

THE STATUS OF PROFESSIONAL PLAYERS BETWEEN SELF-EMPLOYED AND EMPLOYEE STATUS: STATE OF THE ART IN SLOVAKIA AND IN EAST-CENTRAL EUROPE

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Summary

On Dec. 3rd, 2019, decision of the Parliament of Slovakia was taken, aiming to allow sportspersons to freely choose between their status as an employee or a self-employed person. Still, this intention is not properly reflected in the new wording of the Act on Sports, which might lead to further quarrels. The author attempts to show that in fact nothing has changed in the status of players even under the 2019 amendment and if performing dependent work, they are still to be considered employees.

Keywords: *sports; employment; self-employed person; Act on Sports; Slovakia.*

1. INTRODUCTION

The actual legal status of sportspersons plays an important role not only in the field of labour law, but also in social security law and tax law. Legal status of sportspersons was thereby not clearly defined in Slovakia until 2016. Until then, sportspersons in Slovakia usually signed a player's contract under the Civil or Commercial Code, which was to be considered an illegal practice at least since the 2007 amendment to Labour Code, introducing the concept of dependent work. However, even beforehand, the definition of dependent work was known in the Slovak theory of labour law.

Still, the sports sector intentionally circumvented the provisions of Labour Code and mostly used contracts under Civil or Commercial Code, which was understandable due to rigid, predominantly mandatory nature of labour law in Slovakia. For example, repeated concluding of fixed-term contracts is restricted by both national and European labour law, whereby such employment is usually accepted only for two

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years, while in sports, five-year contracts are usual. Therefore, a simple application of the Labour Code was not possible. Similarly, rules on the termination of employment cannot be applied in a sporting relationship, in order to prevent potential termination of relationship during the season. Slovak labour law, moreover, does not accept fines or arbitration in labour disputes, which would make the application of labour law in professional sports even more difficult in Slovakia.

Since 2016, however, sportspersons, whose sporting activity shows features of dependent work, were newly considered employees, under special rules on sporting employment expressed in the Act on Sports no. 440/2015. Social security law and tax law similarly started to consider such persons as employees – albeit, within a transitory period until December 31st, 2021, professional sportspersons performing dependent work are still considered self-employed persons for social insurance and health insurance purposes.

Generally, football sector complied with the new regulations. Ice hockey, in contrast, did not. Those who complied, understandably faced higher costs, mostly due to the costs of advance payments of taxes on behalf of their employees – the players.

Pressure from the side of the clubs not willing to comply, nor to accept higher payments for their employees, finally resulted in the 2020 amendment to the Act on Sports, aiming to allow the players to choose between their employment or self-employed status on their own. The amendment is thereby claimed to mean a sort of a return to the Czech (and former Czechoslovak) model, currently deviating from the rest of (East-Central) Europe. Basically, in the whole Europe, including East-Central Europe, players are namely considered employees in terms of labour law, social security law as well as tax law.

2. SITUATION PRIOR TO 2016

The employment status of players engaged in dependent work has been discussed for many years in Europe. It has been often argued against their employment status either on the basis that sport was allegedly to be considered an art, or at least that there was a problem with whether to consider players as white-collar or blue-collar workers.¹ Finally, it was Roger Blanpain who was the first in Belgium to suggest that players should be considered employees – and a number of legislative proposals subsequently pursued this goal. These arguments have gradually established themselves not only in Belgium, where Blanpain came from, but also in France, and gradually throughout the whole Western Europe.

In Western Europe, it was thereby often possible to use general labour law itself, being much less rigid than in the countries of Central and Eastern Europe, due to specific historical reasons. At present, however, many Western European legal systems are already even one step further in regulating the status of players in that they have introduced, in addition to general labour law, a specific regulation of sporting labour

1 Jean-Claude Germaine, *Le sportifs et le droit* (Liège: Faculté de droit de Liège, 1975), 107–9, 116.

relations.² This situation – the assertion of the concept of dependent work in sports (be it under general or special labour regulations) – has been established as undisputed in the meantime throughout whole Europe, with the exception of the Czech Republic and Malta.

Even in the Slovak Republic, the development has taken the indicated direction. The Slovak Labour Code contains, since 2007, in its first paragraph, an enumeration of the features of dependent work, which is an essential precondition of any employment relationship. According to § 1 (2) of the Labour Code (Act no. 311/2001), “Dependent work is work performed in a relationship of the employer superiority and subordination of employees, personally by an employee for the employer, under guidance of the employer, in his name, in the working time designated by the employer.” Dependent work can thereby generally be carried out only within the employment and only rarely in other legal relationships, governed by special legislation (e.g., civil service).

However, until 2016, the practice of using Civil Code and Commercial Code contracts in sports was a general rule, which was already back then to be firmly rejected, with reference to § 3 (2) of the Labour Code as effective up to 2016: “Labour relations of ... professional sportspersons are governed by this Act, unless stipulated otherwise.” Still, even the Slovak courts did not use their authority to remedy the status of players, either. Even while deciding on claims of players arising from player’s contracts, the courts did not dispute the nature of the contracts concluded as atypical contracts under § 51 of the Civil Code or § 269 (2) of the Commercial Code. The fictitious status of these players as self-employed apparently did not bother any of the parties in the relationship.³

This was thereby traditionally the case in all countries in East-Central Europe. However, since the downfall of the Communist regimes, the situation was slowly changing in all the countries of this region, except the Czech Republic and Slovakia. From among these last countries to consider players as self-employed, Slovakia made the important step towards their employment status in the 2015 Act on Sports, while the Czech Republic still insists on their self-employed status. The Slovak Act on Sports has namely introduced a detailed regulation of the employment within professional sports, as well as a detailed regulation of contracts for performing amateur sports. The Act has also introduced some amendments to the Labour Code, such as explicitly stating in § 2 (3) that professional sportspeople’s employment is regulated by a separate Act, and the Labour Code applies only if so provided by that special Act (Act on Sports). Thus, since 2016, sportspeople whose sporting activity shows features of dependent work, are newly considered employees under the special rules on sporting employment in the Act on Sports no. 440/2015.

3. SPORTING EMPLOYMENT UNDER THE 2015 ACT ON SPORTS

2 Jean Mouly, “Sur le recours au contrat de travail à durée déterminée dans le sport professionnel: Le droit commun du travail a-t-il encore un avenir dans le domaine du sport?” *Droit social* no. 5 (2000): 508.

3 Tomáš Gábriš, *Sports Law in Slovakia* (Alphen aan den Rijn: Wolters Kluwer, 2012).

Since the Slovak Labour Code due to its rigidity does not allow covering all the specificities of sporting activities, it was not possible to simply submit sporting dependent work to the Labour Code. Some exceptions and deviations from the Labour Code had to be introduced in the Act on Sports. Still, it was necessary to proceed very cautiously with regard to excluding or adapting the rules from the Labour Code so that the fundamental purpose of labour law and of the Labour Code – protecting employee as the weaker party – would not be affected. The result of these attempts was a certain compromise between the specificity of sports and the general labour legislation contained in the Labour Code.

Thus, since the entry into effect of the new Slovakian Act on Sports no. 440/2015, sportspeople performing dependent work in sports are now considered to exert a special type of employment – sports employment, based on the contract for professional performance of sport. Should they, however, perform sports maximum eight hours per week, five days per month, or thirty days per year, they can be considered amateurs, under a contract for amateur performance of sports. (Amateurs have in addition also the possibility to use a contract for training of a talented sportsperson, or a contract for work based on the Labour Code, or finally they do not need to sign any written contract at all.)

The most important limit in Slovakian labour law, which was also the reason for introducing specific regulation of sporting employment in the Act on Sports, is the principle of so-called *numerus clausus* of contract types, which means that labour law does not recognize neither atypical contracts, nor, for example, arrangements on contractual penalties, unless explicitly provided for in the Labour Code. Slovak labour law hence does not allow the conclusion of any other type of contract outside of those regulated in detail by the Labour Code (employment contract, contract for work performance, contract for work activity, contract for students work). Therefore, new contractual types had to be introduced in the Act on Sports. From among those, we shall focus here solely on the contract for professional performance of sport. It is namely this contract that is specifically affected by the latest amendment to the Act on Sports that we wish to dwell upon in this paper.

Under § 46 (1) of the Act on Sports “a contractual relationship established by a contract for professional performance of sport is considered to be other employment relationship”. However, legal relationship established by the contract is subject to provisions of the Labour Code only if expressly provided by the Act on Sports, which is done by references in footnotes or explicitly in the text of the individual provisions throughout the Act on Sports. Most importantly, there is also a general enumeration of applicable rules from the Labour Code in § 46 (3) of the Act on Sports: “The professional performance of sport is adequately covered by § 27 to 31, § 40 (3) to (7), § 64, § 75 (2) to (4), § 146 to 150, § 177 to 181, § 185 to 188, § 191 to 198, § 217 to 222, § 229 (1) and (2), (5) and (6), § 230 (1) to (3), § 231, 232, and § 238 and 239 of the Labour Code.”

In addition, several other institutes of the Labour Code to which the Act on Sports does not refer, are to be found in the Act on Sports in a more or less modified form – in case their standardized form in the Labour Code was considered not to be

applicable to professional sporting relationship due to the specificity of sports. This is the case mostly with the following rules and institutes:

Under § 34 of the Act on Sports, in the context of pre-contractual relations, a sports organization may require the sportsperson to undergo a medical examination, and it is also allowed for the organization (club) to obtain some sensitive personal data of the sportsperson, in particular on health status, which is considered to be a particularly important prerequisite for concluding a contract with a professional player.

According to § 46 (6) of the Act on Sports, “The contract for professional performance of sport can be concluded only for a certain period of time, no longer than five years from the effective date of the contract, unless the regulations of the sports association provide otherwise.” This is a deviation from § 48 (2) of the Labour Code, which allows for the use of fixed-term contracts only to a limited extent: “A fixed-term employment relationship may be agreed for a maximum of two years. Employment for a fixed period may be extended or renegotiated only twice within two years.”

In § 46 (8) of the Act on Sports, the sports organization’s ability to conclude a contract for professional performance of sports is also specifically regulated – the rules of the national sports association can namely provide that a contract for the professional performance of sport may only be concluded by a sport organization which has deposited a financial guarantee to a bank account of the sporting body, which governs the sporting event.

The regulation of the player’s capacity to conclude contracts for the professional performance of sport also constitutes a specific modification of the provisions of the Labour Code. According to § 31 (2) and (3) of the Act on Sports, modelled after the Labour Code, the age limit of 15 years was taken as a condition for the capacity to enter into contractual relationships under the Act on Sports generally, not only in relation to contract on professional performance of sports: “Capacity of a sportsperson to have in a contractual relation established under this Act any rights and obligations and the legal capacity to acquire these rights and to assume these obligations by their own legal acts, unless stipulated otherwise in par. 3, arises on the day when the sportsperson reaches 15 years of age.” Under the following (3): “In order to conclude a written agreement with sportspersons between the ages of 15 and 18, their legal representative shall be required to additionally sign a contract or a separate document as a part of the contract.” This allows the players to conclude contracts already from the 15 years of age, but at the same time their legal representatives (parents) are required to affix their signature (even if they disagree with the contract). Without the signature the player will not be able to validly enter into a contract. Thus, failure to sign a contract by a legal representative will make it impossible for the player to pursue sport. On the other hand, even if the representative disagrees, the signature of the representative allows the minor player to perform the sport.⁴

4 The Labour Code in a similar situation does not require this statement to be in writing, nor in particular to have the form of a signature on the contract, since refusal to sign would have the effect of frustrating the possibility of a minor employee to validly conclude an employment contract.

Furthermore, according to § 34 (6) of the Act on Sports, even a person under the age of 15 may also conclude a contract for the professional performance of sports, but in this case the contract with the sports organization is concluded on behalf of the players by their legal representatives: “The contract for the professional performance of sport is concluded with the sports organization on behalf of the sportsperson under the age of 15 by their legal representative. The conclusion of a contract for the professional performance of sport by a sportsperson under 15 years of age or older than 15 years but prior to ending their compulsory education shall be subject to authorization, issued by the competent labour inspectorate in agreement with the relevant state administration body in the field of public health. Authorization may only be granted if the performance of sport does not endanger the sportsperson’s health, safety, further development or compulsory education. The permit shall specify the conditions for the exercise of sport. The competent labour inspectorate shall withdraw the permit if the permit conditions are not complied with.”

According to § 31 (4), a contract between a sportsperson and a sports organization having as its object the performance of sport shall not contain a restriction on sporting activity after the termination of their contractual relationship. It is thus prohibited for the contract to include a non-competition clause for the period after the end of the contractual relationship, thus preventing the player from establishing a new contractual relationship with a competitor of the previous contractual partner, i.e. with another sports organization (club).

Furthermore, the Act on Sports specifically lays down the basic obligations of a sportsperson (§ 32) and of a sports organization (§ 33), which in the past usually found their expression in player contracts only. Now it should be sufficient to refer to the relevant provisions of the Act on Sports, respectively the provisions of the Act apply also in the event of a complete omission of this issue from the player contract (a contract for the professional performance of sport). The definition of obligations is important also because the breach of some of these obligations is further considered in the Act on Sports to be an acceptable reason for termination of the contractual relationship (see § 40 on termination, § 42 on immediate termination of the contractual relationship).

As regards the essential content of a contractual relationship, the Act on Sports specifically deviates from the Labour Code in particular with regard to the following institutes of labour law:

a) wage and average earnings (§ 36) – even in sports it is required to respect the minimum wage under a special regulation (Act no. 663/2007),

b) working time and rest (§ 37) – the player’s daily working time is considered to be a period of 24 consecutive hours during which the player is obliged to observe the rules of lifestyle and of healthy status. Actual performance of sport thereby takes place only during the time agreed in the contract for performance of sport. The continuous rest shall thereby not be less than six hours in any 24-hour period. The sports organization shall also ensure that the player has one day of continuous rest once a week. If this is not possible, the sports organization shall ensure continuous rest so that the player has at least two days of continuous rest every week,

c) leave and obstacles to sporting work (§ 44) – under § 44 (2), the player shall be entitled to an annual leave of at least 20 calendar days; under § 44 (3) the sportsperson is entitled to 1/12 of the annual leave for each month of the contractual relationship. According to § 44 (13), leave shall be granted for a period of at least a week of seven consecutive calendar days. Concerning obstacles to performing sports, according to § 44 (14), some of the provisions of the Labour Code on the obstacles to work on the part of an employee are adequately applicable to the obstacles on the part of a sportsperson,

d) special regulation of pregnancy and maternity in the context of obstacles to the performance of sport was introduced (§ 44) – according to the provisions of § 44 (16), a pregnant sportswoman has the right to refuse to practice sport if, according to a medical opinion, the practice of sport endangers the life or health of the conceived child. For a period when a pregnant sportswoman does not perform sport because of pregnancy, she is not entitled to wage or wage compensation unless the sports organization and sportswoman agree otherwise. According to § 44 (17), the provisions of the Labour Code shall adequately apply to maternity and parental leave.

As regards the termination of the contractual relationship, the Act on Sport discerns the same basic ways of termination as the Labour Code – termination by expiration, death of a sportsperson or the dissolution of a sports organization without a legal successor, agreement, dismissal (period of notice is regulated by the Act as being of one month, but it can be regulated otherwise in internal regulations of the national sports association) or by immediate termination (§ 38). A special way, also similarly based on the Labour Code, is to terminate the contractual relationship on the day on which the player's permitted stay in the territory of Slovak Republic ends according to a special regulation.

For the sake of completeness, it is also important to note that the Act on Sports does not only regulate individual labour relationships, but also collective action. § 45 provides to players who pursue sport under a contract for professional performance of sport the right to associate in trade unions in order to protect their economic and social interests. The players also have the right to collective bargaining with a sports organization, and may also enter into a collective agreement with the sports organization in which they can agree on conditions that are more favourable to players than those provided for by the Act on Sports.

Finally, in addition to labour law analogies, the Act on Sports also introduced some original requirements and particulars of the contract for professional performance of sport – especially in § 35 (2) requiring the contract to be in writing, (3) specifying essential elements of the contract and (4) on possible subsidiary arrangements of the contracts.

A special rule serving to protect player is introduced in § 31 (5) of the Act on Sports: “The period between the day of signature of the contract and the day of its effectiveness cannot be longer than one year, under the penalty of invalidity.” This aims to avoid the possibility of “chain contracts” that could be signed in advance with effectiveness deferred for several years, as a result of which the sportsperson would be contractually committed longer than the allowed maximum duration of contracts

under the Act on Sports (five years).

It follows from the foregoing that the Act on Sports pursued the objective of adapting, as far as possible, the performance of dependent work in the sports sector to the actual sporting reality while introducing only such Labour Code provisions and institutes which have no negative impact on sports. Maybe it even too much accommodated to the reality of sport, since this Act has earned numerous criticism from the ranks of labour law experts, according to which it has dealt too loosely with labour law institutes.

Still, should there be one area in which sports entities could potentially criticize the Act on Sports in this regard, it might have been the social insurance area, where, in particular, sports organizations as well as players themselves, were worried about the consequences of introducing a social insurance levy on wages of players to be paid by both clubs and the players (as applicable in all other sectors of economy). However, this concern was resolved by the legislature already when the Act on Sports was adopted – by the transitional provision of § 293d in the Act no. 461/2003 on social insurance, in which the obligation to pay contributions for players was postponed until December 31st, 2018, and currently it is postponed until December 31st, 2021.

In principle, it was thus assumed that most players in team sports, respectively in sports in general, whose performance of sports shows the features of dependent work as defined in the Labour Code, would carry out sporting activity on the basis of the contract for professional performance of sport. In principle, however, this assumption was fulfilled only with respect to professional football. Other sports, especially ice hockey, have ignored and circumvented this regulation, following the practice of innominate (atypical) contracts under the Civil Code or the Commercial Code.

Instead of intervening and ensuring compliance with the Act on Sports in these cases, the state bodies were inactive. In contrast, surprisingly, the parliament of Slovakia itself, at the very end of its parliamentary term, adopted in December 2019 an amendment to the Act on Sports attempting at confirming the actual illegal practice – the amendment to the Act on Sports, effective as of February 1st, 2020, namely aimed at allowing the sports organizations to replace the contracts for professional performance of sport with “other contracts”, i.e. innominate contracts under the Commercial Code, freely choosing between the statuses of sportspersons as employees or self-employed persons.

Apart from circumstances such as the end of the parliamentary term and the fact that it was an initiative of only a small number of members of parliament, this amendment should undoubtedly be regarded as at least unusual, and as we will see below, even in terms of its contents, in the context of the whole legal system it in fact leads to something completely different from what the authors of the amendment intended. Namely, instead of allowing the choice between the statuses of players (which the actual amendment is incapable of bringing – in our opinion), the amendment actually newly regulates the previously unregulated area of performance of sport as an independent, self-employed activity, introducing some of the mandatory provisions from the contract for professional performance of sport into previously unregulated area of “other contracts” to be used in case of performance of self-employed sporting activities.

4. CHANGES EFFECTIVE FROM FEBRUARY 1ST, 2020 AND THEIR CONSEQUENCES

Amendment no. 6/2020 to the Act on Sport, effective from February 1st, 2020, introduced substantial changes especially to the provisions of § 4 and § 46 of the Act on Sports. Newly, according to § 4 (3) (a) “professional sportspersons pursue sport ... under a contract for the professional performance of sport or other contract if they pursue sport for a sports organization as self-employed persons ...”.

§ 46 (10) of the Act on Sports, with effect from February 1st, 2020, stipulates that “A contractual relationship between a sportsperson and a sports organization established by other contract if the sportsperson carries out sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, shall be deemed to be a commercial relationship.”

This is closely related to the transitional provision effective from February 1st, 2020, expressed in the provisions of § 106d of the Act on Sports: “A contractual relationship between a sportsperson and a sports organization established before February 1st, 2020 if the sportsperson performs sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, is to be considered a relationship established by other contract than a contract for professional performance of sport under this Act...”

According to the members of parliament suggesting this amendment to the Act on Sport, these changes were to introduce the possibility for sportspersons (but rather for clubs) to “freely” choose between the status of a dependent worker or a self-employed person.

Thereby, if this sudden and strange interference with the basic principles of the Act on Sports was aimed to pursue the objective of avoiding the obligation to pay social security contributions, it might be understandable at least to some extent. Albeit, it should be once again noted here that this obligation was not relevant at the time of adoption of the amendment, since the provisions on payment of social security contributions were already previously suspended by another act for the period until December 31st, 2021 (§ 293do of Act No. 461/2003 on Social Insurance).

However, if the purpose of the amendment effective from February 1st, 2020 was to allow clubs to avoid certain provisions of the Act on Sports governing professional performance of sport under the contract for professional performance of sport, this practice and goal should be firmly rejected. Moreover, it should be noted here that this objective can even now still be perceived as unfulfilled; on the contrary, by introducing the “other contract” (in § 4 and § 46) in the Act on Sports, a new, previously non-existent obligation to use “other contract” under Commercial Code with some specific contents given by the Act on Sports was imposed on all sportspersons who perform sport as self-employed persons and whose contracts have not been previously regulated by the Act on Sports at all!

Specifically, according to § 46 (9) of the Act on Sports, as effective from February 1st, 2020 “The legal relations of a sportsperson and a sports organization established by other contract, if the sportsperson performs sport for the sports organization as a

self-employed person, shall be adequately subject to the provisions of § 32 to 34, 38, 39, 40 (1) to (3), § 42 and 43.” This means that the amendment extends to the self-employed persons in sport the statutory regulation of the Act on Sports, which was intended only for players engaged in dependent work, namely:

- Basic obligations of the sportsperson (§ 32)
- Basic obligations of a sports organization (§ 33)
- Pre-contractual relations (§ 34)
- Ways of termination of contractual relationship (§ 38)
- Agreement on termination of contractual relationship (§ 39)
- Termination by notice (§ 40 (1) and § 41 (1) to (3))
- Immediate termination of the contractual relationship (§ 42)
- Temporary hosting of a sportsperson (§ 43)

Was it really the intention of lawmakers to achieve this policy goal? If so, it is certainly a commendable amendment to the Act on Sports.

At the same time, however, was it truly their aim to deprive sportspersons being previously in the position of employees (under the contract for professional performance of sport) of the benefits and protection offered by those provisions of the Act on Sports which are now not applicable to the “other contract”? Specifically, it is the following provisions of the Act on Sports that should not apply now to all those sportspersons who have so far been employed and, according to the authors of the amendment, should now rather be governed by the “other contract” as self-employed persons:

- the contents of the contract (§ 35),
- minimum wage claims (§ 36),
- working time and rest arrangements (§ 37).

In addition thereto, one may also wonder if it was the aim of the authors of the amendment to deprive employees of the protection provided by the provisions of the Labour Code, which applied to sportspersons pursuant to the provisions of Art. § 46 (2) of the Act on Sports, according to which: “The legal relations in the performance of sport on the basis of a contract for professional performance of sport are adequately covered by § 27 to 31, § 40 (3) to (7), § 64, § 75 (2) to (4), § 146 to 150, § 177 to 181, § 185 to 188, § 191 to 198, § 217 to 222, § 229 (1) and (2), (5) and (6), § 230, § 231, 232, § 238 and 239 of the Labour Code.”

These provisions will namely no longer apply to sportspersons who, according to the authors of the amendment, should sign “other contracts” instead of a contract for professional performance of sport. The respective provisions of the Labour Code thereby include provisions governing the transfer of rights and obligations arising from contractual relations, the definition of minor and pregnant employees, the prohibition of dismissal, the issuing of employment certificates, labour protection, compensation of damage and liability of employees and employers, collective labour relations, trade union association, and the right to information and control.

In addition, it should also be borne in mind that, with the waiver of labour and related social protection, sportspeople would also lose the protection afforded to the weaker party in a possible civil litigation and even criminal protection in the event

of a failure in payment of their salary (which is considered a crime in employment relationship), as well as several other achievements provided by the Act on Sports.

Was it really the aim of the authors of the amendment to derogate these already acquired rights of players as employees – especially in those cases where sports organizations have not respected the Act on Sport even in the past and now their illegal conduct is to be healed in the provisions of § 106d of the Act on Sports? Is this in compliance with Art. 24 of the Universal Declaration of Human Rights under which “Everyone has the right to rest and recovery, in particular to a reasonable definition of working hours and regular paid leave.”? (and likewise Article 7 of the International Covenant on Economic, Social and Cultural Rights). And are the concerned sportspersons aware of this?

Perhaps, after introducing these facts, even the creators of the amendment themselves might be willing to accept a different, “more appropriate” interpretation of the amendment than the one provided by the explanatory memorandum to the amendment. We will try to offer our own “corrective interpretation” in the following chapter.

5. ANALYSIS AND “CORRECTIVE INTERPRETATION” OF THE AMENDMENT TO THE ACT ON SPORT

Explanatory memorandum to the amendment no. 6/2020 openly states that this amendment to the Act on Sports was intended to enable sportspersons (in fact rather sports clubs as their employers and stronger parties) to choose between statuses and legal regimes – that is, between the performance of dependent or independent (self-employed) work. However, the explanatory memorandum is not legally binding, and we believe that the text of the amendment at least in this respect does not say exactly what the explanatory memorandum intended.

It may namely be claimed that the change in the wording of the relevant provisions of § 4 of the Act on Sports, as opposed to the original wording of that provision, has essentially resulted only in the deletion of the reference to the definition of dependent work under the Labour Code, emphasizing instead that that not all activities in the sports sector are performed as dependent work. However, the criterion for the choice between the contract for professional performance of sport and “other contract” is not explicitly provided in this provision (and nowhere else in the Act on Sports) – only the explanatory memorandum states that the sole criterium is the will of the contracting parties.

However, it is clear that if such a criterion is missing in the Act on Sports itself, it must be sought in other legally binding regulations. Naturally, one should reach for a law that defines dependent work, and that is the Labour Code. In addition to the definition of dependent work, the Labour Code thereby also contains a provision of § 1 (3) which provides that “Dependent work may be performed solely in an employment relationship, in a similar employment relationship or, exceptionally, under the conditions laid down in this Act in other employment relationship. Dependent work may not be carried out in a contractual civil relationship or in a contractual commercial

relationship under special regulations.”

Thus, the concept of dependent work is clearly a generally accepted fundamental sectoral and cross-sectoral principle decisive for assessing work performance as dependent or independent work even there, where the Labour Code does not seem to apply – in relations contracted under Civil Code or Commercial Code. Precisely because of that, there are labour protection authorities which, even in relations governed by commercial or civil law, are charged with the tasks to uncover cases of hidden dependent work, whereby one cannot argue with the applicability of the Civil Code or the Commercial Code (which is applicable to “other contracts” under the amendment to Act on Sports) against the principle of protection of dependent work under the Labour Code.

Thus, in the absence of an explicit criterion for choosing between contract types in the Act on Sports itself, the criterion expressed in the Labour Code should apply. Based on that, it is clear that a contract for professional performance of sport, which is deemed to constitute “other employment relationship” (pursuant to § 46 (1) of the Act on Sport), is to be concluded in cases of dependent work meeting the definition criteria set out in Labour Code.

Since the Amendment effective as of February 1st, 2020 it is hence in our opinion up to the law application authorities (courts and administrative authorities) to interpret the text of the Act on Sports systematically, with respect to the entire legal order of the Slovak Republic, including the regulation of undeclared work and illegal employment, which makes it possible to penalize a “hidden” employer. In this spirit, therefore, we advocate that the law applying authorities should in cases of dependent work in sports consider it obligatory to use the contract for professional performance of sport, and only in other cases (of self-employed work) it should be possible to conclude “other contract” which has found its new regulation in the Act on Sports as effective since February 1st, 2020 (and which is to be observed by all those who have so far pursued sports as self-employed persons and whose contractual relations were not regulated in detail by the Act on Sports until February 1st, 2020).

In this respect, however, some provisions of the latest amendment may be more problematic for interpretation. § 46 (10) of the Act on Sports with effect from February 1st, 2020, namely stipulates that “A contractual relationship between a sportsperson and a sports organization established by other contract if the sportsperson carries out sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, shall be deemed to be a commercial relationship.” This is closely related to the transitional provision cited above regarding the amendment effective from February 1st, 2020, stipulated in § 106d: “A contractual relationship between a sportsperson and a sports organization established before February 1st, 2020 if the sportsperson performs sport for the sports organization as a self-employed person, even in a manner that meets the features of dependent work, is to be considered a relationship established by other contract than a contract for professional performance of sport under this Act...”

There is no doubt that should these provisions be interpreted in the sense of the explanatory memorandum, one would understand them as stating that the existing

employees could themselves (or given their position of a weaker party, rather the stronger party – employer / club would be the actual decision-maker) choose between the status of dependent work with appropriate social protection and the status of independent, entrepreneurial activity.

Disregarding the fact that the non-binding explanatory memorandum says here clearly more than the Act itself, moreover, there is no doubt that such an interpretation of the amendment could become a precedent for all other sectors of economy in which both employers and employees would quite naturally also prefer the short-sighted possibility of saving on levies and other expenses instead of social protection. Whether sport is “specific” enough to justify such an extensive exception only for sports is very much doubtful.

For all the reasons given above, we suggest that instead of such an interpretation of the currently effective wording of the Act on Sports, which would itself be unsystematic, and even contrary to constitutional and European values (in particular with regard to the derogation of existing employees’ rights in sport) on the contrary, systematic, constitutionally and internationally acceptable interpretation should be selected and prioritized instead. A “corrective interpretation” of the not entirely clear provisions of the amendment to the Act on Sports is thus necessary.

It is thereby acceptable without major problems that the cited provisions of § 4, § 46 (10) and § 106d of the Act on Sport can be interpreted in a much different way than expected and envisaged by the explanatory memorandum to the amendment. A potential interpreter from the ranks of law applying bodies is namely offered foremost the systematic interpretation outlined above, taking into account the protection of dependent work.

In addition, there is also the operation known as so-called “construction of axiological (value) hierarchy of legal norms” available here.⁵ This is an operation confirming that even a later and special standard may not take precedence over an earlier and more general standard if the latter is to preserve the values of the more general regulation in the context of the whole legal system – and thus in favour of protection of dependent work in sports.

Moreover, a law-applying body advancing in this way could also use another specific interpretation technique, known as “dissociation”,⁶ if, for example, in a phrase used repeatedly in the provisions of § 46 (10) and in § 106d of the Act on Sports, “in a manner that meets the features of dependent work”, the authority would consider that the legislature “said more than they wanted and should”, and in fact the legislature meant “in a manner that meets **some, but not all** (bold by author), features of dependent work”. In this light, “A contractual relationship between a sportsperson and a sports organization established by other contract if the sportsperson carries out sport for the sports organization as a self-employed person, even in a manner that meets **some, but not all** (bold by author) the features of dependent work, shall

5 Carlos Alchourrón and Eugenio Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales* (Buenos Aires: Astrea, 1974), 158; Riccardo Guastini, “Defettibilità, lacune assiologiche, e interpretazione,” *Revus* 14 (2010): 57–72.

6 Cf. Chaim Perelman, *Logique juridique: Nouvelle rhétorique* (Paris: Dalloz, 1979), point 74.

be deemed to be a commercial relationship.” Similarly: “A contractual relationship between a sportsperson and a sports organization established before February 1st, 2020 if the sportsperson performs sport for the sports organization as a self-employed person, even in a manner that meets **some, but not all** (bold by author) the features of dependent work, is to be considered a relationship established by other contract than a contract for professional performance of sport under this Act...”

Thus, should this interpretation technique be used, it could be argued that all those relationships that are based on an “other contract” are commercial relations, unless all the characteristics of dependent work are met, or at least unless they are fulfilled to the extent showing that this truly is a case of dependent work. On the contrary, where there are no doubts as to the nature of dependent work, the axiological hierarchy of norms, as well as the dissociation procedure, together with systematic and internationally and constitutionally acceptable interpretation, must aim to provide adequate protection for dependent workers-sportspersons, against economic interests pursued by the stronger party in their relationships (i.e. sports clubs acting as employers).

6. CONCLUSIONS

Prior to 2016, the Slovak Republic, by not adopting special legislation on the performance of dependent work in sports, and at the same time by not challenging the persistent illegal situation of hidden dependent work, violated the fundamental rights of sportspersons, foremost their right to social protection. This situation has been remedied by the adoption of a special regulation on the performance of dependent work in the field of professional sport, in the Act on Sports. However, the amendment to this Act effective since February 1st, 2020, according to its explanatory memorandum and the intention of its authors, aimed to reverse this situation and to allow clubs to force sportspersons to sign instead of legally regulated contract serving to protect dependent workers in sport (which was even exempted from social security contributions until December 31st, 2018, and currently is exempted until December 31st, 2021) to rather sign “other contracts” that do not guarantee such protection. In our view, this unsystematic and manifestly unlawful attempt (contrary to the principle of protection of dependent work and related international, constitutional and national legal safeguards) should be firmly rejected in favour of constitutionally and internationally consistent and systematic interpretation – guaranteeing protection of dependent work. The interpretative guidelines provided by us in this paper provide for tools to meet this objective, while at the same time we advance the idea that amendment effective since February 1st, 2020 went even further – with regard to protection of the self-employed sportspersons. In this light, the amendment effective as of February 1st, 2020 can namely be – paradoxically – understood as a supplement to the Act on Sports, by expressly regulating also the particulars of contractual relations of “tradespeople” in sports who are to be governed by “other” contracts, previously not mentioned in the Act on Sports. Under our interpretation of the amendment, such sportspersons should now urgently align their “other contracts” concluded before

the amendment became effective with the currently effective wording of the Act on Sports, since all these “other contracts” are now to include some obligatory elements as required by the amendment to the Act on Sports.

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Tomáš Gábriš*

Sažetak

STATUS PROFESIONALNIH IGRAČA IZMEĐU ZAPOSLENIKA I SAMOZAPOSLENIKA U SLOVAČKOJ I ISTOČNOJ SREDNJOJ EUROPI

Slovački je parlament 3. prosinca 2019. donio odluku s ciljem omogućavanja sportašima da slobodno izaberu između statusa zaposlenika i samozaposlenika. Ta intencija, međutim, nije jasno odražena u novoj formulaciji Zakona o sportu, što bi moglo dovesti do budućih sporova. Autor nastoji pokazati da se, u stvari, ništa nije promijenilo u statusu igrača unatoč amandmanu iz 2019. i da ako obavljaju zavisan posao, još uvijek trebaju biti smatrani zaposlenicima.

Ključne riječi: *sport; zapošljavanje; samozaposlena osoba; Zakon o sportu; Slovačka.*

Zusammenfassung

PROFESSIONELLE SPORTLER ZWISCHEN SELBSTSTÄNDIGEM UND ANGESTELTLEM STATUS: ZUM AKTUELLEN STAND IN SLOWAKEI UND OST- UND MITTELEUROPA

Die am 3. Dezember 2019 vom Parlament der Slowakischen Republik getroffene Entscheidung ermöglichte Sportlern die Wahl zwischen dem angestellten oder selbständigen Status. Im neuen Wortlaut des Sportgesetzes spiegelt sich diese Absicht jedoch nicht wider, was zu weiteren Streitigkeiten führen könnte. Der Autor zeigt auf, dass sich auch aufgrund der im Jahr 2019 eingeführten Änderung nichts am Status der Sportler geändert hat, denn falls sie abhängige Arbeiten ausführen, gelten sie weiterhin als Angestellte.

Schlüsselwörter: *Sport; Anstellung; selbstständige Personen; Sportgesetz; Slowakei.*

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Riassunto

**LO STATUS DEI GIOCATORI PROFESSIONISTI
TRA IL LAVORATORE AUTONOMO E LO STATUS
DI LAVORATORE DIPENDENTE: L'AVANGUARDIA
IN SLOVACCHIA E NELL'EUROPA ORIENTALE E
CENTRALE**

Il 3 dicembre 2019 è stata presa la decisione dal Parlamento della Slovacchia ai fini di permettere agli sportivi di scegliere liberalmente il proprio status di dipendente oppure di lavoratore autonomo. Ciononostante, questa intenzione non è stata adeguatamente implementata nella nuova formulazione della Legge sugli sport, che potrebbe portare ad ulteriori dispute. L'autore tenta di mostrare che niente sia cambiato di fatto nello status dei giocatori anche dopo le modifiche del 2019 e che se essi prestano un'attività lavorativa dipendente, continuano ad essere considerati dei dipendenti.

Parole chiave: sport; occupazione; lavoratore autonomo; Legge sugli sport; Slovacchia.

