esports operates within a distinct legal framework. This distinction arises from the ownership of the games themselves. Traditional sports lack a single owner, with the core rules and gameplay existing in the public domain. Conversely, esports titles are intellectual property owned by game publishers, such as Blizzard Entertainment's ownership of Overwatch<sup>107</sup> and Epic Games' ownership of Fortnite<sup>108</sup>. This ownership structure introduces a layer of copyright considerations not present in traditional sports<sup>109</sup>.

South Korea takes intellectual property rights (IPR) for video games very seriously. Their regulations are designed specifically to protect these rights for game developers. To achieve this, they've implemented several measures<sup>110</sup>. First, they ensure technical safeguards are in

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<sup>106</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 27.

<sup>107</sup> Owen S. Good, 'Overwatch trademark suit settled between Blizzard', Polygon, November 3, 2015.

<sup>108</sup> Matthew DiLallo, 'How to Invest in Epic Games', The Motley Fool, January 16, 2024.

<sup>109</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 15.

<sup>110</sup> Article 13, Game Industry Promotion Act (South Korea).

place to prevent unauthorised access or use of game products<sup>111</sup>. Additionally, the government encourages developers to clearly include copyright information within the games itself. This information should be comprehensive enough to identify both the game and its creator<sup>112</sup>. Furthermore, South Korea prioritises public education on intellectual property rights, particularly copyright, within the gaming industry. They achieve this through educational initiatives and public relations campaigns<sup>113</sup>. Finally, the government reserves the right to designate specialised institutions or organisations with expertise in intellectual property<sup>114</sup>. These designated entities, for instance the Kenya Copyright Board with regards to Kenya, can play a vital role in enforcing and managing these protections for game developers.

The intellectual property rights (IPR) of game developers warrant significant recognition. Their creativity and ingenuity are fundamental to the creation of the beloved games that captivate audiences in esports tournaments worldwide. Without the protection of these IPRs, the very foundation of this popular form of entertainment could be undermined<sup>115</sup>.

### **4.3 Revenue generation**

As demonstrated in preceding chapters, esports possess significant economic potential that could be harnessed for the benefit of both the state and its citizens, contingent upon official recognition. In light of these considerations, it is essential to explore effective mechanisms for capturing tax revenue generated by the esports industry. To achieve this, it is necessary to determine the appropriate tax category to which esports should be assigned.

Initially, it is imperative to distinguish esports gaming from gambling, a differentiation that South Korea notably emphasises. They define gambling games as “speculative game products”, which is defined as game products which bring profits or loss as a result of using the game products in which its contents are related to betting or allotment and the outcome is determined by some fortuity or lack of skill<sup>116</sup>. The purpose of this distinction is to separate gaming in a gambling sense which is taxed entirely different from sports in which esports lie.

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<sup>111</sup> Article 13 (2)(1), Game Industry Promotion Act (South Korea).

<sup>112</sup> Article 13 (2)(2), Game Industry Promotion Act (South Korea).

<sup>113</sup> Article 13 (2)(3), Game Industry Promotion Act (South Korea).

<sup>114</sup> Article 13 (2), Game Industry Promotion Act (South Korea).

<sup>115</sup> Eric Windholz, ‘Governing Esports: Public Policy, Regulation and the Law’, Sports Law eJournal, 2020, 15.

<sup>116</sup> Article 1-2, Game Industry Promotion Act (South Korea).

Hence, the approach should be to tax esports as a sport and consider its participants as athletes. Nonetheless, esports possesses unique characteristics compared to traditional sports, necessitating legislators to avoid merely replicating tax regulations designed for traditional sports without due consideration of the differences they entail<sup>117</sup>.

For instance in South Africa esports is classified as a ‘mind sport’<sup>118</sup> by the Mind Sports South Africa which is the regulative authority for esports in South Africa. The tax implications for professional esports athletes centre on the inclusion of service-related income within the gross income definition. This definition explicitly includes voluntary awards received for services rendered<sup>119</sup>. As professional esports athletes are considered employees of their teams, any competition prize money they receive is viewed by South Africa Revenue Services (SARS) as remuneration directly tied to their job function, and therefore subject to taxation. This applies regardless of whether the prize is awarded in cash or other forms, with the monetary value of non-cash prizes being included in gross income<sup>120</sup>. Additionally, all entities operating professional esports teams, often referred to as multi-gaming organisations (MGOs), are obligated to register with the revenue authorities. This registration facilitates the declaration of team winnings and the appropriate withholding of taxes from athletes' earnings<sup>121</sup>.

Furthermore, a noteworthy parallel exists between esports and conventional sports: the participation of athletes in competitions beyond their home nation. This international competition can expose athletes to the potential issue of double taxation. Double taxation refers to a scenario where a country levies taxes on income earned by athletes that has already been subjected to taxation in the same country or another jurisdiction<sup>122</sup>. While the Income Tax Act offers certain alleviations for double taxation, these are only applicable in instances

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<sup>117</sup> Eric Windholz, ‘Governing Esports: Public Policy, Regulation and the Law’, Sports Law eJournal, 2020, 24.

<sup>118</sup> ‘Esports Around The World: South Africa’, Esports Insider, 25 August 2023.

<sup>119</sup> Staff writer, ‘Professional gamers and eSports players need to register for tax in SA’, BusinessTech, 13 January 2019.

<sup>120</sup> Staff writer, ‘Professional gamers and eSports players need to register for tax in SA’, BusinessTech, 13 January 2019.

<sup>121</sup> Staff writer, ‘Professional gamers and eSports players need to register for tax in SA’, BusinessTech, 13 January 2019.

<sup>122</sup> Nakholi John B Inyanga, ‘The Taxation of Athlete’s Income in Kenya: An analysis of the Duty to pay tax and its link with optimal tax revenue collection’, Strathmore University Law School, February 2017, 1.

where a relevant double taxation treaty or a specific tax arrangement exists with the country in question<sup>123</sup>.

Esports' explosive growth demands clear tax regulations. Determining fair tax brackets requires collaboration among esports stakeholders and governments. Only then can esports thrive on a sustainable, transparent tax foundation.

## **4.4 Player protection**

### **4.4.1 Rating**

The prevalence of video games within esports, a rapidly growing industry, attracts a significant youth demographic. However, video game content can vary widely, with some titles designed for mature audiences. Therefore, it is essential to establish regulations that safeguard minors from exposure to inappropriate adult content within esports. South Korea provides a noteworthy example with the establishment of a dedicated committee<sup>124</sup>.

This committee's primary function is to deliberate on matters concerning the rating classification of game products. Additionally, they are tasked with assessing the potential harmfulness of games to juvenile audiences and evaluating the speculative nature of game products<sup>125</sup>. Additionally, South Korea has implemented age-based rating classifications for games, restricting access to certain products based on age. For instance, some games are not accessible to individuals under the age of twelve, while others are restricted to those above fifteen years, and some are entirely prohibited for minors<sup>126</sup>. Finally, the Committee is responsible for determining whether a game product, for which a rating application has been submitted, qualifies as a speculative game product<sup>127</sup>.

### **4.4.2 Player exploitation**

Similar to conventional sports, athletes play a crucial role in esports and are entitled to protection. As esports gain widespread popularity, numerous players are eager to secure contracts with prominent teams and secure lucrative agreements. Nevertheless, the actual circumstances they encounter may not always align with their expectations. The majority of

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<sup>123</sup> Section 41 of *The Income Tax Act*, Cap. 470.

<sup>124</sup> Article 16, Game Industry Promotion Act (South Korea).

<sup>125</sup> Article 16(2), Game Industry Promotion Act (South Korea).

<sup>126</sup> Article 21(2), Game Industry Promotion Act (South Korea).

<sup>127</sup> Article 21(2), Game Industry Promotion Act (South Korea).

players in the esports industry are engaged as independent contractors rather than employees, resulting in the absence of statutory rights and protections typically granted to employees, such as workers' compensation insurance and minimum employment standards<sup>128</sup>. However, a significant portion of these contracted players are young, inexperienced, have short professional lifespans, and are part of a large pool of readily available replacements. When considering the substantial influence, authority, and financial resources of game publishers and competition organisers, it becomes evident that most players have limited negotiating power to advocate for improved conditions individually<sup>129</sup>. This situation can give rise to concerns of player exploitation<sup>130</sup>. This refers to unethical practices employed by organisations, teams, and even other industry figures against players. These practices take several concerning forms<sup>131</sup>.

One major issue lies in unfair contracts<sup>132</sup>. Professional eSports competitors commonly enter into contractual agreements with organisations, however, there exists apprehension regarding the unequal bargaining power between players, teams and even game publishers leading to potential inequities in the terms of player contracts. These contracts could restrict their ability to switch teams, give organisations excessive control over their image rights, and offer scant compensation compared to the intense training and competition demands they face. Another troubling aspect is insufficient compensation. Despite the rigorous training and competition schedules esports athletes endure, their salaries might be insufficient to cover basic living expenses. This financial strain can lead to burnout or force them to retire prematurely from their careers. Furthermore, players may not receive the support they need to thrive. Teams or institutions might neglect to provide crucial support structures, such as access to medical care, mental health services, or proper training facilities. The lack of such support can hinder optimal performance and increase the risk of injuries or health issues<sup>133</sup>.

The South Korean government, known for its proactive stance in this field, founded the Korean Esports Association (KeSPA) under the Ministry of Culture, Sports and Tourism to oversee and foster the esports industry within the nation. In its regulatory capacity, KeSPA

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<sup>128</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 26.

<sup>129</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 26.

<sup>130</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 26.

<sup>131</sup> T. Dominteanu; N. Smîdu; A. Voinea; C. C. Dinciu; M. C. Porfireanu; A. Iacobini, 'Player Exploitation in Esports Esports Organizations Policies and Business Strategies', Sciendo, 2023, 2.

<sup>132</sup> Jeanina Awni, 'Esports Legal Aspects', LinkedIn, 15 October 2023.

<sup>133</sup> T. Dominteanu; N. Smîdu; A. Voinea; C. C. Dinciu; M. C. Porfireanu; A. Iacobini, 'Player Exploitation in Esports Esports Organizations Policies and Business Strategies', Sciendo, 2023, 2.

has implemented mandatory minimum salaries for professional players and mandated that player contracts must have a minimum duration of one year. These measures aim to offer professional players a level of financial security and stability by ensuring a certain income level and contractual continuity<sup>134</sup>.

In conclusion, fostering a healthy and thriving esports industry necessitates prioritising the well-being and fair treatment of its athletes as seen in the South Korean statutes<sup>135</sup>. After all, a robust player base is the lifeblood of esports; without dedicated competitors, the industry itself cannot exist.

#### **4.4.3 Social issues**

One additional aspect that distinguishes esports from traditional sports is the nature of the activity itself. Unlike conventional sports, which necessitate participation in an outdoor environment and often involve a high degree of physical interaction between players, esports can be primarily conducted indoors and with a lesser emphasis on direct physical contact between participants. While video games have become a popular form of entertainment, concerns exist regarding their potential association with unhealthy lifestyle choices. This association is particularly prevalent with regards to the most popular titles. The World Health Organization (WHO) has formally recognized a condition termed "gaming disorder."<sup>136</sup> This disorder is characterised by a pattern of excessive gaming behaviour, encompassing both digital and video games. Individuals with gaming disorder exhibit diminished control over their gaming habits, prioritising gaming activities above essential responsibilities and daily routines to the point where it displaces other interests. Even in the face of negative consequences stemming from their gaming habits, the behaviour persists or even escalates<sup>137</sup>.

Certain governments have implemented regulations to address potential risks to the health and safety of players. In South Korea, specific measures are taken to prevent excessive immersion or addiction to gaming products<sup>138</sup>. These measures include: 1. Verifying the real identities and ages of individuals when they register as members and self-authenticate; 2.

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<sup>134</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 27.

<sup>135</sup> Article 3(2)(7), Game Industry Promotion Act (South Korea).

<sup>136</sup> World Health Organisation, 'International Classification of Diseases', <https://www.who.int/standards/classifications/classification-of-diseases>

<sup>137</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 29.

<sup>138</sup> Article 12-3, Game Industry Promotion Act (South Korea).

Obtaining consent from legal guardians, such as parents, for minors joining as members; 3. Imposing restrictions on the usage methods and time spent on gaming products when requested by minors or their legal guardians; 4. Providing information to minors and their legal guardians regarding essential aspects of gaming products, including characteristics, ratings, usage guidelines, time spent playing, and payment details; 5. Displaying warning notices to discourage excessive use of gaming products; 6. Showing the passage of time on the screen to indicate the duration of use since a user initiates playing gaming products<sup>139</sup>.

Effective communication is undeniably crucial for successful participation in esports<sup>140</sup>. However, a concerning trend has emerged where some players engage in antisocial behaviour, resorting to bullying their peers<sup>141</sup>. This online bullying, often referred to as "cyberbullying," is defined as the use of internet technology or gaming systems, for the purpose of teasing, humiliating, harassing, threatening, or coercing another person" (target)<sup>142</sup>. The anonymity afforded by online platforms can embolden these bullies, intensifying the harm inflicted upon their victims<sup>143</sup>. The emotional and psychological impact of video game bullying can be profound, particularly for young players. Constant exposure to verbal abuse and harassment can lead to anxiety, depression, and low self-esteem<sup>144</sup>. To cultivate a healthy esports environment, prioritising player mental wellbeing and addressing cyberbullying practices is essential.

#### **4.5 Game integrity**

A defining feature of esports that ignites spectator passion is the unwavering commitment to fair competition. This very essence of competition can be undermined by athletes who attempt to gain an unfair advantage through rule violations<sup>145</sup>, commonly referred to as cheating. The substantial prize pools associated with esports, coupled with the significant sums of money wagered on these events, can create an environment that incentivizes unethical behaviour<sup>146</sup>. This includes the potential for teams, players, their associates, and

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<sup>139</sup> Article 12-3, Game Industry Promotion Act (South Korea).

<sup>140</sup> Antonio Bratefixe, 'What are the most effective ways to communicate with players and teams, online and offline?', LinkedIn, Mar 26, 2024.

<sup>141</sup> Vibha, 'How Video Game Bullying is Threatening the Future of the Industry', Checkstep, August 16 2023.

<sup>142</sup> Hinduja, Sameer, Justin W. Patchkin, 'Prevention of Cyber/Gaming Bullying in Scouting', ScoutingU.

<sup>143</sup> Vibha, 'How Video Game Bullying is Threatening the Future of the Industry', Checkstep, August 16 2023.

<sup>144</sup> Vibha, 'How Video Game Bullying is Threatening the Future of the Industry', Checkstep, August 16 2023.

<sup>145</sup> Ian Preston and Stefan Syzmanski, 'Cheating in Contests', Oxford University Press, March 28, 2024, 613.

<sup>146</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 28.

even external parties to engage in cheating or match fixing, whether to secure victory or a predetermined outcome<sup>147</sup>. Cheating in esports, despite being conducted virtually, remains a source of frustration. It manifests in various forms, such as the use of aimbots to enhance aiming capabilities, map hacks to gain unintended vision, and ghosting practices that involve receiving additional information about the match from third parties, such as streamers<sup>148</sup>. To illustrate this point, one can consider an incident from 2013. Four esports players received suspensions, with one facing a permanent ban, for engaging in a deceitful practice. These players wagered against their own team and subsequently exhibited gameplay deliberately aimed at securing a loss<sup>149</sup>.

Furthermore, South Korea has implemented measures to bolster the efforts of video game publishers in combating hacking activities. A recent legislative act criminalises the creation and distribution of unauthorised hacking programs or scripts, as defined within a game's terms of service. These offences carry significant penalties, potentially resulting in imprisonment for up to five years and substantial fines reaching forty three thousand US Dollars (\$43,000)<sup>150</sup>. The preservation of integrity within esports is paramount, as it guarantees a level playing field for all participants, regardless of skill level. This fosters fair competition, echoing the core values traditionally upheld within sports.

#### **4.6 Conclusion**

In conclusion, esports share numerous similarities with traditional sports, suggesting that the regulatory framework established for traditional sports could be applied to esports. However, significant differences exist between the two. Notably, esports are commercial enterprises driven by profit, overseen by game publishers who do not view themselves as guardians of a social or cultural institution. These publishers, as owners of the intellectual property in the games, wield substantial influence over the organisation of esports competitions<sup>151</sup>. The call for change and potential government involvement in effecting such change primarily originate from external sources, such as academics analysing esports from a sports perspective, or stakeholders whose personal interests necessitate a transfer of control from

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<sup>147</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 28.

<sup>148</sup> Jamie Hwang, 'Cheating in Esports: A Proposal to Regulate The Growing Problem of E-doping', Northwestern Pritzker School of Law, 1301.

<sup>149</sup> Ben Kim, 'Dota 2 team banned for alleged match fixing,' PC Gamer, 18th June 2013, <https://www.pcgamer.com/dota-2-team-banned-for-match-fixing/> .on 18th March 2024.

<sup>150</sup> Kaden Hefli, 'South Korea passes new law to combat cheating in video games', The Riverside Eddy.

<sup>151</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 33.

game publishers to a more aligned governing body<sup>152</sup>. Therefore, the development of an effective regulatory framework for esports requires consideration of both public and private interests while acknowledging the unique characteristics of the esports industry.



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<sup>152</sup> Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', Sports Law eJournal, 2020, 33.

## **5.0 CHAPTER FIVE**

### **RECOMMENDATIONS AND CONCLUSION**

Having explored the intricacies of the esports industry, this study offers valuable insights for potential stakeholders in Kenya. These stakeholders encompass legislators who can craft policy, investors seeking opportunities, and even aspiring players themselves.

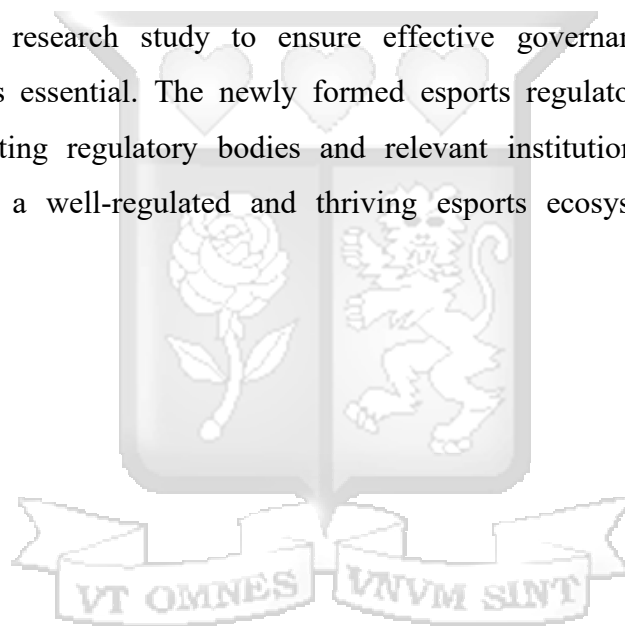
For the government, establishing a dedicated esports regulatory body can be transformative. Similar to KeSPA in South Korea, this body could reside within the Ministry of Youth Affairs, Creative Economy and Sports. This centralised authority would oversee both the regulation and promotion of esports in Kenya. The proposed regulatory body wouldn't merely oversee the industry; it would actively shape its development. One key function would be to grant approval for esports tournaments held within Kenya. This ensures that these events adhere to established regulations and maintain a high standard of competition. Furthermore, the body could play a vital role in establishing fair labour practices within the industry. By developing policies like minimum salaries for professional esports athletes, they can promote fair compensation and contribute to a healthier working environment for players. The well-being of players wouldn't be neglected either. The regulatory body could facilitate the creation of initiatives that promote healthy training practices, mental health awareness, and bullying preventive measures. This holistic approach ensures that the esports industry in Kenya thrives while prioritising the well-being of its athletes.

The taxation framework can also be adapted to accommodate esports. The Kenya Revenue Authority (KRA) could develop a system inspired by the South African Revenue Services (SARS) approach, where any income earned by professional esports athletes is considered taxable. In the context of taxing esports athletes working internationally within the country, it is imperative to avoid subjecting them to double taxation. The government should prioritise establishing double taxation agreements with prominent esports nations to safeguard against this issue.

In addition to regulatory measures, the protection of intellectual property holds significant importance. The Kenya Copyright Board has the potential to play a vital role in preserving the intellectual property rights of game publishers, which form the foundation of the esports sector.

Protecting players and ensuring responsible content consumption are further priorities. A regulatory body, akin to the Kenya Film Classification Board, could be established to categorise games based on age suitability, potentially restricting access to certain titles for minors. This body could also regulate in-game features that resemble gambling and implement other necessary restrictions. To ensure compliance, sufficient penalties would be established for offences like distributing illegal game products, promoting cheating, or providing age-restricted content without parental supervision.

Finally, the skyrocketing popularity and economic potential of esports necessitate serious consideration by government entities. In the event of official recognition, the establishment of an appropriate regulatory body is crucial. This body should consider the recommendations outlined within this research study to ensure effective governance. Furthermore, a collaborative effort is essential. The newly formed esports regulatory body should work cohesively with existing regulatory bodies and relevant institutions. This collaborative approach will foster a well-regulated and thriving esports ecosystem that benefits all stakeholders.



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