STUDIA IURIS

Jogtudományi Tanulmányok / Journal of Legal Studies

2024 I. évfolyam 1. szám

Károli Gáspár Református Egyetem
Állam- és Jogtudományi Doktori Iskola

A folyóirat a Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskolájának a közleménye. A szerkesztőség célja, hogy fiatal kutatók számára színvonalas tanulmányaik megjelentetése céljából méltó fórumot biztosítson.
A folyóirat közlésre befogad tanulmányokat hazai és külföldi szerzőktől – magyar, angol és német nyelven. A tudományos tanulmányok mellett kritikus, önálló véleményeket is tartalmazó könyvismertetések és beszámolók is helyet kapnak a lapban.
A beérkezett tanulmányokat két bíráló lektorálja szakmailag. Az idegen nyelvű tanulmányokat anyanyelvi lektor is javítja, nyelvtani és stilisztikai szempontból.
A folyóirat online verziója szabadon letölthető (open access).

Kiadó: Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola
Székhely: 1042 Budapest, Viola utca 2-4
Felelős Kiadó: Tóth J. Zoltán
Olvasó szerkesztő: Giovannini Máté

A tipográfia és a nyomdai előkészítés Csernák Krisztina (L'Harmattan) munkája
A nyomdai munkákat a Robinco Kft. végezte, felelős vezető Gembela Zsolt

Honlap: https://ajk.kre.hu/index.php/kiadvanyok/studia-iuris.html
E-mail: doktori.ajk@kre.hu
ISSN 3057-9058 (Print)
ISSN 3057-9392 (Online)

CERTAIN ISSUES IN THE FIELD OF PROFESSIONAL SPORTS

Botond Székely[1]

ABSZTRAKT ■ A sport döntő szerepet tölt be a társadalom hétköznapi működését illetően, ugyanis összeköti az egyéneket, biztosítja a szellemi feltöltődést és a szórakozás egyik alappillére. Ez utóbbi miatt a sport hatalmas üzleti iparággá fejlődött, amely részben a hivatásos sportolókra épül, akiknek a szerződéses jogviszonyai érdekes és vizsgálandó aspektusokból tevődnek össze. Ezért jelen tanulmányban a hivatásos sportolók sporttevékenységét és foglalkoztatását érintő kérdéseket veszem górcső alá. Tehát a vizsgált szempontok mind a szerződéses kötelezettségek teljesítéséhez és az általános magatartási szabályokhoz kapcsolódnak. Ezért a tanulmány elején áttekintő jelleggel összefoglalom a sportipar fejlődését, hogy átfogó képet kapjunk a problémák forrásáról, amelyek főként a kommercializált folyamatokból fakadnak. Ezt követően a hivatásos sportszféra szerződéseinek teljesítésére irányuló magatartások kérdését vizsgálom meg. Végül pedig a hivatásos sportolók szólásszabadságának keretrendszerét elemzem, ugyanis ezek a szempontok határozzák meg a felek magatartásának alapvető irányelveit.

Kulcsszavak: szerződés teljesítése, általános magatartási szabályok, hivatásos sportszféra

ABSTRACT ■ Sports have a crucial role in society: they bond individuals, cultivate their spirit and serve as the main source of amusement. The latter one caused sports to develop into a simultaneously evolving industry that is partially built on the professional athletes whose contracts provide some interesting aspects to be examined. In this study, I look at some of the issues posed by the activity and employment of professional athletes. The examined aspects are all related to the performance of the contractual obligations and the common rules of conduct. Therefore, to begin with, the paper provides a summary of the development of the sports industry to understand the source of the problems that mainly derive from the commercialized progress. Furthermore, I examine the issue of interpreting the performance of contracts in professional sports. Lastly, I observe the questions related to the freedom of speech of professional athletes as these aspects constitute the basic guidelines for the conduct of the parties.

Keywords: performance of the contract, general rules of conduct, professional sport

[1] PhD student, Károli Gáspár University of the Reformed Church in Hungary, Postgraduate Doctoral School of Law and Political Sciences.

1. The rise of economic aspects in sport

The business sector has played a significant role in the development of the current structural organisation of sports organisations and clubs, as sporting activities have also become profit- driven. It is interesting to note in this context that sport was originally a completely private activity which developed independently of the business sector and that the main purpose of the initial associations was therefore to provide sporting facilities for natural persons as their members. Consequently, most associations did not have legal personality, a trend which was reversed in the second half of the 20th century. The emergence of private sporting organisations and their specialisation in a particular sport initiated the process of autonomous self-regulation of sport, to which the creation of their own statutes and rules of organisation and operation also contributed significantly.[2]

As for the norm-setting activities of sports organisations, it is also necessary to look at the rise of the business sector, as the process shows the growing demand for sports, which has also led to a corresponding rise in the status of sports organisations. Indeed, the "commercialisation"[3] of sports organisations has significantly changed the nature of sport. This has led to the prioritisation of the need for companies employing sportspeople to look first and foremost at the "usefulness" or "usability" of the worker when selecting their staff, as it is by assessing these two criteria that they can decide whether the employment of a particular sportsperson will sufficiently advance their business plans.[4]

As a result, the focus has noticeably shifted away from sporting activities, as it is no longer only the athlete's performance that plays a major role in business processes, but also the indirect impact of athletes on the various factors of the sports economy. The commerciality of sports products depends almost entirely on the athletes. Indeed, the success of sports products is also influenced by the athlete's off-the-field activities and behaviour. This aspect increases the uniqueness of sports products, since they are unique goods that can be consumed by fans at the moment of production (matches) and also have a strong emotional attachment (fans). Therefore, in the light of merchandising and the enthusiasm for the sportsman or sportswoman, it is easy for a fan to enjoy even a sporting event

[2] Tamás Sárközy: A sport, mint az állami-jogi és az önszabályozás határterülete. Állam- és Jogtudomány, 3-4/2000. 212-213.

[3] Tamás Sárközy: A hivatásos sport gazdasági jogi alapkérdései Magyarországon. *Gazdaság és Jog*, 7-8/2000. 38.

[4] John Solow – Peter von Allmen: Performance expectation, contracts and job security. In: *Research Handbook of Employment Relations in Sport*. Cheltenham, Edward Elgar Publishing, 2016. 47.

that would be essentially boring in itself.[5] Thus, the players may not necessarily have any influence on the outcome of the sporting event, but they can nevertheless generate a profit for the sporting enterprise if the athlete himself is presented as a product to be sold in other respects. Therefore, the players continue their activity as an intangible asset of the sports organisation within the organisational structure of their employer.[6] It is therefore not surprising that sporting employers may treat athletes as "goods" or "tools" in certain cases, if the interests of the sporting enterprise so require in terms of the saleability of a sporting product. This means that it may even be easy to do without putting an athlete into play in a particular match.[7] This is important to underline because in this way sport offers an undeniable opportunity to build a business, giving sports organisations a significant economic dominance. It is therefore no wonder that only persons who unilaterally agree to be bound by these rules and to be subject to the rules of competition established by the sporting organisation can be members of these legal entities.[8]

In light of this, it is reasonable to ask how the state intervenes and what limits it imposes on the sportsmen's relationship with the sporting organisations, given their advantage and dominance as employers. The growing demand for sport on the part of both consumers and market players has made legal regulation inevitable, even though the State had initially chosen not to intervene in the spirit of laissez-faire. This move is even more obvious if we look at the national sports federations that have started to associate themselves, creating international sporting federations, in the process of which competition rules have been internationalised and have become the "supranational" norms of the sport concerned.[9]

2. Basic considerations on the right to give instructions

In my view, when examining the performance of contracts for sporting activities, it is useful to consider the questions of contractual performance along the lines of the law of instruction, since the instruction of the principal or employer determines the conduct and performance of the service expected of the

5 Kevin K. Byon: Consumer Behaviour. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 98.

6 See: Zsuzsanna Gősi: A sportoló mint a sportszervezetek különleges erőforrása. In: Enikő Korcsmáros (ed.): *Selye János Egyetem 2018-as X. Nemzetközi Tudományos Konferenciájának tanulmánykötete*. Komárno, 2018.

7 John Solow – Peter von Allmen 2016, 53.

8 Sárközy 2000, 213.

9 Sárközy 2000, 214-216.

sportsperson. Therefore, in relation to the contractual context of the activity, it is important to address the types of contracts used for the employment of sportsmen and sportswomen and their nature. It is not the specific purpose of this study to distinguish between the different types of contracts, as the present analysis is mainly focused on the specific requirements for performance. However, a brief overview of the specificities of the two types of contracts is essential, as the typology implies that there are certain differences between certain aspects of the two legal relationships. The tangential overview of the nature of the employment relationship and the agency relationship about the right to instruct serves the purpose of providing an approximate framework for assessing the cornerstones of contractual performance. After a comparison in the light of sporting activity, we will be able to take a general, consolidated view of the issue for both types of contracts, since we will see the impact of the sporting sphere on the classical private law institutions, which will consequently be applied unusually.

2.1. Exercise and interpretation of the right to instruct

The activity of the party performing the task depends largely on the exercise of the rights of the party with the power to instruct, since it is the party with the power to instruct who determines the task to be performed. Thus, the power to instruct is an essential element of employment contracts in the business sphere and is, one might say, an essential content element.

Paragraph (2) of Article 6:63 of Act V of 2013 on the Civil Code (hereinafter the Civil Code) sets out the criteria in the light of which a given contractual term is deemed to be an essential element of the content. According to this provision, a substantive aspect is important if the party expresses clearly that he or she does not intend to conclude the contract in the absence of agreement on the matter. Pursuant to 6:63 (4), the parties do not have to agree on a matter which is regulated by law, but under paragraph (2) the parties must agree on any matter which they both consider to be material to conclude the contract. Thus, the Civil Code. Although the provisions of Article 6:273 of the Civil Code do regulate the principal's power to give instructions, it is nevertheless necessary to agree on the scope and exercise of this power by clear criteria if either party considers it to be essential. Furthermore, it is important to agree on the cornerstones of the exercise of this right in a contract for an activity in the business sphere, since the scope and manner of exercise of the right have a significant impact on the classification of the contract and the content of the obligations.

Regarding the provisions of the Civil Code that address the relevant issue, it is important to point out that Article 42 (2) of Act I of 2012 on the Labour Code (hereinafter referred to as the Labour Code) sets out one of the most essential elements of the employment contract concerning performance, namely that the employee is obliged to perform work under the direction of the employer. Under Article 20 (1) and (2), the person exercising the employer's authority is entitled to make legal declarations on behalf of the employer and the employer determines the way the employer exercises the employer's authority. In addition, under Article 46(1), the employer is obliged to inform the employee of the identity of the person exercising the employer's authority. Compared to the power to instruct under the Civil Code, the Labour Code seeks to define the employee's obligation in this respect *expressis verbis*. In this way, the provisions on instruction in the context of the employment contract are *ipso iure* a clearer circumstance in the legal relationship. Therefore, while this aspect is an essential substantive element, the more explicit provisions of the law may make it appear that it is not necessarily necessary for the parties to negotiate in detail on the issue, since the circumstances are clear to them in advance.

Therefore, the principal also has the power to instruct in the case of an agency relationship, but the principal's power is not as detailed, whereas the employer has full control over the employee. This means that the employer has the right to give instructions to the employee on any detail of the work (how, where, when).[10] All these elements derive from the power of management, which can be interpreted in several ways, and therefore, because of the different interpretations from one discipline to another, the legislation is not necessarily consistent in its use of the concept.[11] In the employment relationship, the interpretation of the term "management" is closest to the content of the administrative sciences, which consider management to be a system of powers consisting of several elements. This system includes the power to make rules, give instructions and exercise control. However, these three concepts cannot be sharply delimited in terms of labour law. In the context of labour law, both rule-making and instruction derive from the right to control, and therefore both powers reflect the dominance of the employer in the context of the legal relationship.[12] In this respect, rule-making and instruction provide a form of process control within the employer's organisational system, which defines the basic conduct and work

[10] Anna Kozma – György Lőrincz – Lajos Pál – Zoltán Petrovics (eds.): *A munka törvénykönyvének magyarázata*. Budapest, HVG Orac, 2020. 151.

[11] Lajos Bosánszky: Az igazgatás, irányítás, vezetés, felügyelet, ellenőrzés, vizsgálat fogalmakról. Állam és *igazgatás*, 6/1986. 503.

[12] György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020. 5.

expected in the workplace. Instruction and, in a broader sense, direction is therefore an intrinsic element of an organisation, as it is the only way to ensure coherent and coordinated functioning. However, precisely because of this, the aforementioned organisational direction – the exercise of organisational power, so to speak – cannot necessarily be regarded as a specific feature of the employment relationship, since the establishment of a system of interdepartmental relations is not only observed in organisations with the status of employer (e.g. the relationship between an orchestra and a conductor).[13] However, in the context of a mandate, the principal has broad powers of direction, which would seem to suggest that the mandate and the employment relationship share elements of the same power of direction in a broad sense. It is important to note, however, that the broad power of direction that comes with the status of principal also entails greater risk-taking.[14] Thus, the concept of direction in the context of the agency relationship, as opposed to the employment relationship, is primarily one of the principal's mediation or assertion of his interests.[15]

In the light of this, the special circumstance arising from the nature of the sporting activity must be considered, namely that there may be a situation during the performance of the task when the athlete is unable to carry out the given instruction through no fault of his/her own, because he/she is prevented from doing so by his/her opponent. The question, therefore, arises as to whether the failure to carry out the task as instructed was due to a lack of diligence on the part of the athlete or whether the skills of the other player were in fact far superior at the time and the failure to perform cannot, therefore, be attributed to the athlete, since it was not reasonable to expect him to overcome the difference in quality in the circumstances prevailing at the time.

Similar situations and facts arising in the context of professional sports activities create a particularly interesting conflict, since it is an essential element of the employment relationship that the employer can control its employees to ensure that they perform their work properly and can act and impose sanctions against employees who fail to comply with their obligations. These aspects are intrinsic qualifying features of the employment relationship, without which there is a possibility that the purpose of the relationship would be lost and that a different type of contractual relationship would therefore exist between the parties. Nevertheless, account must also be taken of the interests of the

[13] Lőrincz 2020, 6.

[14] Sándor Takó: A filmkészítés során alkalmazott egyes szerződések ismérvei és specifikumai. *In Medias Res,* 1/2023. 190.

[15] See: László Kovács: Változások a fuvarozási és a szállítmányozási szerződés szabályozásában II. *Céghírnők,* 1/2018. 11.

subordinate party, i.e. the employee, which, in the light of the above-mentioned aspects, cannot be prejudiced, since this is not only an individual interest but also a social interest. It is therefore necessary to define the limits to the employer's exercise of his rights in such a way that they are not restricted to such an extent that the employer is deprived of the possibility of taking the necessary measures.[16]

The power to give instructions is also an important circumstance in that the principal or the employer's instruction determines the partial obligation to be performed, which implies the definition of the parameters of contractual performance. It is the task to be performed, designated in the form of an instruction, which constitutes the subject matter of the contract or part of it, the performance of which is to be carried out by the obligated party. In this connection, it is worth recalling that Tamás Prugberger, in examining the differences between the two legal relationships,[17] invokes the theory of Hugo Sinzheimer, a jurist who has studied labour law,[18] according to which a certain economic dependence and vulnerability can be detected in the relationship of the employment relationship. In this respect, a view has also emerged that the specific nature of the employment relationship prevents the employer from determining the content of future duties and obligations.[19] In my view, a narrow interpretation of this theory applied to sporting activities would mean that, in the case of professional sportsmen and sportswomen employed in the context of an employment relationship, the sports club would not be able to determine the expected performance, which would also mean a failure to perform, since, in the absence of clear instructions, the sportsman or sportswoman would not be able to define the task to be performed or the objective to be achieved.

So, in both relationships, the athletes are performing the tasks set out in the sports club's instructions in a fiduciary relationship. Some of the subtasks and activities required for performance arise from the power of direction exercised by the principal or employer, the dynamics of which are different in the case of an employment contract and a contract of entrustment.However, the unusual nature

[16] Tivadar Miholics: Problémák, javaslatok a munkaviszonyt érintő egyes szabályok körében. *Munkajog*, 5/2021. 289-290.

[17] Tamás Prugberger – Bernadett Szekeres: Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájára. Állam- és Jogtudomány, 2/2022. 69.

[18] See: Hugo Sinzheimer: *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*. Frankfurt, Europäische Verlagsanstalt, 1976.

[19] See: Mark Freedland: *The Personal Employment Contract*. Oxford University Press, 2005; Simon Deakin: The Comparative Evolution of the Employment Relationship. In: Guy Davidov – Brian Langille (eds.): *Boundaries and Frontiers of Labour Law.Goals and Means in the Regulation of Work*. Hart Publishing, 2006. 89–108.

of sporting activities blurs the boundaries between the two legal relationships, thus bringing the interpretation of the instruction closer together, as in the case of activity-based contracts allowing for longer-term cooperation, the relative interoperability between the employment contract and the contract of engagement arises. For this reason, the issue of the instruction can be examined from almost the same perspective in both types of relationship, since in the relationship of both the agency and the employment contract a fiduciary duty to perform a sporting activity is created, in the context of which it is difficult to interpret the performance of the instruction. The athlete is prevented by his opponent from performing his contractual obligations during the match, the object of which is to win the competition and the tasks which are part of the performance of that competition.

The failure to comply with a particular instruction raises the question of the athlete's liability, in which cases the failure to comply is due to no fault of the athlete – that is, the athlete's obstruction of the opponent – and in which circumstances the athlete can be held responsible for the failure to comply. In this context, it is important to note from the athlete's point of view that, given the unique content of his/her obligation, the performance of the activity requires specific knowledge, skills and abilities which make it difficult to substitute.[20] Given this, the possibilities of excusing the athlete seem to be reduced, but it should not be overlooked that the other professionals in the sports club also have a responsibility in the preparation, as it is their work that ensures, in part, the effective training work which, by its very nature, is intended to help the athlete to perform effectively, i.e. to fulfil the contract. They also have a key role to play in the selection process for competition and transfer, as they have to assess the athlete's ability and potential performance.[21] Therefore, even before the sporting activity is contractually performed, there is a certain liability for the sporting club if it has not properly assessed the athlete's abilities. Therefore, in my view, the failure to instruct and perform as contractually required also gives rise to a failure of the sporting club to perform as contractually required in terms of the selection processes and training work.

[20] Peter J. Bosch: Enforcement Problems of Personal Service Contracts in Professional Athletics. *Tulsa Law Journal,* 6/1969. 46-48.

[21] Abdulsamad Olajide Yusuf – Oladele Isiaka Oladipo: Talent evaluation. In: : Encyclopedia of Sport Management. Northampton, 2021. 484.

3. Issues concerning the expression of the views of athletes

Another important issue arising from the contractual relationship of professional sportsmen and women is the issue of expression of opinion. This is because, in addition to the conduct aimed at the performance of the contract, there are other aspects to be examined which are manifested in the verbal or non-verbal acts of the sportsmen or sportswomen. The non-verbal conduct of sportsmen and sportswomen can often have significant consequences, as it may harm the legitimate economic and organisational interests of employers acting as sports organisations. The lack of a concrete delimitation of the interests of sports organisations to be protected makes it difficult to assess the situations that arise. Consequently, the assessment of the conduct of sportsmen and sportswomen is also on shaky ground, since the employer's interest to be protected is not clear. The question is how we can determine whether it is indeed harmed.

The problem has several components, as the subject matter under consideration involves aspects of constitutional law, labour law and the specific status of sportsmen and sportswomen. In other words, we are talking about a three-layered problem. The first step in analysing this issue is to review the constitutional law aspects, since this area constitutes the broadest layer. The next step is to look at the labour law aspects, which form a narrower layer than the previous one. The third step of the analysis is to examine the additional aspects arising from the status of sportsmen and sportswomen.

3.1. Constitutional aspects

As a first step, it is essential to examine the constitutional aspects, since the behaviour of sportsmen and sportswomen, which could potentially threaten the interests of employers in sports organisations, most often takes the form of employee expression. This legal instrument is referred to by various names in the literature, which, among other things, indicate that the expression of an opinion may take place at several levels of communication. The terms "freedom of expression", "freedom of speech", "freedom of thought", "Meinungsfreiheit" or "freedom of opinion", all show that the protection of the fundamental right guaranteed by this legal instrument and the examination of its framework can be relevant to several different forms of communication.[22] Everyone has a certain

[22] András Koltay: A véleménynyilvánítás szabadsága. In.: András Jakab – Balázs Fekete (eds.): Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat, rovatszerkesztő: Bodnár Eszter,

kind of internal conviction, world view or outlook. This inner conviction rarely remains in the inner world of the individual because it usually always breaks out from there.[23] This is when conflicts or collisions can arise between members of society.

The problem arises from the fact that it is a fairly important and broad fundamental right, the entitlement to which people by their very nature enjoy almost every day. This is also declared in the Fundamental Law, which states that everyone has the right to freedom of opinion and expression [Article IX(1) of the Fundamental Law], but that the exercise of this right must not violate the human dignity of others [Article VI(1), IX(4) and (5) of the Fundamental Law]. The role of this legal institution is therefore of paramount importance. This is also indicated by the Constitutional Court's formulation that freedom of expression is the mother right of fundamental communication rights,[24] but this does not mean that it is unrestricted.[25] The right to freedom of expression must nevertheless be allowed[26] in the event of a conflict with other fundamental rights.[27] Restrictions may be imposed based on a strict criteria subject to a necessity-proportionality test,[28] which sets limits to unjustified or excessive restrictions on fundamental rights. Interestingly, the mere offensive or insulting nature of a particular expression does not justify a restriction on expression.[29]

Regarding the above, an important question that arises is how the constitutional aspects of the conduct of a potential employee – particularly his right to freedom of expression – are reflected in the employment relationship and how they are enforced. An overview of the principles of constitutional law is not in itself

Jakab András) http://ijoten.hu/ szocikk/a-velemenynyilvanitas-szabadsaga (2023.12.02.), 2018. 2.

23 György Kiss: Managerial prerogative és a véleménynyilvánítás szabadsága. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. 11.

24 30/1992 (26.V.) AB, reasoning [III. 2.2].

25 Bernát Török: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022, (hereinafter referred to as Török 2022), 32.

26 Decision 30/1992 (V. 26) AB, reasoning V.1, ABH 1992, 167, 178.

27 András Koltay: A véleménynyilvánítás szabadsága. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *A magyar közjog alapintézményei*. Budapest, Pázmány Press, 2020, (hereinafter referred to as Koltay 2020), 570.

28 See for more information Zoltán Pozsár-Szentmiklósy: Az arányossági teszt a jogalkalmazásban. *Alkotmánybírósági Szemle*, 2/2016. 98-100.

29 Koltay 2020, 569-570.

sufficient, since the question of horizontal scope arises even before the specific features of labour law are analysed.

3.2. Transposition of constitutional law into the employment relationship

Before reviewing the labour law aspects, it is important to mention the horizontal scope, i.e. the effect of the *"third party effect" to* get a comprehensive picture of why provisions on the legitimate economic and organisational interests of the employer appear in the employment relationship (and in the more specific sports employment relationship).Fundamental rights were originally intended to regulate the scope of the state's action vis-à-vis private individuals, thereby protecting human and civil liberties against public authority. However, the protection of fundamental rights is not limited to private individuals against the State.[30] This is because, due to the horizontal scope of constitutional law, which is accepted to varying degrees in the European Union, constitutional law does not directly shape private legal relationships between private individuals, but does impose constitutional obligations on the parties individually, which has an indirect effect on legal relationships between private parties.[31] The constitutional rules therefore act as a kind of interpretative guide which must be taken into account when interpreting the content of private-law obligations.[32]

Using this analogy, we can observe that, as stated in Article 10 of the Convention on Human Rights, which in turn is reflected in Article 11 of the Charter of Fundamental Rights of the European Union, *"everyone has the right to freedom of expression"*. The exercise of this right may be restricted in a democratic state only if justified, for example, on grounds of national security, territorial integrity, the reputation of others or the protection of their rights. This principle is also reflected in the Constitution, so a kind of cross-over between norms can be observed in this case too. This perspective is confirmed by the position of the Constitutional Court[33] that the norms of the Fundamental Law must have an effect throughout the entire legal system.

It is therefore important to stress that public law norms can indirectly shape private legal relations between individuals, as constitutional law norms "spill

30 Török: 2022, 24.

31 Stephen Gardbaum: The Horizontal "Effect" of Constitutional Rights. *Michigan Law Review*, 102/2003, Iss. 3. 388-389.

32 Eric Engle: The Third Party Effect of Fundamental Rights (third party effect). *Hanse Law Review*, 5/2009, Iss. 2. 166.

33 8/2014 (III. 20.).

over" into the provisions governing other areas of law. This happens in such a way that the public law norm in question is stretched and compressed across the interfaces between the branches of law, thereby taking on new frameworks and terminology adapted to the specificities and nature of the field of law in question, thus facilitating its applicability in the more specific context of that field. In this way, for example, the constitutional rules relating to freedom of expression and reputation are also embodied in the employment relationship.

3.3. General standards of conduct in labour law

Thanks to the transposition of constitutional law, the employment relationship also contains provisions on the fundamental conduct of the parties. Article 6(1) of Act I of 2012 on the Labour Code (hereinafter referred to as the Labour Code) refers to the conduct to be expected in the performance of the employment contract in the given situation. It is a broad provision which is partly objective and partly subjective. It is objective in the sense that it sets an average standard for the assessment of the conduct of a party. Also, it is subjective in the sense that this yardstick has different aspects in different situations and life situations.[34] Since each case, dispute or factual situation that raises the question is unique and different in its details, it is difficult to define a precise, taxonomically demarcated yardstick for the conduct that can generally be expected. Furthermore, in the case of a consideration based on the standard of reasonableness, the position of the employee in the work organisation plays a significant role,[35] so the subjective side of the above-mentioned principle is more likely to be given greater weight, since a given employer may have a wide variety of positions in the organisational hierarchy, which further nuances the weight to be given to the conduct of all employees.

From all this, it can be deduced that in Mt. the more specific criteria of conduct contained in § 8, which are naturally derived from the standard of expectations. The employee may not, during the employment relationship, engage in conduct which would jeopardise the legitimate economic interests of the employer [Art. 8 (1) of the Labour Code]. This provision is supplemented by a further section of the Labour Code. Section 8 (2) of the Labour Code, according to which an employee may not, outside working hours, engage in conduct which is directly and likely to damage the reputation or legitimate economic interests of the employer, in

[34] Kozma et al. 2020, 15.
[35] Ibid.

particular about the employee's position in the employer's organisation [Section 8 (2) of the Labour Code]. Furthermore, the employee may not exercise his right to freedom of expression in such a way that the employer would damage his reputation or his legitimate economic and organisational interests. [Mt. § 8 (3)].

The three provisions referred to above are closely interrelated, as they are all intended to limit the conduct of the employee. In this sense, the law requires from the employer a passive conduct that is generally expected. Looking at these provisions, it can be concluded that the freedom of the employee's conduct, particularly the freedom of expression, which derives from fundamental rights, is constrained by the legitimate economic and organisational interests of the employer.

However, part of the problem with the labour law aspect is that while the limits of the employee's conduct are to some extent more precisely defined by labour law than by the basic principles of constitutional law, the limits for the employer are vague and nebulous. It is difficult to define what is meant by the employer's organisational interest. There is no precise definition of the employer's organisational interest,[36] and its determination depends for the time being on the case-by-case work of the legislator.[37] In disputes relating to the expression of employee opinions, the court must necessarily assess and evaluate whether the dubious communication in question is capable of causing harm to the employer's interests and what constitutes the employer's legitimate economic and organisational interests in the case in question. In addition, it should be examined whether there is a risk of harm to the employer's interests. After all, under the rules governing the subject matter of this question, the actual occurrence of harm is not a prerequisite, i.e. the real possibility of harm is simply sufficient.[38]

It is also worth looking at the issue from a different angle and examine cases that do not harm the employer's interests in question. The basis for this line of thinking is the question of the scope of freedom of expression, which determines which communications are communications of a kind that fall within the scope of freedom of expression. Certain communications do not necessarily fall within the scope of freedom of expression, even from the point of view of constitutional law. To decide this question, we must examine which

[36] See: Mt. § 8 Commentary (Wolters Kluwer Law Library Commentary).

[37] Jácint Ferencz – Éva Nyerges: A munkavállalói véleménynyilvánítás versus munkáltatói érdek. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. (hereinafter referred to as Ferencz – Nyerges 2022) 57.

[38] Ferencz – Nyerges 2022, 58.

communications have relevant attributes.[39] Three types can be identified: the creation of new knowledge, individual autonomy, and democratic self-government.[40] If an attribute can be identified in a communication of an opinion, it can be included in the freedom of expression. Thus, when examining an employee's expression of opinion, we must look for a representation of these elements to distinguish an employee's expression from the sharing of an opinion that is merely intended to cause harm.

A further point of examination of the question is to determine the criteria according to which the communication of an opinion should in no case be protected. In this context, the Constitutional Court has laid down as a yardstick in its decision that freedom of expression does not apply to communications by employees whose sole *"purpose is merely to use abusive or destructive language which is damaging to the employer's good name, business reputation, favourable market or commercial image or which is offensive or insulting to the private or family life of a representative of the employer."*[41] In addition, it is worth mentioning the test applied by the Constitutional Court, based on ECHR case-law, which sets out important considerations concerning the protection of the fundamental rights of the opinion giving rise to the dispute.[42] Accordingly, the following five points should be taken into account: (1) the public and professional nature of the communication which is the subject of the dispute; (2) the factual nature of the communication and the nature of the value judgement; (3) whether the communication has caused detriment or adversely affected the employer's perception; (4) the good faith of the person exercising his freedom of expression; (5) and the seriousness of the employer's action taken as a result.[43]

In the light of the aspects reviewed, the employer's legitimate economic and organisational interest is, to a certain extent, clarified in employee's conduct. It must not harm the employer's commercial and market image, i.e. the employee's conduct must not be detrimental to the employer's success in the business sphere. This approach makes it easier to assess whether a legitimate economic interest has been harmed, but it should be noted that, because of the different market segments

[39] Török 2022, 26.

[40] Robert C. Post: Participatory Democracy And Free Speech. *Virginia Law Review*, 97/2011, Iss. 3. 478.

[41] Decision 14/2017 (30.VI.) AB [33].

[42] Attila Kun: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022. 86.

[43] For more information, see AB Decision 14/2017 (30.VI.) [34.].

and the variety of business activities across sectors, it is not possible to make a black-and-white determination of whether an employer's economic interest has been harmed in the light of market power. However, it is likely to be simpler to examine the issues involved than to resolve the organisational interest issues. In my view, to some extent, uncertainty can be minimised by trying to delimit the organisational interest in the light of the economic interest. Accordingly, it is worth asking what the employer should do organisationally to achieve the protected economic interest. In this way, there is, in my view, a realistic chance that the employer's interests in question, which arise precisely from the specific nature of the employment relationship of sportsmen and sportswomen, can be defined in a more transparent manner in the sports sector.

3.4. Employer's economic and organisational interests in the light of the expression of sportspersons' opinions

Professional sportsmen and women are also subject to the requirements of labour law, so the general conduct clause discussed above also raises relevant issues in this area. This is because in Hungary, according to Act I of 2004 on Sport (hereinafter referred to as the Act on Sport), the provisions of the Labour Code apply to the employment relationship of sportsmen and sportswomen, with the taxative exceptions set out in the Act. At the beginning of this study, it was mentioned that the status of sportsmen and sportswomen constitutes a third layer of issues related to the employer's interest, which is rather specific, as this form of employment differs significantly in certain aspects from the employment relationship in the "classical sense". The possibility therefore arises that the freedom of expression of sportspeople and the economic and organisational interests of employers in the form of sports organisations may need to be treated in an atypical way. One of the main reasons for this relates to the role of athletes in society and their vulnerability to the media. Accordingly, it is necessary to look at this phenomenon first to examine it more comprehensively.

If we look at media platforms, it is clear that they have become one of the main tools of communication and have long been an integral part of our everyday lives, which technological advances have made increasingly indispensable to our daily routines. This is supported by surveys in our country, according to which 73.5% of the population were users of social media in January 2021, which shows a clear trend that nowadays anyone can capture attention and communicate their thoughts widely, creating new formats of expression, which also have their

drawbacks.[44] After all, we may not be able to control the spread of the ideas we share, so they may reach people or platforms that we did not originally intend. Even more to consider is the fact that by reacting to and consuming public events that spread as news, we can be identified with a few clicks and our person instantly associated with any organisation or group of dubious ideology.[45] All this is important for professional sportsmen and women because sporting performance plays a significant role in the organic development of the status of sportsmen and women, a role that is amplified in a major way by the media phenomenon.

Therefore, it is at this point that the social role of sports should be addressed, since the main social-cultural function of sports is to build identity and emotional attachment in all sports. The direct expression of this is the participation in sporting events as a competitor in a sport. The indirect manifestation of this aspect is the consumption of a sporting event as a fan. The key point is the embedding of the latter activity in media culture.[46] For this reason, we can talk about sports and sporting activities as sports products, which are of particular interest to employers. Indeed, two types of sport-related advertising can be distinguished: the advertising of the sporting event itself and the marketing of sporting activity to sell another product through media platforms. The business sector has recognised the potential of these tools, and the latter strategy has become one of the most popular marketing tools, even for companies whose economic activity is not based on sport.[47]

Athletes are identified as key points for major sporting events and other related products. The athlete as a "celebrity" is an integral part of sporting activity, which is a major product of the media and the entertainment industry, and around which globalisation processes of undeniable importance are built. Furthermore, the sporting "celebrity" phenomenon is also reflected in a highly complex business model based on the relationship between the athlete and various political stakeholders and investors in the sporting industry. This is a performance-based

[44] Anita Vereb: Facebook-posztok és munkáltatói riposztok: A közösségi média és a véleménynyilvánítás a munka világában esetjogi megközelítésben. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022 (hereinafter referred to as Vereb 2022), 36-37.

[45] Vereb 2022, 37-38.

[46] Ádám Guld: Sportolók, rajongók, influencerek. Szurkolói szokások változása az online térben. *Szabad piac.* Gazdaság- Társadalom- és Bölcsészettudományi folyóirat, 2/2021 (hereinafter referred to as Guld 2021), 78.

[47] Mynkio Lee: Advertising. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 12.

profit-oriented approach in a capitalist context, which has its potential but also its dangers. These drawbacks lie mainly in the diminishing performance over time.[48] A further contribution to the status of the athlete is the interdependence between the media and the athlete. On the one hand, to maintain or possibly gain exposure as a "celebrity", it is essential for the athlete to maintain interest in himself or herself by appearing in the media. On the other hand, the media present the athlete's persona along different narratives to appeal to consumers' emotions by exploiting social and cultural factors.[49]

It is therefore easy to see that professional athletes are at the centre of the aforementioned media habits and business strategies, thanks to their easy followability, which supports significant community-building and cohesive power, a phenomenon that unsurprisingly extends beyond national borders. The popularity of the media products built around them in this way, which is partly based on their personality, is influenced by the quality and attractiveness of the content.[50] It is therefore not surprising that they are under enormous pressure, as their actions can have a significant impact on the demand for sports products and they are almost constantly monitored (i.e. their behaviour and any other manifestations are widely visible). Also, one of the main characteristics of the media product is the character of the athlete. It is therefore clear from this approach that, from an employee perspective, sportsmen and sportswomen are typically subject to a broader and more serious responsibility for the expression of their opinions, which raises the question of whether the restriction of their conduct, and particularly their freedom of expression, to such limits is proportionate to the legitimate economic and organisational interests of sports organisations.

This is not the subject of this paper, but it is worth considering the idea that the employment relationship between sportsmen and sportswomen does not necessarily restrict the fundamental rights of workers (in this case sportsmen and sportswomen) by the necessity-proportionality test, which may be due to the self-regulatory nature of the sporting world. [51]

Furthermore, the everyday responsibilities associated with the influencer role, which are to a large extent linked to the employment relationship, raise the question of to which extent the athlete's personal and private sphere can be intruded upon by the employer. Another question is to which extent the

[48] Timothy Robeers: Celebrity. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021. 69.

[49] Ibid.

[50] Guld 2021, 78.

[51] See Tamás Sárközy: Regulation in Sport as a Borderline Case between State and Law Regulation and Self-Regulation. *Acta Juridica Hungarica,* 42/2001. Iss. 3-4.172-173.

employer can, even absurdly, assert its legitimate economic and organisational interests outside working hours and outside the workplace to the detriment of the athlete's private life. With a certain amount of paraphrasing, this tendency suggests that professional sportsmen and women are under constant control, even in their own homes or elsewhere outside working hours.

Literature

Abdulsamad Olajide Yusuf – Oladele Isiaka Oladipo: Talent evaluation. In: Paul M. Pedersen (ed.): Encyclopedia of Sport Management. Northampton, 2021.

Ádám Guld: Sportolók, rajongók, influencerek. Szurkolói szokások változása az online térben. *Szabad piac.* Gazdaság- Társadalom- és Bölcsészettudományi folyóirat, 2/2021.

András Koltay: A véleménynyilvánítás szabadsága. In: Lóránt Csink – Balázs Schanda – András Zs. Varga (eds.): *A magyar közjog alapintézményei*. Budapest, Pázmány Press, 2020.

Anita Vereb: Facebook-posztok és munkáltatói riposztok: A közösségi média és a véleménynyilvánítás a munka világában esetjogi megközelítésben. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Anna Kozma – György Lőrincz – Lajos Pál – Zoltán Petrovics (eds.): *A munka törvénykönyvének magyarázata*. Budapest, HVG Orac, 2020.

Attila Kun: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Bernát Török: A munkavállaló szólásszabadságának alkotmányjogi keretei. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

Eric Engle: The Third Party Effect of Fundamental Rights (third party effect). *Hanse Law Review*, 5/2009, Iss. 2.

György Kiss: Managerial prerogative és a véleménynyilvánítás szabadsága. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.

György Lőrincz: A munkaszerződés teljesítésének egyes kérdései. *Munkajog*, 3/2020.
Hugo Sinzheimer: *Arbeitsrecht und Rechtssoziologie: Gesammelte Aufsätze und Reden*. Frankfurt, Europäische Verlagsanstalt, 1976.
Jácint Ferencz – Éva Nyerges: A munkavállalói véleménynyilvánítás versus munkáltatói érdek. In: Lajos Pál (ed.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2022.
John Solow – Peter von Allmen: Performance expectation, contracts and job security. In: *Research Handbook of Employment Relations in Sport*. Cheltenham, Edward Elgar Publishing, 2016.
Kevin K. Byon: Consumer Behaviour. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021.
Lajos Bosánszky: Az igazgatás, irányítás, vezetés, felügyelet, ellenőrzés, vizsgálat fogalmakról. Állam és *igazgatás*, 6/1986.
László Kovács: Változások a fuvarozási és a szállítmányozási szerződés szabályozásában II. *Céghírnők,* 1/2018.
Mark Freedland: *The Personal Employment Contract*. Oxford University Press, 2005.
Mynkio Lee: Advertising. In: Paul M. Pedersen (ed.): *Encyclopedia of Sport Management*. Cheltenham, Edward Elgar Publishing, 2021.
Peter J. Bosch: Enforcement Problems of Personal Service Contracts in Professional Athletics. *Tulsa Law Journal,* 6/1969.
Robert C. Post: Participatory Democracy And Free Speech. *Virginia Law Review*, 97/2011, Iss. 3.
Sándor Takó: A filmkészítés során alkalmazott egyes szerződések ismérvei és specifikumai. *In Medias Res,* 1/2023.
Simon Deakin: The Comparative Evolution of the Employment Relationship. In: Guy Davidov – Brian Langille (eds.): *Boundaries and Frontiers of Labour Law.Goals and Means in the Regulation of Work*. Hart Publishing, 2006. 89–108.
Stephen Gardbaum: The Horizontal "Effect" of Constitutional Rights. *Michigan Law Review*, 102/2003, Iss. 3.
Tamás Prugberger – Bernadett Szekeres: Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájára. Állam- és Jogtudomány, 2/2022.
Tamás Sárközy: A hivatásos sport gazdasági jogi alapkérdései Magyarországon. *Gazdaság és Jog*, 7-8/2000.
Tamás Sárközy: A sport, mint az állami-jogi és az önszabályozás határterülete. Állam- és Jogtudomány, 3-4/2000.
Tamás Sárközy: Regulation in Sport as a Borderline Case between State and Law Regulation and Self-Regulation. *Acta Juridica Hungarica,* 42/2001. Iss. 3-4.

Tivadar Miholics: Problémák, javaslatok a munkaviszonyt érintő egyes szabályok körében. *Munkajog*, 5/2021.

Zoltán Pozsár-Szentmiklósy: Az arányossági teszt a jogalkalmazásban. *Alkotmánybírósági Szemle*, 2/2016.

Zsuzsanna Gősi: A sportoló mint a sportszervezetek különleges erőforrása. In: Enikő Korcsmáros (ed.): *Selye János Egyetem 2018-as X. Nemzetközi Tudományos Konferenciájának tanulmánykötete*. Komárno, 2018.