DECISION OF THE EMPLOYER AS A SOURCE OF REPRESENTATIVENESS? A RECENT LESSON FROM THE CZECH SEMI-PROMOTION OF COLLECTIVE BARGAINING

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Abstract: *In some countries, trade unions have certain rights or privileges guaranteed by the constitution, such as the right to engage in collective bargaining and negotiate a collective agreement. However, these rights are significantly restricted in other countries, particularly in light of recent internal social problems. This article examines the concept of trade unions' representativeness, with a focus on the Czech Republic. We will consider what can be a source of legitimacy, as understood and promoted by an ex-communist Eastern European legislator in 2024. The Czech legislator has empowered employers to decide which trade union organisation, out of the many operating in their facility, shall be recognised, unless most employees oppose the employer's decision. If we compare it with international and European obligations, it is a bold move. Is it inspiration or deprivation when we compare the Czech story with recent trends of trade union representativeness in the Western and Central European legal space?*

Keywords: *Trade union organisation, Representativeness of trade union organisation, Labour law*

INTRODUCTION

Scholarly discourse has previously divided legal orders regarding the representativeness of trade union organisations into so-called open or closed ones. Some legal systems avoid strict regulation of trade unions at all. Whereas open legal systems enable the examination of whether a trade union has the highest number of members, legal systems without precise regulations on representativeness make it very difficult to measure this accurately. Closed legal orders do not offer this possibility; however, certain trade unions or associations are declared representatives without further consideration. Of course, some previously closed legal systems moved to open ones, such as France. Open legal orders must address methods to quantify the number of members of a particular trade union.[1] The employer has the right to know which trade union is representative, as established by Czech case law and other applicable laws. According to the German Constitutional Court,[2] such a restriction follows from the nature of property protection and is required by constitutional law.

The Czech legislator enacted, in Section 24(3) et seq. of the Czech Labour Code, the employer's right to determine which trade union organisation is recognised to operate at that employer's facility. This article analyses whether the concept of representativeness

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This article was created with support for the long-term conceptual development of the research organisation Institute of State and Law of the Czech Academy of Sciences, v. v. i., RVO: 68378122.

[1] Cf. PRIGGE, W.-U. Gewerkschaftliche Repräsentativität in pluralistischen Systemen: Belgien und Frankreich. *Industrielle Beziehungen – Zeitschrift für Arbeit, Organisation und Management.* 2001, Vol. 8, No. 2, pp. 200–220.

[2] For example, the decision of the German Federal Constitutional Court of *3 January 1979, Collection of Decisions* No. 50, p. 90.

outlined in the amended[3] Czech Labour Code[4] is still at all in line with the international obligations of the Czech Republic and, if so, whether it fulfils the meaning and purpose of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on fair minimum wages, i.e., whether, in the light of recent European trends, it has the potential to promote and encourage collective bargaining.

To consider it, the Czech Republic's international and EU commitments will first be analysed, followed by national trends in identifying representative trade union organisations. The new Czech regulation will then be evaluated based on the approaches found.

I. REPRESENTATIVENESS IN INTERNATIONAL AND EU TERMS

In the international context, conventions of the International Labour Organisation, the International Covenant on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Social Charter are relevant to representativeness. According to Article 8 of the International Covenant on Economic, Social, and Cultural Rights, the establishment and activities of trade unions may not be restricted by any limitations other than those provided for by law and which are necessary in a democratic society, in the interests of national security or public order, or for the protection of the rights and freedoms of others. The International Covenant then refers to the International Labour Organisation (ILO) Convention, stating that its content is not affected by the provisions of the Covenant.

The ILO, at its inception, had already prioritised the representativeness of workers' representatives over equality among workers' representatives. Thus, from the outset, its non-governmental delegates are not selected by all the workers' representatives, not even by all the trade union organisations operating in the member countries, but only by the most representative ones. Similarly, the tripartite, i.e., the formalised dialogue between the government, the trade union organisations, and the largest employers' unions, is to be carried out, according to the ILO, not by all trade union organisations, but only by the most representative ones.[5] As stated by the Committee of Experts, representativeness does not restrict coalition freedom but develops it if predetermined and objective criteria are used to determine it.[6]

Thus, while internationally, there has been more or less a rejection in principle of the equality of all trade unions and a denial of the right of all employees to decide who their delegate is, the Czech legislator has, on the contrary, enacted the concept of determining the representativeness of a trade union through the employer's decision, which is only to the limited extent correctable through the will of the majority of its employees. By

[3] Done by Act 230/2024 Coll. (In Czech: Zákon č. 230/2024 Sb. kterým se mění zákon č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů, a některé další zákony).
[4] Act No. 262/2006 Coll. Labour Code as amended (hereinafter the "Czech Labour Code").
[5] Article 1 of ILO Convention No. 144.
[6] Cf. ILO, Freedom of Association Committee of the Governing Body of the ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition 2018, International Labour Office, par. 515 and 1351.

such a regulation, the legislator has favoured the employer, whose decision cannot be set aside by the will of the majority of unionised employees, but rather by the will of all employees, including those who are not and do not wish to be unionised.[7]

I.1. International Labour Organisation

The ILO Constitution states that non-governmental delegates are appointed by the trade unions *"which are most representative of employers or workpeople, as the case may be, in their respective countries."*[8] Representativeness will be determined based on pre-defined and objective criteria to be established in consultation with the most representative employers and trade unions' organisations. The trade union must provide its representatives with sufficient supporting documents. However, we will look in vain in the International Labour Organisation (ILO) conventions for a more detailed regulation of trade union representativeness. Article 3 of ILO Convention No. 87 and Article 2 of ILO Convention No. 98 leave the door open for national regulation of trade union representativeness. Under the ILO Conventions, the workers' representative may not be limited to the trade union directly, but may also include another body elected or delegated by the trade union, or another body altogether, freely elected by the establishment's employees or employer, without the cooperation or participation of the trade union. The interpretation of Convention No. 87 by the International Labour Organisation is based on a collection of decisions of the Committee of Experts, referred to as Digesta.[9] The conclusions contained in that collection of decisions suggest that adopting a statutory regulation governing the functioning of a trade union does not, in itself, conflict with the internationally guaranteed autonomy of trade unions to draft their statutes and rules of procedure,[10] provided that the regulation is general. The decision of the registry court in registering the rights and obligations of a trade union would only be a problem if that decision were outside the discretionary jurisdiction of that judicial body.[11]

Detailed regulation of a trade union's internal workings is considered problematic unless it is merely formal (minimum) requirements for the form of these internal workings. Regulation of the relationship between trade unions and basic organisations should be exceptional and, as such, only applicable to unusual cases.[12] Moreover, in such cases, trade unions should retain all possible means of defence against interference with their autonomy.[13]

[7] PICHRT, J. In: BĚLINA, M. a kol. *Pracovní právo. 6th edition.* Praha: C. H. Beck, 2014, p. 354.
[8] Article 3 (5) of the ILO Constitution.
[9] Cf. ILO. Digesta, *Part six "Right of organizations to draw up their constitutions and rules"* in Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition. In Czech: ILO Svoboda sdružování, Přehled rozhodnutí a zásad svobodného sdružování formulovaných Výborem pro svobodu sdružování Správní rady MOP, 5th edition, ČMKOS, 2006.
[10] Cf. Digest conclusion 370.
[11] Cf. Digest conclusion 373.
[12] Cf. Digest conclusion 386.
[13] Cf. Digest Conclusion 386.

I.2. European Convention

Among the international treaties, we should also mention the European Convention for the Protection of Human Rights and Fundamental Freedoms, where the freedom of association has gradually become part of the protection of the freedom of assembly provided for in Article 11 of the Convention. The European Court of Human Rights (ECHR) has concluded that the right to freedom of association is protected under Article 11 of the European Convention on Human Rights. This freedom includes the right not to be compelled to join a trade union.[14]

However, part of the freedom of association is the right of trade unions not to have the state exclude municipal officials from the right to bargain collectively.[15] On the other hand, in the case of a conflict between ecclesiastical autonomy and coalition autonomy, the ECHR gave priority to the protection of a particular church, finding no violation of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the practice of the Romanian courts, which refused to register a trade union organisation founded by 35 members (including clergy) of the Roman Catholic Church, citing a threat to the relationship of subordination within that church.[16]

I.3. European Social Charter

The case of the European Social Charter (ESCH) concerns the support for the right to collective bargaining under Article 6. According to said Article, States undertake to ensure the effective exercise of the right to collective bargaining by promoting, where necessary and appropriate, mechanisms for voluntary negotiation between employers or employers' organisations and workers' organisations to determine employment terms and conditions by collective agreements. Article 6(2) has traditionally been interpreted by the Committee of Experts (European Committee of Social Rights) as meaning that it is the task of the Contracting States to encourage collective bargaining by trade unions, not to hinder or restrict the right of trade unions. The basic argument, then, is the economically weaker position of employees and trade unions vis-à-vis employers.

On the other hand, this right cannot be interpreted as granting all trade unions the right to participate in collective bargaining or to conclude a collective agreement. Therefore, trade unions' access can be limited according to the criterion of representativeness. However, the limitation of representativeness must not be extensive. The European Court of Human Rights has rejected the principle of parity, i.e., the mandatory representation of all trade unions, as a criterion for representation.[17]

When both the French[18] and Spanish legislatures allowed other entities to negotiate collective agreements, the Committee of Experts interpreted Article 6(2) ESCH to mean

[14] Cf. Sørensen and Rasmussen v. Denmark, *Grand Chamber's judgment, Applications nos. 52562/99 and 52620/99*, par. 58, ECHR 2006I.
[15] Cf. Demir and Baykara v. Turkey, *Grand Chamber's judgment, Application no. 34503/97.*
[16] Cf. Sindicatul "Păstorul cel Bun" v. Romania, *application no. 2330/09, Grand Chamber's judgment.*
[17] Matica Hrvatskih Sindikata v. Croatia, *application no. 116/2015, pars 59 and 80.*
[18] Articles L. 2232-21 to L. 2232-29-2 of the French Labour Code. The amendment was made by Act no. 2018-217 of 29 March 2018.

that this possibility was only available for factual situations where trade unions were unwilling or factually unable to gain membership, even though the State supported their existence, while guaranteeing, through the relevant procedural rules, that the resulting agreement represented the genuine will of the bargaining employees.[19]

I.4. Union law

The CJEU has interpreted that both collective agreements and collective actions, such as strikes, fall within the scope of EU law.[20] It further held that, although this is a fundamental right, it is subject to limitations under EU law.[21] Regarding EU law, the key provision is contained in Article 28 of the EU Charter of Fundamental Rights, which regulates the right to collective bargaining and to take collective action. These rights are guaranteed to trade unions, but other representative bodies also have them, as they are held by *"practitioners and employers, or their respective organisations."* According to the CJEU, although the social partners are not public law bodies, they implement EU acts through collective agreements. Thus, even collective agreements must pursue legitimate objectives. In the event of a conflict with the prohibition of discrimination, the measures agreed upon must be necessary to achieve the objective pursued.[22]

Primary EU law provides for the involvement of representative trade unions, and a specific methodology has been developed to identify them, but this is not explicitly supported by primary law. Representative organisations are understood as trade unions with an EU dimension, which are involved in collective bargaining in their country and are sectorally relevant. However, a numerus clausus is applied here, as in some cases, only one of several trade unions is identified for each country.[23] Thus, there is a tradition in EU law of reviewing the representativeness of trade unions for Article 154 TFEU. Eurofound conducts the review, which has been carried out for 2023, focusing on inter-sectoral social dialogue, the woodworking industry, the furniture industry, and professional football.[24]

Regarding secondary legislation, mention should be made of Directive 2001/86/EC, which supplements the Statute for a European Company regarding employee involvement and provides for the creation of a special negotiating committee to ensure the exercise of employees' collective rights. The Directive again does not outline the procedure for determining which employee representative will nominate a member of the special negotiating committee, nor does it specify the key criteria for this decision. It does, however, regulate the primacy of employee representatives over the election of the employees themselves, stating: *"Without prejudice to national legislation and/or practice laying down thresholds for the establishing of a representative body, Member States shall*

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[19] Cf. paragraph 104 of the decision of the European Committee of Social Rights in Confédération française démocratique du travail (CFDT) v. France, complaint no 189/2020.

[20] Cf. CJEU Decision C-438/05, par. 37

[21] Cf. CJEU Decision C-438/05, par. 44.

[22] Cf. CJEU decision in Case C 447/09 Reinhard Prigge and Others v Deutsche Lufthansa AG.

[23] REGO, R., ESPÍRITO-SANTO, A. Beyond density: Improving European trade unions' representativeness through gender quotas. *European Journal of Industrial Relations.* 2023, Vol. 29, No. 4, pp. 415–433.

[24] Eurofound (2023), Representativeness of the social partners in European cross-industry social dialogue, Sectoral social dialogue series, Dublin.

provide that employees in undertakings or establishments in which there are no employees' representatives through no fault of their own have the right to elect or appoint members of the special negotiating body." However, there is no provision for the employer to designate a representative of the employees.

Lastly, reference should be made to Directive 2022/2041, which requires Member States to promote the ability of social partners to negotiate collective agreements, and on which the legislator based the adoption of the Directive above. Amendment of Article 24 of the Labour Code. However, this Directive does not provide for any further regulation of the determination of the representative.

II. NATIONAL APPROACHES

The trend in recent decades has been to regulate the freedom of association in the constitutional provisions of respective national states.[25] This is the case of Article 27 of the Czech Charter of Fundamental Rights and Freedoms, Article 39 of the Italian Constitution,[26] Article 3(3) of the German Basic Law, Articles 12 and 59 of the Polish Constitution, and Articles 36 and 37 of the Slovak Charter of Fundamental Rights and Freedoms, et cet.[27] All these provisions guarantee the right of workers and employers to form and join their organisations. Only the Italian Constitution explicitly requires trade unions to undergo a registration procedure, which is also provided for in ordinary laws, such as those of Czech or Polish legislation. The Slovenian Constitutional Court has expressly confirmed the right of the Slovenian legislator to regulate the obligation of a trade union to register in the relevant register.[28]

Generally speaking, legal systems such as those in Germany, Ireland, Portugal, or Sweden tend to oppose the explicit regulation of representativeness. In those jurisdictions, the legitimising factor is not based on counting members. However, other criteria, such as tradition (e.g., Belgium), the sectoral principle (Denmark and Austria, to

[25] RIBEIRO, A. T. *The Scope of Representation of Trade Unions in Portugal: A New Reality? E-Journal of International and Comparative Labour Studies.* 2023, Vol. 12, No. 3, pp. 82 et seq. *System of Employee Representation at the Enteprise JILPT Report.* 2012, No. 11; REGO, R., ESPÚÍRITO-SANTO, A. Beyond density: Improving European trade unions' representativeness through gender quotas. *European Journal of Industrial Relations.* 2023, Vol. 29, No. 4, pp. 415–433. SERAJI, M., KAMAL, H. H. Freedom of association in labour relations in the context of the Maqasid-al-Shari'ah principles. *European Journal of Law and Economics.* 2018, No. 45, No. 2, pp. 377–395; ŠVEC, M., HOMER, Z. *Odbory 2022, Dopady novely Zákonníka práce na pôsobenie odborových organizácií u zamestnávateľa.* Bratislava: Friedrich Ebert Stiftung, 2022; GEORGE, E. R. et al. Recognizing Women's Rights at Work: Health and Women Workers in Global Supply Chains. *Berkeley Journal of International Law.* 2017, Vol. 35, No. 1, pp. 1–46. SERVAIS, J.-M. The Right to Take Industrial Action and the Supervisory Mechanism Future. *Comparative Labor Law & Policy Journal.* 2017, Vol. 38, No. 3, pp. 375–394. ŠVEC, M. *Kolektivní smlouva.* Bratislava: Fridrich Ebert Stiftung, 2016; VOGT, J. S. The Right to Strike and the International Labour Organisation (ILO). *King's Law Journal.* 2016, Vol. 27, No. 1, pp. 110–131. WAAS, B. Who is allowed to represent employees? The capacity to bargain collectively of trade unions. In: Tomas Davulis – Daiva Petrylaite (eds.). *Labour Market of 21st century: Looking for flexibility and security.* Vilnius, 2011, p. 164.

[26] But the Italian constitutional regulation is not applicable.

[27] Cf. Articles 54 to 57 of the Portuguese constitution, Article 41 of the Romanian constitution, Article 77 of the Slovenian constitution, and Articles 281 and 371 of the Spanish constitution. Cf. RIBEIRO, A. T. *The Scope of Representation of Trade Unions in Portugal: A New Reality? p.* 82 et seq.

[28] Decision of the Constitutional Court of Slovenia of *5 February 1998, Case No. U-I-57/95.*

some extent), or the ultimate success in the collective bargaining process, as evidenced by the conclusion of a collective agreement (e.g., Germany and Sweden). Both legislations grant the right to collective bargaining only to the trade union.[29] However, in Germany and Sweden, employers can negotiate a collective agreement with any active trade union within their company. Moreover, relatively recently, the German Supreme Court has reconsidered its case law and accepted that an employer may negotiate multiple collective agreements with various trade unions. In contrast, for decades, the rule was that employers were, in principle, bound by only one collective agreement at a time.[30] The implementing regulation can be found in Article 77(3) of the Act on Co-Determination in the Workplace.[31] Although German works councils may negotiate certain agreements, these agreements may not exclude or replace the collective bargaining agreement. The negotiation of a collective agreement is considered to be a sign of the representativeness of a trade union under German law. Contrary to Czech tradition, a trade union with fewer members in Belgium can become a representative.[32]

However, other states also establish legal requirements for a trade union to emerge at the employer, specifying a certain number of members required to form a trade union or a representative trade union. In those legal systems, trade unions are defined by material and formal characteristics. In terms of numbers, the limit on the number of employees required is the lowest under Slovak legislation, which requires a minimum of two trade union members to be proven. The Czech regulation sets the limit at three employees, while the Polish regulation sets the limit at 10 employees. The English regulation sets a limit of 10% of the members of the unit formed for collective bargaining purposes. The French regulation provides the right to appoint an employee representative for employers with 50 or more employees, but here, too, it is a so-called electoral unit.[33]

In the UK, there is a process of both voluntary and compulsory recognition of the existence and operation of trade unions. For statutory recognition of a trade union, membership of at least 10% of the employees in the relevant constituency (a minimum of 21 persons) is required. The Central Arbitration Committee verifies the number of members of the trade union.[34] Austrian law also provides for the representativeness of trade unions; these rules are applied, for example, under the inter-union collective agreement of April 13, 1999, the collective agreement for public schools of February 23, 2000, and the collective agreement of October 4, 2016, for the bargaining area of sanitary workers.[35] The decision on whether a trade union is active at the employer is made by an

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[29] The German prerogative reserved to the trade union only is called Tariffähigkeit. WAAS, B. *Who is allowed to represent employees? The capacity to bargain collectively of trade unions. In: Tomas Davulis – Daiva Petrylaite (eds.). Labour Market of 21st century: Looking for flexibility and security.* p. 164.

[30] BGB decision of 7 July 2010, Case No 4 AZR 549/08.

[31] Cf. Article 6 of the Act on Co-Determination in the Workplace. In German Betriebsverfassungsgesetz as amended by 1 Act of 19 July 2024 (BGBl. 2024 I Nr. 248).

[32] Cf. Article 6 of the Act of 5 December 1968 on collective agreements and joint committees.

[33] Article L. 2143-3 of the French Labour Code.

[34] The CAC is the body of the Department for Business & Trade Arbitration.

[35] For participation in contract negotiations, those unions whose membership in their respective bargaining areas reaches the prescribed minimum percentages (10% or 5%) shall be considered representative. The representativeness of unions shall be determined as of November 30 of each year based on union dues collection authorizations submitted to the Governing Body.

arbitrator in the event of a dispute under Slovak law. If the parties to the conflict do not agree on the appointment of an arbitrator, the Slovak Ministry of Labour appoints the arbitrator upon either party's proposal.[36]

II.1. French measurement of representativeness and, in particular, influence

Since 2008,[37] seven criteria have been required for achieving representativeness under French law, including respect for the values of the Republic, independence, existence for at least two years, influence, number of members, amount of dues, and the so-called share of votes.[38] The criteria relating to respect for the values of the Republic, independence, and financial transparency must always be met and assessed independently of one another. The other criteria, relating to influence, membership, contributions, length of existence, and share of votes, are subject to a comprehensive overall assessment.[39] Only representative trade unions have certain rights, particularly the right to engage in collective bargaining. Of course, a trade union can also lose its status as the organisation with the most members.

This means that once fulfilled, these criteria are considered met throughout the electoral cycle. However, when it comes to a trade union's representativeness, it is not a homogeneous concept. Still, it is demonstrated in varying quality and quantity at the company, sectoral, group, national, and inter-sectoral levels.[40]

The impact of the union is monitored and measured through the activities carried out by the union and the feedback from its members. The effect of all activities, including activities in a trade union federation that the trade union has subsequently left, is assessed. Regarding the number of members and dues, the number of members is determined by the number of employees in the plant or a part of the plant. However, the Labour Code does not set a minimum level of contributions. However, according to case law, the contributions must be significant in financing the trade union's activities.

The most controversial but essential criterion regarding representativeness is the number of votes of the trade union. The share of votes is calculated based on the votes obtained by each trade union in the elections to the works councils. It is determined according to the level considered – company, sectoral, or inter-sectoral. The representativeness of trade unions in a sector means that a trade union must obtain at least 8% of the votes cast to be considered representative of the industry.[41]

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[36] Act 76/2021 Coll. And Section 230a of the Slovak Labour Code. In Slovak: Zákon č. 76/2021 Z. z. a ust. § 230a zákonníka práce.

[37] Until then, the five unions were simply considered representative. These were the CGT, CGC, FO, CFTC and CFDT. The other unions were obliged to prove their representativeness.

[38] There is participation in formalised elections to the social and economic committee (comité social et économique) and at the various chambers and other events are used for measurement. Cf. Article L. 2121-1 of the French Labour Code.

[39] See the decision of the Court of Cassation of 29 February 2012, Case No. 11-13.784.

[40] Thus, a trade union is considered representative in a factory or sector if it meets the above criteria and received at least 10% of the votes cast in the first round of the last election of employee representatives. The percentage of votes is measured every four years at the time of the election.

[41] The Court of Cassation has held that a trade union that is not representative at the beginning of an election because it did not participate in the election cannot become representative during the same election cycle by joining an organisation that has already achieved representativeness at the beginning of the election, even if that organisation is not representative.

II.2. Czech regulation

The Charter of Fundamental Rights and Freedoms of the Czech Republic forbids limiting the number of trade unions[42] and favouring them in an enterprise or sector. The legislator, after the experience of the Revolutionary Trade Union Movement[43] in socialist Czechoslovakia, has regulated freedom of trade union association as a primary value in the Charter. The elementary equality of trade unions was the basis for the Constitutional Court of the Czech Republic to reject the majority principle as a guiding criterion in 2008, when it repealed the relevant regulation in the then-new Czech Labour Code, which had continued to determine a trade union organisation based on a majority. However, as we have seen in the Czech Republic in the last 30 years, the de facto and even legal equality of trade unions is an illusion. If an officially untracked and unverifiable number of employees are associated with Czech trade unions, and if the unions informally estimate that about 12% of all employees are affiliated, can this still constitute a majority sufficient to shape government or business social policy?

The Czech Constitutional Court stated, *"If the purpose of collective bargaining is to be a mechanism of social communication and democratic procedural resolution of potential conflicts threatening internal peace, then it is also linked to the requirement of legitimacy (representativeness)."*[44] Thanks also to this intervention of the Constitutional Court, the representativeness of a trade union was, and continues to be, addressed in Czech law in the case of an extension of a higher-level collective agreement, in such a way that the relevant higher-level trade union body in a given sector acts on behalf of the most significant number of employees.[45] In addition to this arrangement, representativeness has remained regulated in Czech collective labour law in the case of European companies[46] and the Insolvency Act.[47] In both cases, the legitimisation of the trade union organisation through the majority is again.[48] The interpretation of European company regulation is somewhat more complex, as the legislator has even attempted to regulate the weight of the trade union's vote.[49]

According to the traditional Czech notion of representativeness in company collective bargaining, an association of three employees in an employment relationship is sufficient for a trade union to operate on behalf of an employer. This is not unusual in Europe, where other countries have traditionally resisted greater legal regulation of

[42] It is outlined in Article 27 (2) of the Charter. For this article, for the sake of brevity, the term trade union in the sense of Czech law will be used uniformly, i.e., as a collective term for an essential trade union organization, a regional trade union organization, a trade union federation and a federation or confederation of trade unions.

[43] It was the only one allowed trade union organisation.

[44] Constitutional Court judgment of 11 June 2003, Pl. ÚS 40/02.

[45] Cf. decision of the Municipal Court in Prague, No. 14 A 80/2017-43 and the Municipal Court in Prague, 14 A 64/2017-66.

[46] Cf. Section 55(4) of Act No. 627/2004 Coll. on the European Company.

[47] Pursuant to Section 67 of Act No.182/2006 Coll., the Insolvency Act, as amended, provides that *"If several trade unions operate side by side at the debtor, the trade union with the largest number of members or the association of trade unions with the largest number of members shall have this right, unless the trade unions operating at the debtor agree otherwise."*

[48] Thus, a trade union with a simple majority of employees is representative.

[49] Cf. Section 55(4) of Act No. 627/2004 Coll. on European Companies, as amended.

employee representatives. The previous Czech practice of small, essential trade union organisations, while sometimes impractical, has been in line with international law.[50] Nevertheless, legal life brought several complications, and the legislator resolved them by amending the Labour Code.

The Czech legislator has adopted a procedure whereby, if trade unions fail to reach a collective bargaining agreement, they are required to inform the employer within 30 days of the commencement of such negotiations.[51] The employer will then designate the trade union organisation or organisations with the most significant number of members. The key question in this new arrangement is how the employer repeatedly determines which union or group of unions has the most significant number of members. Moreover, the employer will need to have this knowledge at a specific time, but likely at the start of and during collective bargaining, to properly prepare for future collective bargaining developments and alternatives. He will then have to repeat this procedure in every collective bargaining session if he conducts them again in the years to come.[52]

The courts have repeatedly stated in case law that an employer can undoubtedly invite a trade union to have its membership verified by a notary public or a lawyer. However, a fee is required for this service. However, if the employer refuses to pay the costs of the notary or lawyer, this may be a problem for the trade union. Additionally, it is worth noting that in the Czech Republic, a tradition of employer donations has emerged, to which not all trade unions operating within the same establishment are entitled. Thus, one can imagine that by repeatedly requesting proof of membership through paid services, an employer can effectively exclude from negotiations a union that lacks adequate financial resources to meet the employer's demands.[53]

Leaving aside these practical problems of ascertaining the number of members of a particular trade union, the amendment to the Czech Labour Code poses a more general question concerning verification: Should the employer decide on the largest trade union? If we look at the Austrian, English, French, or Slovak legislation, we do not find any authorisation from the employer. Nor can we take inspiration from the otherwise very liberal national legislation of the United States, because such legislation would likely run up against the federal constitutional limits.

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[50] For example, the interpretative practice of Article 6 of the European Social Charter has clearly supported the functioning of trade unions as representatives of employees. PICHRT, J. § 286 In: BĚLINA, M., DRÁPAL, L. a kol. *Zákoník práce, komentář. 2th edition.* Praha: C. H. Beck, 2014, p. 1112.

[51] The question of application remains to be resolved as to whether the courts will consider this notification to be a legal act, and thus require written agreement by all trade unions that they have not reached an agreement, or whether only a notification by some trade unions will suffice. In the first case, one trade union refusing to agree would then block even the solution provided for in section 24(3) of the Labour Code.

[52] Security guards escorted the author out of a meeting of the European Works Council to which he had been invited as an expert of a trade union not recognized by his employer, an international IT corporation. The listed company then selectively asked this particular trade union to provide proof of membership.

[53] If at least 3 trade union members do not want to come forward and declare themselves members of a particular trade union, then the employer requires, for example, that the number of employees be verified by a notary, but the employer does not want to pay the costs associated with this verification.

CONCLUSION

The concept of representativeness of a trade union is a restrictive idea that allows an exclusion of a trade union organisation from collective bargaining and/or stripping it of other or all collective rights based on a chosen criterion or criteria for being unrepresentative. This can be achieved by the State, typically through its legislation, or by the employer through its measures, when it no longer deals with a particular trade union. International protection is primarily directed against the excesses of totalitarian states and is inspired by the lessons from the past.

Since the development of collective law is significantly influenced by local tradition and historical development, there are regional differences in the concept of representativeness. In most democratic countries, genuine trade unions are active, acting to protect the rights of employees, not overcharging employers, operating by their statutes, and conducting constructive collective bargaining with employers. The criteria must identify a representative trade union if the employer has more than one trade union.

A trade union is a corporation, so its legitimacy has always derived, and continues to derive, from the association of its members. More members equal more political power and, at the same time, more funds from membership dues. If more than one trade union operates at an employer, a representative trade union must be identified to bargain with the employer at the company level collectively. In a democratic society, working with the majority principle makes sense if it is verifiable and demonstrable that the majority has expressed its will, i.e., a particular trade union or grouping of trade unions brings together a relevant part of the workforce. Some examples from abroad support this finding. Representative trade unions are then favoured over non-representative ones in open foreign jurisdictions.

The principle of representativeness has traditionally been viewed in the Czech Republic and abroad as a defence against the abuse of law by trade unionists; however, it should not be used as a tool to unify views and representatives. Some countries have also had negative experiences with this during the Nazi and Communist periods. The ECtHR has rejected the principle of parity, i.e., the mandatory representation of all trade unions, as a criterion for representation.

By Act No. 230/2024 Coll., the Czech legislator addressed the issue of a trade union's representativeness in promoting collective bargaining. From the perspective of international regulation, a simple majority of the employees represented is acceptable as a criterion of representativeness, provided that such a criterion is discussed with the most representative trade unions and employers' associations and is established in advance in a binding law. The requirement of a simple majority of employees is not unconstitutional, even according to Czech case law, and is also found in other jurisdictions. Therefore, the solution proposed by the amendment to the Labour Code, in the new wording of Section 24(4) of the Labour Code, can be identified as one of the possible solutions.[54] However, it

[54] Implemented by Act No. 230/2024 Coll. It is essentially a veto right for employees who have the right to express in a written declaration of intent that they do not want the employer to negotiate a collective agreement with a particular trade union that has the highest number of members or with several trade unions that together have the highest number of members at a given employer.

would be more usual to link the designation of a representative trade union organisation to the conclusion of a collective agreement, rather than to a kind of pre-selection of a suitable contracting party. Moreover, the legislator has left it to practice to determine the procedure for how specifically and repeatedly the employer will verify the number of trade union members. From an international perspective, the Czech legislator's silence cannot be considered appropriate or beneficial. Suppose the legislator wanted to help collective bargaining. In that case, the procedure for verifying the number of employees in individual trade unions should also be regulated, including the method and the period for which verification is conducted. There are enough foreign models and experiences. From a normative point of view, an elegant one is the Slovak regulation, which uses an arbitrator, or the French regulation, which leaves the decision to the court.[55]

Therefore, although the number of affiliated workers is undoubtedly a quality in itself, other conceptions of the representativeness of a trade union organisation can be found in foreign legislation. In German law, for example, following the Second World War, pressure from the American, British, and French occupying forces led to the creation of duality in the form of works councils and trade unions as two distinct representatives of employees, who must not exclude each other in their activities. Sectoral affiliation can also be a different legitimising factor, as in Denmark, Germany, and Sweden, countries with a tradition of high union organisation. Another well-known legitimising factor is a union-wide or constituency-based election. The French legislation allowed for the recognition of a trade union organisation by a decision of a specific body. The employer selects a trade union in Sweden and Germany by concluding a collective agreement. The Czech regulation appears to be the only one in Europe that allows employers to determine the recognised trade union organisation without any objective form of attestation that the chosen organisation is the most numerous one.

[55] Such a procedure would also help the Czech mediation and arbitration system, which is not in the best shape. For all the application problems, let us mention the real low number of disputes resolved by arbitrators in the Czech Republic.