

# I. The legal dogmatic status and law policy opportunities of trade unions based on Hungarian employment regulations from 1992 till today

GYÖRGY KISS

## 1. Trade unions as new collective entities: A historical-dogmatic analysis

### 1.1. The legal nature of trade unions

#### 1.1.1. The transition from individual right through self-determination to collective autonomy

The development of the idea of freedom of coalition was a necessary corollary of the forms of dependent work. In the course of the historical development of work performed for other persons, in respect of dependent work, collective work soon became more prevalent in certain areas.<sup>1</sup> In this structure, a sharp contradiction developed between the legal presentation of labour relations and the sociological impact of collective performance. Private labour law of contractual liberalism strictly stood behind individual contractual

<sup>1</sup> Although collective performance developed differently in some work areas, practically it was present almost everywhere. It can be clearly demonstrated in certain working relationships even in feudal societies. Emergence of the beginnings of collective labour law among agricultural hired labourers, the guilds or mine workers resulted either in the fall of these forms (see the case of guilds), or most of these features were preserved and strengthened (like mine workers, or the class of industrial mine workers evolving from manufactures). See this in detail: Plannitz, H.–Buyken, Th.: *Bibliographie zur deutschen Rechtsgeschichte*, Frankfurt a. M., Klostermann, 1983; Ebel, H.: *Quellen zur Geschichte des deutschen Arbeitsrechts*, Berlin, Duncker & Humblot, 1964; Pergolesi, I.: *Introduzione al diritto del lavoro*, Padua, Cedam-Casa, 1958; Dolléans, H.–Dehove, M.: *Histoire du travail en France*, Paris, Dalloz, 1967; Rogers, J. E.: *Six Centuries of Work and Wages*, London, Batoche Books, 2001 [1884]; Pirenne, H.: *A középkori gazdaság és társadalom története (Economic and Social History of Medieval Europe)*, Budapest, Gondolat, 1983; Ogris, W.: *Geschichte des Arbeitsrechts von Mittelalter bis in das 19. Jahrhundert*, *RdA*, 1967, No. 4. From Hungarian literature, among others, see: Szűcs J.: *Városok és kézművesség a XV. századi Magyarországon (Cities and Handicraft in Hungary in the 15th Century)*, Budapest, Művelt Nép, 1955; Eperjessy G.: *Mezővárosi és falusi céhek az Alföldön és a Dunántúlon, 1689–1948 (Market-Town and Village Guilds in the Great Hungarian Plain and Transdanubia)*, Budapest, Akadémiai Kiadó, 1967; Iványi B.: *Két középkori sóbánya-statútum (Two Medieval Statutes on Salt Mines)*, Budapest, Századok (Centuries), A Magyar Történelmi Társulat kiadása (Published by the Hungarian Historical Society), 1911.

freedom,<sup>2</sup> while, on the basis of the actual situation, the focus shifted towards collectivism. Namely, with the progression of industrial development, the demand for unifying individual working conditions at a higher level inevitably came to the forefront. The uniform presentation of working conditions, originally expressed by means of individual labour contracts, became possible only through the so-called collective agreements. However, collective agreements assumed the legal recognition of a peculiar circle of subjects – which was completely new, compared to the previous practice.

The recognition of the new subject has taken place relatively shortly after a brief period of contractual liberalism, i.e., labour law soon got free from the approach determined by the *loi d'Allarde* and *loi Le Chapelier* acts.<sup>3</sup> In Germany, the Industrial Confederation of North German Domains (*die Gewerbeordnung des Norddeutschen Bundes*) laid down measures in this field as early as in 1869. By virtue of the statute, all previous prohibitions and sanctions were repealed which had been applied against the agreements and conspirations of assistants, apprentices and factory workers, aiming to achieve the collective use of more favourable wages and working conditions – with special attention to taking up work and dismissal of workers. The right of coalitions to legal action was recognized simultaneously, and substantive and procedural legal recognition of coalitions was started by these institutions.<sup>4</sup> This was of utmost importance because coalitions were no longer the subjects of police measures, but they became institutions – at a later stage, fundamental institutions – of labour law structure, built on private law principles. A similar time-frame and evolution can be found in *Austrian* law as well. For the first time in 1867, the basic law on the fundamental rights of citizens (*Staatsgrundgesetz über die allgemeine Rechte der Staatsbürger*) provided for the citizens' right of coalition.<sup>5</sup>

Perhaps surprisingly, due to certain factors, this process was carried out with more difficulties in Great Britain – which is considered the homeland of trade unionism – than in continental legal development. At the turn of the 18th and 19th centuries, the Combination Acts prohibited all employer's combinations and conspiracies and threatened them with criminal prosecution.<sup>6</sup> Despite the fact that these laws were almost entirely

<sup>2</sup> An excellent example of this is the French *Le Chapelier* law of 1791, mentioned above, which banned any conspirations by employers and employees on the assumption that the contract, as a manifestation of the will of sovereign individuals may not be defective.

<sup>3</sup> Despite the fact that the criminal code of the Napoleonic era punished the formation of coalitions, it was simply impossible to stop this progress with the evolvement of the industrial revolution. Finally, recognition of the freedom of association took place in the era of the Second Republic, after 1848. After several bypasses, coalition freedom – as a fundamental right – was declared for the first time in its entirety in 1864; this was later complemented with the *Waldeck-Rousseau* law in 1884. Coalitions were first legally recognized indirectly, through dissolving prohibitions that had prevented the formation of these conspirations.

<sup>4</sup> MünchArbR/Löwisch 1992, § 235, RdNr. 1.

<sup>5</sup> Mayer-Maly, Th.–Marhold, F.: *Österreichisches Arbeitsrecht, Bd. I.*, Wien/New York, Springer, 1991, pp. 15–16.

<sup>6</sup> A significant player in the fight against mergers was the Anglican Church, whose struggle with other religious communities came in handy in the struggle against employee coalitions. This is referred to by Halmi G.–Tóth G. A.: *Emberi jogok (Human Rights)*, Budapest, Osiris, 2003, p. 501.

repealed in 1824,<sup>7</sup> the criminal prohibition of employee conspirations was not lifted. A famous case of this era was the *Hornby v. Close* case,<sup>8</sup> where it was stated that the intention to form a trade union had been against the law because it would have actually hindered trade and market development.<sup>9</sup> It was in the same year (1867) that a more differentiated perception of trade unions emerged on the basis of a report made by the Erle Royal Commission. According to this, trade unions were no longer deemed illicit on the reason of hindering competition, their members were not allowed to be accused of the crime of illegal plot, but collective agreements concluded by them did not have any direct effect. The Trade Union Act of 1871 was made on the basis of this report. Its significance is given by the fact that it recognized trade unions as autonomous bodies.

The first decades of the 20th century were instrumental to the development of coalitions and rights of coalition from the aspect of ideology, too. France is a good example, where clarification went so far as to identify the place and function of coalitions in the political system.<sup>10</sup> With some differences, the same process took place in the history of the Italian syndicalism.<sup>11</sup> *Tarifverordnung*,<sup>12</sup> issued on 13th December 1918 can be considered an important stage of the German development of law, whose substantial element was to extend the settlement of wage- and labour-related conflicts to all employers, employees and trade unions. Laying down this became necessary because the norms of tariff agreements had become legally binding by this decree and applicable to the contracting parties directly and without special conditions. Moreover, it should be pointed out that *Tarifverordnung* introduced the technique and instrument of extended general applicability (*Allgemeinverbindlichkeit*).<sup>13</sup> Despite party-political struggles, gradual consolidation of labour law continued from the beginning of the 1920s, and, through the so-called *Ermächtigungsgesetz* (1923), the regulation of the resolving system of collective interest conflicts became almost complete.<sup>14</sup> In Austria – almost simultaneously with German law development – an act was born about collective agreements after the end of World War One, which also provided for the resolution of conflicts arising from

<sup>7</sup> Combination Laws Repeal Act (prepared by Francis Place and the so-called reformers).

<sup>8</sup> *Hornby v. Close*, 1867, LR 2 QB 153.

<sup>9</sup> In fact, trade unions were not given the legal assistance that other friendly societies were entitled to. See on this: Curthoys, M.: *Governments, Labour, and the Law in Mid-Victorian Britain: The Trade Union Legislation of the 1870s*, Oxford, Oxford University Press, 2004, pp. 58–66; Deakin, S.–Wilkinson, F.: *The Law of the Labour Market, Industrialization, Employment and Legal Evolution*, Oxford, Oxford University Press, 2004, pp. 206–208; Morris, S. G.–Archer, Th.: *Collective Labour Law*, Oxford, Oxford University Press, 2000, pp. 43–46.

<sup>10</sup> See the congresses held in Montpellier in 1902 and in Amiens in 1906. The so-called *La Charte d'Amiens* laid down the autonomy of coalitions, as well as their political neutrality. See Camerlynck, G.-H.: *Traité de droit du travail*, Paris, Dalloz, 1968, p. 597.

<sup>11</sup> Treu, T.: *Labour Law and Industrial Relation in Italy*, Deventer–Boston, Kluwer International, 1991, pp. 120–121.

<sup>12</sup> See *RGBl.*, 1918, p. 1456. (Verordnung über Tarifverträge, Arbeiter und Angestelltenausschüsse und Schlichtung von Arbeitsstreitigkeiten).

<sup>13</sup> Däubler, W.: *Tarifvertragsrecht*, Baden-Baden, Nomos, 1993, p. 47.

<sup>14</sup> See Verordnung über das Schlichtungswesen (*RGBl.*, 1923, p. 1043).

collective agreements.<sup>15</sup> Through this act, the normative content of collective agreements was recognized: it received mandatory nature. The importance of the legislation lies in the fact that from then on it became evident that the tools of labour conflicts in resolving conflicts can be looked at as *ultima ratio* solution only.<sup>16</sup> English law development – at least formally – differs from that of the states mentioned above in that a collective agreement is not deemed a *civilis obligatio*; however, this fact has never actually weakened the position of coalitions.<sup>17</sup> Namely, this was a period when certain acts of great significance were adopted, which ultimately transformed the approach to coalitions, including the Conspiracy and Protection of Property Act (1875),<sup>18</sup> after some antecedents the Trade Union Act (1913) and the Trade Disputes and Trade Union Act (1927).

The beginning of the 20th century and the period between the two world wars – in spite of all extremisms – cleared the ground for legal resolution that finally determined the status of coalitions after World War Two. We can say that the essence of this process was that legislation had to react to the activities of coalitions. First of all, the legal nature of collective agreements had to be defined. Further, the institutional system for the peaceful resolution of collective conflicts had to be worked out, and, last but not least, “direct actions,” the tools of so-called labour conflicts, had to be addressed. It is apparent, therefore, that irrespective of the direct legal recognition of coalitions, all activities and procedures carried out by coalitions came to the forefront of legislation. And this process inevitably contributed to the *de iure* strengthening of the position of coalitions.

The period that lasts from the end of World War Two to the present day is far from being homogeneous from the perspective of the judgment of trade unions, and it differs considerably country by country. In the “industrial states” of the 1960s and later in the “social states of law,” as frequently quoted, the most important pillar of labour law is perhaps the coalition freedom and the activity of coalitions that builds on it. The constitution of many countries – usually in the framework of the right of association – stipulates the right to coalition freedom.<sup>19</sup> However, regardless of whether a given country’s constitution provides for coalition freedom or not, today it can also be observed that employer/employee coalitions and coalition associations appear and cooperate as equal social partners. Cooperation of such quality can occur in a professional, sectoral and cross-sectoral relation, or in a relation affecting the entire national economy. The high-

<sup>15</sup> See Gesetz über Errichtung von Einigungsämtern und über kollektive Arbeitsverträge, 1919.

<sup>16</sup> Strasser, R.: *Arbeitsrecht*, Wien, Manzsche, 1988, No. II., p. 80.

<sup>17</sup> Robson, W.: *Industrial Law*, LQR, 1935, p. 204.

<sup>18</sup> This law repealed the Master and Servant Act. Thereby breach of contract by a servant was no longer deemed a criminal offence(!). By contrast, the institution of picketing was considered as a criminal offence if it resulted in the harassment of employees willing to pick up work. It also established criminal liability if participants of the strike did not provide the essential services or the strike posed a risk to human life.

<sup>19</sup> The relevant article of the German Basic Law mentions the right in question under the title of freedom of association and the prohibition of action against labour fight. The Italian constitution stipulates in a separate chapter – titled “Economic Relations” – the freedom of trade union organization and activities (Kiss, 1995, pp. 77–78).

est manifestation of cooperation is the lasting cooperation of employer and employee associations, which may even influence legislation work. Examples for such, often organized, cooperation can be found in several EU member states.<sup>20</sup>

However, the statutory regulation of coalitions – especially that of trade unions – is not coherent. Labour law regulations of some countries provide for trade unions in detail. For example, *Code du Travail* in France or *Codice Civile* in Italy provide for trade unions in detail. Also, the contents of the laws in the majority of Central European states are formed in a similar way. However, there are solutions which do not include any explicit provisions on trade unions, but the basic right to coalition freedom is extremely strong. German law is a good example of this. § 3, Section (3) of *Grundgesetz* allows everyone and every profession to form organizations for the promotion and protection of work and economic conditions. The importance of this is duly demonstrated by the second sentence of this article: “Abreden, die diese Recht einschränken oder zu behindern suchen, sind nichtig, hierauf gerichtete Maßnahmen sind rechtswidrig.” Content-wise, it represents the direct scope of the basic law, which is, by the way, an exception.

### 1.1.2. The regulation of trade unions in international treaties, as well as their role in the law of the European Union

International treaties and the law of the European Union serve to ensure and, in some areas, to extend the leeway for trade unions. Let me refer to § 20 of the Universal Declaration of Human Rights and ILO Convention No. 87. The latter includes the most important content elements of employer and employee organizations; the so-called preventive prohibition clause stands out from among them.<sup>21</sup> This means that acquisition of the legal personality – as far as these organizations are concerned – may not depend on any criteria that would constitute a limitation of coalition rights set out in the Convention.<sup>22</sup>

<sup>20</sup> In the Netherlands, after World War Two, the so-called “Work Foundation” (*Stichting van de Arbeid*) was established, comprising delegates of representative employer and employee organizations. Its function is twofold: on the one hand, it allows continuous consultations between employer and employee organizations, while, on the other hand, it elaborates recommendations for legislation – especially in wage and social matters. See Windmüller, P.: *Labour Law and Industrial Relations in the Netherlands*, Deventer–Boston, Kluwer International, 1969. Along with this organization, there is another important advisory body to the Government: the “Social–Economic Council,” which operates as a permanent tripartite consultative body.

In Belgium, *Conseil National du Travail* (the National Work Council) is a board operating on a parity basis, composed of delegates of the most representative employer and employee organizations and trade unions. Since 1968, the scope of the council has significantly increased upon receiving explicit statutory empowerment to conclude collective agreements. See Blanpain, R.: *Labour Law and Industrial Relations in Belgium*, Deventer–Boston, Kluwer International, 1990, pp. 224–245, and also Act of 5 December 1968, about collective labour contracts and parity committees.

In France, there is a consultative body that operates attached to the Minister of Labour. See Despax, M.–Rojot, J.: *Labour Law in France*, Deventer–Boston, Kluwer International, 1987, p. 40.

<sup>21</sup> MünchArbR/Löwisch, 1992, § 238, RdNr. 2–5.

<sup>22</sup> ILO Convention, No. 87, § 7.

This is supplemented by ILO Convention No. 98. One of its significant statements is that employee and employer organizations shall enjoy adequate protection against any acts of interference that affect their establishment, functioning or administration. An act of interference can be any measure designed to promote, or arrange for, the establishment of workers organization by the employer, or to place such organisations under the employer's control or financial influence. Besides, this provision in Hungarian labour law had and still has a specific meaning, namely in respect of the financial compensation of working time reduction that affects trade union officials (see below.) Finally, let me refer to § 11 of The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which lays down the right of association. The wording of Section (1) of the Article is atypical in a way that it addresses the right to form trade unions separately.<sup>23</sup> ECHR emphasizes in this context that it is not a special, stand-alone right, but merely a case of the general freedom of association.<sup>24</sup> The Court has established that there is no need for any special legal act to form a trade union. Further, as a type of association, they do not have any privilege due to their dedication to a specific objective, which is a characteristic feature of trade unions.<sup>25</sup>

The process of community legislation is one of the peculiarities of the EU's law and order. Employee and employer coalitions were given a prominent role in the formation of Community Directives that affect labour law. Directives 96/34/EC on parental leave, 97/81/EC on part-time employment, and 99/70/EC on fixed-term work were announced on the basis of framework agreements concluded between European-level employer advocacies and trade unions. All this gives the impression that these advocacy organs conduct legislative activity as well, at least in the specific legislation of the Community. This role has had an effect on the legislation of Member States as well. In several Member States, including Hungary, certain initiatives came to the forefront to empower national-level coalitions with similar rights. At this point, the debate on coalitions, and the legal nature of trade unions in particular, unavoidably intensified. The legal nature of trade unions can be defined either on the basis of a private law or a public law approach. If defined on the basis of the former, a trade union is a social, civilian organization that is formed on the basis of the general right of association and has a specific objective. The definition based on public law is more complex as it tends to furnish these coalitions with a role in areas which are characteristic to organizations manifesting state authorities. This debate culminated in Hungary in Resolution No. 124/2008 (X. 14.) of the Constitutional Court that made a decision in the question of legitimacy and representativity, after all.<sup>26</sup>

<sup>23</sup> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

<sup>24</sup> *National Union of Belgian Police v. Belgium*, 4464/70, Decision 27/10/1975.

<sup>25</sup> See in this context *Swedish Engine Drivers' Union v. Sweden*, 5614/72, Decision 6/2/1976, and *Schmidt and Dahlström v. Sweden*, 5584/72, Decision 6/2/1976.

<sup>26</sup> For an analysis, see Kiss, Gy.: Decision of the Constitutional Court concerning laws on interest reconciliation, *Pécsi Munkajogi Közlemények (Pécs Labour Law Notices)*, 2009, No. 1, pp. 141–148; Héthy, L.: *Civil beszéd vagy "párt-beszéd"?* (*Civilian Speech or "Party Talk"?*), Budapest, Napvilág Kiadó,

### 1.1.3. Judgment of the legal nature of trade unions on the basis of a legal dogmatic approach: Representation

The emergence of trade unions undoubtedly resulted in individual contractual autonomy being replaced by collective self-determination, at least in Western Europe. The process is not affected by the fact that this influence weakens from time to time or by the fading of the role of trade unions and collective agreements.<sup>27</sup> The prevalence of collective institutions can be observed in labour law on both sides.<sup>28</sup> On the employers' side, the use of general contract terms is undoubtedly a sign of this, which directly raised the question of interpreting the labour contract as a type of consumer contract.<sup>29</sup> On the employee side, it also became evident that the employers' legal superordination can be balanced through the use of collective tools only, in particular by creating a so-called coalition-tariff system.

However, this has raised doubts. Organizations formed on the basis of the general right of association are so-called social organizations. The general objective of these organizations is to represent their members' interests. In the case of trade unions, this only means their own membership – in a legal dogmatic sense. However, the existence of trade unions is not autotelic as the protection of members' interest is effectively expressed in the collective agreement. In this construction, a trade union concludes a collective agreement instead of and on behalf of those whom it represents. Based on this interpretation of representation, the effect of the normative part of the collective agreement concluded by the given trade union would only cover the members of the trade. However, in the vast majority of European countries, this principle does not prevail, but the personal scope of the collective agreement – in case the collective agreements are concluded at the employer level – embraces any employees who are in an employment relationship with this employer.<sup>30</sup> Apart from breaking through the content of the right of representation, this principle takes into account that the employer is quasi a natural subject

2010, pp. 126–148; Sólyom, L.: *Pártok és érdekszervezetek az Alkotmányban (Parties and Interest Organizations in the Constitution)*, Budapest, Rejtjel Kiadó, 2004, pp. 188–193.

<sup>27</sup> Wedderburn, K. W.: Consultation and collective bargain in Europe – Success or ideology?, *ILJ*, 1977, No. 1, pp. 1–34; Allen, V. L.: *Power in Trade Unions*, London, Longman Green, 1954; Brown, H. P.: *The Origins of Trade Unions Power*, Oxford, Clarendon Press, 1983.

<sup>28</sup> Migsch, E.: *Die absolut geschützte Rechtsstellung des Arbeitnehmers*, München–Salzburg, Fink Verlag, 1972.

<sup>29</sup> In connection with the use of Unfair Terms in Consumer Contracts Regulations under English law, see Collins, H.: Legal response to the standard form contract of employment, *ILJ*, 2007, No. 1, pp. 2–18, pp. 11–15; Watson, L.: Employees and the Unfair Contract Terms Act, *ILJ*, 1995, No. 4, pp. 323–336; Freedland, M.: *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp. 190–192. For case law, see typically *Brigden v. American Express Bank Ltd.*, 2000, IRLR (QBD); Stone, R.: *The Modern Law of Contract*, London, Cavendish, 2002, p. 235. In German law, comprehensively, Gotthard, M.: *Arbeitsrecht nach Schuldrechtsreform*, München, Beck, 2003, pp. 5–19; Annuß, G.: Der Arbeitnehmer ist kein Verbraucher!, *NJW*, 2002, pp. 2844–2846; Fiebig, A.: Der Arbeitnehmer als Verbraucher, *DB*, 2002, pp. 1608–1610.

<sup>30</sup> Dokumente 1983: Tarifverträge im Recht der Europäischen Gemeinschaft, *EU Dokumente*, 1983.

of the collective agreement and, accordingly, the principle of *corporate unit* prevails in determining the personal scope of the collective agreement. In contrast, a peculiar legal construction prevails in German law. In respect of norms relating to working conditions (*Individualnormen*)<sup>31</sup> in the tariff contract, the bilateral membership forms the basis of the tariff commitment. This specifically means that this part of the tariff agreement only applies to members of the concluding trade union.<sup>32</sup> In practice, however, the effect of the above norms also extends to employees who are not members of the trade union that concluded the tariff agreement. The theoretical support of this practice is based on the institution system of classical private law. Labour law called upon the help of § 328 of BGB that provides for the contract concluded to the benefit of third parties. It should be noted here that the legislator rejected the initiative of trade unions urging an act to lay down the employer's obligation to apply the working condition norms of the collective agreement only for those trade union's members who actually concluded the agreement.<sup>33</sup>

Along with the problem of the personal scope of the collective agreement, the interpretation of trade unions – as social and civilian organizations – based on representation structure (in the strict sense of the word) fails in other areas, too. In the context of exercising individual trade union rights, regulations of several countries differentiate between the concepts of membership and employee. This was observed in the old Hungarian Labour Code, too. A similar distinction exists in Sections (6) and (7) of § 272 of the Labour Code currently in force. The analysis of this phenomenon leads us to the subject of law policy judgment of trade unions.

#### 1.1.4. Judgment of the legal nature of trade unions, based on a law policy approach: Collective labour law

Again, the starting point is that a trade union is a social organization, formed on the basis of the general right of association. The specific mission and commitment of the trade union is to protect employees' social and economic interests. However, this mission not only requires a law dogmatic representation approach to the social organization, but we also need to reveal the role of trade unions from a law policy perspective, which – in my view – overwrites the representation structure in respect of several legal institutions.

The suppression and subsequent recognition of trade unions, along with their coordination with public law, is closely related to the relatively late recognition of the right of association and its appearance as a codified right.<sup>34</sup> The emergence of trade unions,

<sup>31</sup> These norms are the most important ones, as they contain the tariff provisions relevant to the establishment, termination and content of the employment relationship. See MünchArbR/Löwisch, 1992, § 260, RdNr. 1; Däubler, W.: *Tarifvertragsrecht*, Baden-Baden, Nomos, 1993, p. 125; Zöllner, W.–Loritz, K.: *Arbeitsrecht*, München, Beck, 1992, pp. 347–348.

<sup>32</sup> MünchArbR/Löwisch, 1992, § 260, RdNr. 1.

<sup>33</sup> Dokumente 1983, 1983, p. 31.

<sup>34</sup> Halmai G.–Tóth A. L.: *Emberi jogok (Human Rights)*, Budapest, Osiris, 2003, p. 51.



a manifestation of the right of association, triggered even greater resistance from the ruling power since in certain places the existence of these alliances and the articulation of workers' interests had been obviously tied to the socialist, and later to the communist, ideology.<sup>35</sup>

The emergence of professional conspirations in the international documents at a later stage is of utmost importance from a law policy perspective. In this respect, the content of the Declaration of Philadelphia is decisive, according to which "the recognition of the principle of the freedom of association is one of the tools in the process to improve working conditions and to create lasting peace". This also means that both employer and employee coalitions are high priority social organizations, as it was pointed out by the Hungarian Constitutional Court as well.<sup>36</sup>

Employer and employee coalitions play a key role in the field of the so-called social dialogue.<sup>37</sup> In the early stage of the development of the Community, the institution of social dialogue was basically of bipartite nature, which later tended to shift increasingly towards tripartite consultations. In this role of public law nature, employers' and employees' advocacies are crucial factors of law policy, which takes shape for the most part in the course of adopting Community law. The essence of this is that social partners can indirectly constitute the content of individual Directives. Along with the previously mentioned framework agreements, several Directives allow certain derogation from the primary content since the majority of Directives contains minimum standards only. A good example to this is Directive 2008/33/EC on certain questions of organizing working time. Agreements between social partners have an important role in respect of these derogations. The other Directive where social partners have a strong influence is Directive 2008/104/EC on temporary agency work, where certain derogation from the basic principle of equal treatment is allowed following consultations with social partners and/or through collective agreements.

To sum up, the law policy role of employer and employee coalitions attach great importance to these organizations, well beyond the opportunities deriving from the general right of association. Consequently, a trade union is a high priority social organization as well, whose task also includes the protection of employees' economic and social interests in general, beyond the representation of its membership, in the strict sense of the word. It is not by chance that in German law the so-called coalition-tariff system is called a

<sup>35</sup> Note in this context that this attachment was not exclusive, as exemplified by the history of French trade unions, too. See Krieger, G.: *Das französische Tarifvertragsrecht*, Heidelberg, Decker & Müller, 1991, pp. 61–66; Pélassier, J.: *La fonction syndicale dans l'entreprise*, DS, 1984, No. 41.

<sup>36</sup> 124/2008. (X. 14.) AB.

<sup>37</sup> Ladó, M.–Tóth, F.: *Helyzetkép az érdekegyeztetésről, 1990–1994 (General Survey on Interest Reconciliation 1990–1994)*, Budapest, ÉT Secretariat, 1996; Héthy, L.–Ónódi, I.: *A Gazdasági és Szociális Tanács, 2004–2007 (The Economic and Social Council 2004–2007)*, Budapest, Szociális és Gazdasági Hivatal, 2008; Héthy, L.: *Civil beszéd vagy "párt-beszéd?" (Civilian Speech or "Party Talk"?)*, Budapest, Napvilág Kiadó, 2010. In an international context, see Hepple, B.: *European Social Dialogue – Alibi or Opportunity?*, London, The Institute of Employment Rights, 1993.

tool of legitimate confrontation – as opposed to the participation system provided by the works constitution.<sup>38</sup>

## 1.2. The trade union's collective contracting ability

### 1.2.1. Judgment of the collective contracting ability from the aspect of the right of association

The legislation and law enforcement of most countries generally recognize the broadest concept of coalitions and, as such, provide protection for them, regardless of whether or not they have the collective contracting ability.<sup>39</sup> This means that the objective of coalitions is to be responsible for shaping working and economic conditions, without any interference by the state. Consequently, these coalitions perform public functions. Therefore, they are given a special status in the constitution. One of the most important tasks of coalitions is to (try to) conclude collective agreements. Thus, their activity not only affects the private sphere of individual citizens, but it also exerts a significant impact on the community's social and economic life and circumstances as well. Consequently, the basic law largely, but not without restraint, facilitates the activity of coalitions.

Coalition freedom and the collective agreement are integral parts of the French labour law as well. As far as the constitutional basis of coalition freedom is concerned, labour law can in general be said to have been in the shadow for a long time, but some changes have occurred only recently. This is perhaps due to the fact that – in the possession of an adequate basic law platform – French constitutions focused on the political system. Under the constitution, everyone has the right to protect his interests through organized actions and to join such organizations based on their own choice.<sup>40</sup> The constitutional basis of coalition freedom was reinforced by *Conseil Constitutionnel* in several of its decisions.<sup>41</sup> In sum, the constitutional basis of coalition freedom is entirely ensured.<sup>42</sup> In French law as well, the basic function of coalition is the protection of the social and

<sup>38</sup> Staudinger/Richardi, 1989, Vorbem. zu §§ 611. ff. RdNr. 832–833.

<sup>39</sup> In this respect, see the decision of the German Constitutional Court: “§ 9. Abs. 3 GG schützt auch die Koalitionen als solche.” BVerfGE 4, 96 (Hutfabrikant).

<sup>40</sup> “*Tout homme peut défendre ses droits et ses intérêts par l'action syndicale et adhérer au syndicat de son choix.*” I do not want to comment here on the debate, which was not cleared up even in the 1990s, whether all provisions of the Preamble were applicable in the constitution in force or just those that are, with appropriate refinement, still suitable at this day to form the basis of the law in force. Timeliness of this debate on labour law was given by the term “*action syndicale*”, as it required clarification. However, law enforcement later withdrew the conceptual framework of organizational actions. See on this Verdier, J. M.: *Syndicats et droit syndical – Traité du travail*, Paris, Dalloz, 1987, No. 44.

<sup>41</sup> See Décision No. 80-127 DC des 19 et 20 janvier 1981 – Loi renforçant et protégeant la liberté des personnes; 82-144 DC du octobre 1982 – Loi relative au développement des institutions représentatives du personnel; 83-162 DC du 20 juillet 1983 – Loi relative à la démocratisation du secteur public.

<sup>42</sup> See on this Aliprantis, N.: *La place de la convention collective dans la hiérarchie des normes*, (Thèse Strasbourg), Paris, Dalloz, 1980, pp. 96–98.

economic interests of members, and a key instrument of this is concluding collective agreements.

In English labour law, common law had been an obstacle to collective self-organisation for a long time. The following statement is valid even today: “if the trade unions did not appear able in practice to exploit monopoly power, neither were they credited with much bargaining power”.<sup>43</sup> This classification rightly reflects, inter alia, the approach of the French and English law to differences in the recognition and classification of coalitions, while it shows that the impact of common law was stronger than the enforcement of the individuality of contractual freedom in continental law.<sup>44</sup> This approach softened by the beginning of the 19th century – the decriminalization of English labour law happened somewhat later.<sup>45</sup> The definition of trade union is provided in § 1 of the Trade Union and Labour Relations (Consolidations) Act of 1992 [TULR(C)RA]. This means that the trade union is either a permanent, or even temporary, organization that is composed completely or predominantly of employee groups defined according to one or several criteria, and whose main intention is to regulate relations between the organization and employers or employer associations. The legal definition of trade unions is significantly narrowed down by the following formula: “...whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers and employers’ associations...”. More precisely, this means that trade unions “need to engage in the ‘regulations of relationship’”, which is considerably more than spelling out a simple political or professional-policy activity in general, through which it may, at the most, exert influence on collective labour law relationships.<sup>46</sup> This interpretation has a key element. In addition to the point that “general political activity” is insufficient, the referred formula also indicates that these organizations cannot avoid conducting collective negotiations on working conditions.

The conclusions from the above are the following. Trade unions are considered high priority social organizations, which explicitly or implicitly perform public law function as well. Their most important task – collaborating with the other side – is shaping working conditions, which is primarily possible through collective agreements.

However, here we have to split trade unions as organizations formed on the basis of the right of association and with the purpose of protecting the employees’ social and economic interests on the one hand, and as organizations which have the ability to conclude appropriate-level collective agreements with the other side, on the other hand. This is

<sup>43</sup> Brown, H. P.: *The Origins of Trade Unions Power*, Oxford, Clarendon Press, 1983, p. 21.

<sup>44</sup> Historically, the prohibition of conspirations occurred remarkably soon. The first formal labour law statutes were the *Ordinance of Labourers*, in 1349 and the *Statute of Labourers* published in 1350. These were followed by the *Statute of Artificers* in 1563, decisive for law development for centuries. Prohibition of everything considered as endeavours of the community to define conditions was typical. These situations were subject to criminal law. See in particular *R. v. Journeymen-Taylors of Cambridge*, 1721, 8 Mod 10.

<sup>45</sup> The term “decriminalisation of labour law” is used in Deakin, S.–Morris, S. G.: *Labour Law*, London, Butterworths, 1998, p. 9.

<sup>46</sup> Morris, S. G.–Archer, Th.: *Collective Labour Law*, Oxford, Oxford University Press, 2000, p. 700.

because the existence of trade unions as social organizations does not in itself assume the ability to conclude collective agreements. Something more is needed, beyond the freedom of establishment granted by the right of association, that properly empowers trade unions to be able to prevent at least the other party's rejection of their negotiation offer aiming to conclude a collective agreement. Before examining the legal nature of the ability to conclude collective agreements from the perspective of the created legal transaction, we should analyze this ability on the basis of the right of association.

Trade unions have to perform a specific activity in order to protect employees' social and economic interests because shaping working conditions is not feasible without collaborating with the other party, namely, with employer coalitions. The weight of the individual parties is rather important in this cooperation, which is importance with respect to the independence of trade unions, too. The ability of trade unions to conclude collective agreements thus means a certain kind of empowerment and reputation – in Hungarian law, this is called representativity. This empowerment means more than the minimum requirement of the so-called negative prohibitive prevention clause. In particular, it means that no additional requirement can be tied to the due operation of these organizations other than those related to the proper functioning of the organization. However, the goal of support and/or representativity is that coalitions of the same level should conduct talks and conclude agreements with each other.

No uniform solution has developed to define collective contracting ability. Legislation and law enforcement play different roles in this – different virtually country by country –, while the extras that these organizations must possess are articulated in all countries.

In German law, there is no legal definition for the concept of collective contracting ability (*Tariffähigkeit*). § 2 of the Act on collective agreements (*Tarifvertragsgesetz; TVG*) recognizes trade unions, individual employers and employer associations as tariff partners. However, this does not mean that a trade union – as such – would possess this ability, simply as a result of its formation. Despite the fact that neither TVG nor any other law describes the concept of the trade union, the Federal Labour Court (BAG) made a clear distinction relatively early between trade unions and coalitions in general.<sup>47</sup> According to the perception of law enforcement, any employee advocacy can be considered as tariff-ready if a so-called *soziale Mächtigkeit* is available.<sup>48</sup> According to BAG, this particular power is needed to enable the advocacy to actually protect the social and economic interests of its own members in a special environment, namely, in the process of negotiations with a party of adverse interest – that is, not to conduct mere formal discussions and not to conclude meaningless agreements only. The exact concept of social power is not mentioned by law enforcement either. However, it lists some of the criteria that are necessary to obtain this power. One of them is obviously the

<sup>47</sup> See, inter alia, BAG AP Nr. 25 zu § 2 TVG; BAG AP Nr. 30, 32, 34, 36, 38, 39 zu § 2 TVG. More recently, BAG 1 ABR 33/78; BAG 1 ABR 32/83; BAG 1 ABR 22/85. From the most recent ones, see BAG AP Nr. 55 zu § 2 TVG.

<sup>48</sup> See in more detail Hemmen, G.: *Durchsetzungsfähigkeit als Kriterium für den Gewerkschaftsbegriff im Tarifvertragsrecht*, Münster, Waxmann, 1988.

headcount of a coalition. The second important criterion is the financial background of the organization, which is indispensable in case of a conflict with an adverse-interested party. According to the position of law enforcement, there is a subjective element that is essential to reach tariff capability (*Tariffähigkeit*), namely, the skill and inclination to conclude the tariff agreement (*Tarifwilligkeit*). Accordingly, if an organization's regulation does not include as a task the conclusion – or the endeavour to conclude – a tariff agreement, there is reason to assume that its members have not empowered the organization to do so. Therefore, the binding force of any collective agreement, if concluded, may be questionable. Earlier, in connection with this criterion, consideration of organizations that consciously excluded their tariff capability was contentious. According to the prevailing position, the coalition in this case may possess a potential *Tariffberechtigung*, but no tariff capability.<sup>49</sup> The system of criteria set up and consistently applied by BAG had not been caught in the crossfire of debates for a long time, although in the literature some experts questioned the grounding of the conceptual distinction of coalitions and trade unions.<sup>50</sup>

In determining the representativity of trade unions, legislation plays a much greater role in French law than in German law. The representativity of trade unions has material and formal criteria, among which the legislator sought to create concordance. Material criteria ultimately do not differ from traditional requirements. Thus, one of the most important quantitative criteria is headcount, or more precisely the power represented on the basis of headcount.<sup>51</sup> Regarding headcount or the power deriving from it, the financial

<sup>49</sup> See on this problem Richardi, R.: *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses*, München, Beck, 1968, pp. 153–157.

<sup>50</sup> See in particular Däubler, W.–Hege, H.: *Koalitionsfreiheit*, Baden-Baden, Nomos, 1976, RdNr. pp. 101–146; Däubler, W.: *Tarifvertragsrecht*, Baden-Baden, Nomos, 1993, pp. 71–78. It should be noted here that Däubler, consequently, in certain respect disputes the complete denial of tariff contract capacity of the so-called *ad hoc* coalitions, as well. See Däubler, W.: *Tarifvertragsrecht*, Baden-Baden, Nomos, 1993, pp. 673–674. A significant breakthrough was reached by a case in which BAG also rejected the request of an employee advocacy organization. Subsequently, the organization submitted a constitutional complaint. The Constitutional Court found the complaint unfounded and rejected it. The reason of rejection was that the submitting organization was not deemed a trade union by virtue of TVG 2. § (1) because they did not have the so-called organizational or federative power (*Verbandsmacht*). Yet this would be indispensable to exercise pressure at negotiations with the party who has adverse interests so that the organization would be able to enforce its proposition. On the basis of this fundamental requirement, the Constitutional Court established that § 9, Section (3) of GG allows and protects only the essential core and central component of coalition freedom. Accordingly, tariff capacity should always be measured to contemporary social reality. It follows from this, on the one hand, that coalition freedom is not made subject to tariff capacity by the basic law, while, on the other hand, not every coalition has tariff capacity in itself. In fact, this ability means that the given coalition is able to fill in areas not covered by government regulations with collective agreements. See BVerfGE 58, 233 – Zu den Voraussetzungen der Tariffähigkeit einer Arbeitnehmer-Koalition.

<sup>51</sup> The importance of this requirement is demonstrated in the decisions taken by Conseil d'État. See CE 15 décembre 1954; CE 17 juin 1960; CE 26 octobre 1973. It should be noted, however, that law enforcement manages membership headcount and the deriving organizational power rather flexibly, with the observance of given circumstances, the position of the party with adverse interest and, last but not least, the desired leeway of the trade union in question. Cf. Krieger, G.: *Das französische Tarifvertragsrecht*, Heidelberg, Decker & Müller, 1991, pp. 44–45.

background of the organization must be examined, which is also important in the course of discussions with adverse-interested parties or in resolving conflicts. Among quantitative requirements, there is the so-called *audience*,<sup>52</sup> or, in other words, the audition of trade unions by the community.<sup>53</sup> Similarly to the German law, these criteria might have been designed by law enforcement. However, these criteria have different meanings and senses on different levels, which is defined by law enforcement, namely, by the *Code du Travail*.<sup>54</sup> Perhaps the most characteristic feature of the definition of representativity in French labour law is that law enforcement justified the representativity (*représentativité propre*) of the five largest trade unions that operate in the private sector. The real stability of the coalition system – and its almost centralized structure – was rendered by the recognition of the so-called derived representativity (*représentativité dérivée*). The essence of this is that trade unions, which have joined the five big organizations that are considered to be representative by the state, have a tariff capability. The system has spectacularly split in two, especially since the introduction of the 1982 act as part of the *Auroux* reforms. While law presumes this ability – *praesumptio iuris et de iure* – for trade union affiliates even in the absence of their own representativity, the other, basically workplace-level trade unions that did not join must prove their representativity (*représentativité prouvé*). From the perspective of the ability to conclude collective agreements, the importance of this differentiation is that at workplace level it practically depends on the employer’s decision whether they recognize a trade union present there as being representative or not. Naturally, there is a way to appeal against the employer’s decision before the ordinary court. In contrast, workplace trade unions joining the top trade unions mentioned above will automatically obtain representativity.

In English law the institution of “recognition of the trade union” was developed to facilitate the ability to conclude collective agreements, or more precisely to “force” employers to carry out negotiations.<sup>55</sup> While German law assigned this task mainly to law enforcement, and French law to legislation, the English solution is a compromise between common law and legislation. The primary mode to recognize trade unions along with their tariff capability is the *recognition agreement*. In this agreement, the parties express their will to conclude a collective agreement on the basis of mutual cooperation, and designate the general topics that the collective agreement should cover.<sup>56</sup> Along with *voluntary* recognition, the *statutory* recognition of trade unions also exists. This takes place if the employer rejects the trade union’s request for recognition or if the above agreement cannot be reached between the parties. The *Central Arbitration Committee*

<sup>52</sup> Pélissier, J.–Supiot, A.–Jemmaud, A.: *Droit du travail*, Paris, Dalloz, 2002, p. 650; Krieger, G.: *Das französische Tarifvertragsrecht*, Heidelberg, Decker & Müller, 1991, pp. 45–46.

<sup>53</sup> Gamillscheg, F.: *Tarifverträge über die Organisation der Betriebsverfassung [In FS für W. Herschel]*, München, C. H. Beck’sche Verlagsbuchhandlung, 1982, p. 111.

<sup>54</sup> CT L 2121-1.

<sup>55</sup> § 1978 of TULR(C)A provides for the parties of the collective agreement, as well as for criteria of subject qualities.

<sup>56</sup> Such a sample agreement is presented by Morris, S. G.–Archer, Th.: *Collective Labour Law*, Oxford, Oxford University Press, 2000, pp. 593–596.

(CAC) plays a decisive role in this process as this is where employees' professional organizations may turn to for recognition. The main elements of the procedure are as follows. First of all, the professional organization must submit its claim to the employer. This is the validity condition of the subsequent procedure. The trade union may then turn to CAC with its claim containing the employer's rejection. After this, the committee has to decide whether the applicant trade union is independent or not and whether it meets the requirements on the basis of which their eligibility for concluding a collective agreement – as a bargaining unit – can be established. Without going into details, note that the employer is obliged to cooperate with both the trade union and CAC during the entire process of recognition.<sup>57</sup> What are the consequences if the trade union receives the certificate from the Certification Officer?<sup>58</sup> In practice, this impact has considerably transformed the relationship of trade unions and employers. Despite the fact that under English law there is no explicit compulsion to conclude a collective agreement, if the trade union has a certification – as recognition of its ability to conclude collective agreements – it is very difficult for the employer to avoid signing the collective agreement.<sup>59</sup> In general, it is observed that, as a result of the CAC procedure, agreements *are* created for the most part.

Although the procedure of recognizing the capability of trade unions to conclude collective agreements substantially differs in the three countries examined, there is one important common feature in all of the solutions. The empowerment of trade unions is closely related to their function: the successful performance of their coalition activity. This requires high support of trade unions. There are roughly similar criteria to measure such support in each of these countries. I refer to the importance of these criteria right at this point, in light of the fact that Hungarian labour law had followed a completely different way until Act I of 2012 entered into force.

### 1.2.2. Judgment of the ability to conclude collective agreements from the perspective of the doctrine of legal transactions

The legal nature of collective contracting ability came to the forefront in connection with the legal nature of the collective agreement. The legal dogmatic debate on the classification of collective agreements unfolded primarily in countries where this institution was subject to legal regulation and became a decisive component of the regulation system

<sup>57</sup> See in detail Lourie, J.: *Trade Union Recognition*, House of Commons Library, Research Paper No. 00/55, May 2000.

<sup>58</sup> See details in Statutory Instrument 2000, No. 1300, The Trade Union Recognition (Method of Collective Bargaining) Order 2000.

<sup>59</sup> From the date of the certificate, the parties may start negotiations. In case there are difficulties with the agreement for any reason, the trade union may request the intervention or assistance of CAC. If the efforts to conclude the agreement are unsuccessful despite all this, CAC recommends specific methods, and the parties can then conclude the agreement with the observance of these recommendations. In addition, CAC may specify the topics to the parties that are recommended to agree on.

of labour law – this was the case in Germany and France. German law has two different perceptions: the so-called doctrine of legal transactions and the doctrine of norms.<sup>60</sup> The essence of the former is an attempt to describe the tariff agreement with traditional legal instruments. In this context, the oldest and simplest concept was the representation theory. According to this, a coalition is merely the representative of members and concludes the agreement in their name and on their behalf. However, even the starting point of this solution is doubtful, since the formation of a coalition in itself does not yet provide an empowerment to conclude a collective agreement. What is more, this theory is insufficient to justify the possibility of deviation from collective agreements in individual labour contracts. Another version of the doctrine of legal transactions is the theory of the so-called collective obligatory (contractual) pact. According to this, collective will takes precedence over individual will, and what the individual does not know or dare to express is also part of the community's will. There was also the so-called subjection theory that tried to prove in an extremely complicated way that parties subject themselves to the “expert” will of a third person in determining the content of the collective agreement. Finally, the doctrine of the so-called private community autonomy was deemed effective and dangerous at the same time, and it was soon rejected as “violence on the community from the outside”. Since the solutions under the doctrine of legal tariff transactions could neither be justified to support the theory, nor were they convincing in practice, those views intensified which considered collective agreements a part of objective law. Typically, tariff autonomy was deduced exclusively from state authorization or permission. In contrast, there were many who emphasized that tariff autonomy does not mean state-dependent – a kind of transferred – freedom of action, but it is in fact the breaking of a segment of state sovereignty. Another theory in this group deduces parties' autonomy from the constitution and stipulates, in a fine-tuned version, that parties are entitled to settle specific social relationships (*Regelungsbefugnis*), but they do not have the right to create norms (*Rechtssetzungsbefugnis*). Others, however, go further to voice the opinion that tariff autonomy is merely an delegated legislative authorization. As a summary of the above debate, it can be deemed prevailing that the doctrine of legal transactions cannot be justified. However, the position of tariff norms in the legal system is not clear either. According to this view, tariff norms are on the borderline of private autonomy, their status is rather uncertain, and, as a consequence, all simplified conclusions may imply a bulk of counter-arguments.<sup>61</sup> This wording of the German law, although far from being clear, is still remarkable because the effect of the tariff agreement extends to the contracting parties only, while its extension to third parties is only possible through a state–administrative–legal act. As a result, in German law the apparently prevalent perception still is that tariff norms should not be considered on the basis of the power assigned to the parties' by the state, but on that of the autonomy of

<sup>60</sup> The debate is summarized and evaluated by Zöllner, W.: *Die Rechtsnatur der Tarifnormen nach deutschem Recht*, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 1966.

<sup>61</sup> Zöllner, W.: *Die Rechtsnatur der Tarifnormen nach deutschem Recht*, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 1966, pp. 37–38.



their coalition membership.<sup>62</sup> Accordingly, collective contracting ability means a special capacity for performing collective legal transactions, which is – content-wise – more than the traditional contracting ability under private law.<sup>63</sup>

The dual content of the collective agreement also raises a number of problems when integrating it into French law and order. Despite the fact that the collective agreement – as such – undoubtedly constitutes a contract, it cannot be classified in any traditional contract type, due to its actual impact.<sup>64</sup> As we have seen at the public-law approach of collective contracting ability, this ability reaches beyond the simple private-law contracting ability in French law as well. In other words, there is a contract-based creation of norms in both countries, which, however, does not mean legislation under public law.

## 2. The regulation of trade unions in Hungarian labour law

### 2.1. Re-evaluation of the legal nature of trade unions during the period of the change of regime

#### 2.1.1. Depoliticization of trade unions

The definition of the legal nature of trade unions and setting its leeway in law policy at the time of the change of regime are hard to understand without discussing the system created by Act II of 1967. The labour law of the so-called new economic mechanism aimed at making the labour contract and the employment relationship generally comply with the requirements of an agreement, at least formally. However, the regulation of trade union rights led to a hybrid result. Trade unions were furnished with unrealistically strong rights that would simply have crippled the operations of the employer. Trade unions were entitled with the right to “consensus” and “objection”. The former is merely the right of preliminary contribution to a given decision, whose refusal might hamstring the employer’s decision mechanism. The right of objection suspends the execution of a decision already taken by the employer until enforceable judgment is made about the objection.<sup>65</sup> Since the canon remained cogent for the most part, collective agreements could not fulfil their function. According to the intention of the legislator, collective agreements of “normative nature”<sup>66</sup> should have governed “the rules referring to the rights of the company and its workers, as well as the principles referring to its implementation”

<sup>62</sup> Staudinger–Richardí, 1989, Vorbem. 923. zu §§ 611. ff.

<sup>63</sup> Staudinger–Richardí, 1989, Vorbem. 927. zu §§ 611. ff.

<sup>64</sup> Despax, M.–Rojot, J.: *Labour Law in France*, Deventer–Boston, Kluwer International, 1987, p. 245.

<sup>65</sup> See in detail Román, L.: *A munkáltatói utasítás érvényessége és hatályossága (Validity and Force of Employer’s Instructions)*, Budapest, Akadémiai Kiadó, 1977, pp. 67–71.

<sup>66</sup> Hágelmayer, I.: *A kollektív szerződés alapkérdései (Fundamental Questions of the Collective Agreement)*, Budapest, Akadémiai Kiadó, 1979, pp. 302–343.

– within the scope and framework defined by the rule of law. However, the distortion of this instrument can be traced back rather well on the basis of Directives and “guides” that defined the contents of agreements, issued by the Minister of Labour and SZOT (the National Council of Trade Unions) on the conclusion of collective agreements. These substantially narrowed down the parties’ scope of action.

Trade unions in this period – practically until the change of regime – were functioning as the extended organs of the political party, and they basically played a political role in workplaces and in other respects as well. According to the Statutes of Hungarian Trade Unions, trade unions were mass organizations of Hungarian workers, acting coherently with the direction of MSZMP (Hungarian Socialist Workers’ Party, HSWP), as unified, independent organizations. Although the document highlights the volunteer nature of membership, Dr. Sólyom’s assessment is still correct, who stated that the membership of these organizations was “a forced constraint membership in the sociological sense”.<sup>67</sup> The right of association created the potential of pluralism terminating privileges typical to monolithic organizations, which later became the characteristics of public bodies in general.<sup>68</sup>

No matter how controversial the 1967 model was, it did not collapse as long as the political system could represent its stability and was able to finance non-market mechanisms. At the beginning of the 1980s, however, it became self-evident that the centrally planned, directed and subsidized economy was defective. The economic change of regime was marked by brand new institutions that emerged in both private and public law. Private law legislation regulated small businesses, the governance and management of state-owned companies were reorganized, and finally, the adoption of the Act on Economic Associations in 1988 questioned the function of the basic institutions of socialist labour law. From the perspective of trade unions, Act II of 1989 on the right of association was decisive. With the recognition of coalition freedom, advocacy pluralism developed which made it impossible to interpret the collective labour law instruments of the Labour Code in the traditional way. This situation could no longer be treated by guidelines and resolutions;<sup>69</sup> a new system of regulations was needed. The full conceptual transformation of collective labour law was hallmarked by the new strikes law adopted in 1989.<sup>70</sup>

Along with the right of association and the coalition freedom developed on the base of this right, several trade unions have formed. These organizations not only articulated their claims towards employers, but they also expressed their interests that differed from each other. Trade unions still worked under the legal environment of the LC created by the socialist political and economic system, but because of the pluralism it became

<sup>67</sup> Sólyom, L.: *Alkotmánybíráskodás Magyarországon (Constitutional Jurisdiction in Hungary)*, Budapest, Osiris, 2001, p. 514. On actual tasks of similar organizations and their actual position in the political system, see Kornai, J.: *A szocialista rendszer (The Socialist System)*, Budapest, HVG Kiadó, 1994.

<sup>68</sup> Sólyom, 2001, p. 514.

<sup>69</sup> On exercising trade union rights, see Guide 8005/1989 (MüK. 17) On labour law status of employer advocacies, see Guide 8001/1990 (MüK. 16).

<sup>70</sup> Act VII of 1989.

unthinkable to maintain their earlier political role. Political round table talks and, above all, the radically changing economic environment also headed towards this direction. At the beginning of the 1990s, the depoliticizing of trade unions became absolutely clear. The only remaining question was how trade unions as social organizations should be regulated.

### 2.1.2. The dilemma related to the legal nature of trade unions in the beginning of the 1990s

Act XXII of 1992 was created in a relatively late stage of the process of the change of regime. Justification of the law points out that labour market has become part of the “economic” market and this must be taken into account by the Labour Code, too. Accordingly, the previous public administration regulation must be replaced by a private law instrument which is more appropriate to the characteristics of employment relationships. The state must strongly withdraw from legal interventions, while cogent legislation, relating to subjects of the employment relationship, must be exclusively restricted to the determination of guaranteed content elements of the employment relationship – the identification of the so-called “minimum standards”. Other questions relating to the employment relationship must be settled through negotiations by subjects of the employment relationship: the employers and employees. This means that, in this new situation, governance is not done by the state as owner but on the basis of its public order protection function.<sup>71</sup>

However, the legislator also voiced some of his concerns. According to the Justification, “however, we have to be prepared that both local and mid-level collective agreements will be created only gradually”. Therefore, the resulting void must be filled in by the legislator with dispositive rules. It is important, however, that “it will be the task of collective agreements to create the regulations that are more favourable for employees”.

Apparently, labour law of the regime change was committed to agreements, especially in the field of strengthening the regulative function of collective agreements. However, this endeavour failed due to the regulations on trade unions – among other reasons. The first issue was the leeway of trade unions. With consideration to earlier traditions, the Labour Code defined workplace-level activity of trade unions as a basic criterion. In other words, work organization became the primary field of trade unions’ activity. This solution of the Labour Code in Hungarian labour law was self-evident. However, trade unions do not operate on these bases in every country. German labour law is a good example, where the so-called *Zutrittsrecht*, the right of “entry” to the workplace induced a lot of debates.<sup>72</sup> In some of the European countries – including France and Italy – there

<sup>71</sup> General Justification of Act XXII of 1992.

<sup>72</sup> The problem in fact dates back to 1965, when the debate on recruiting members for trade unions (*Mitgliederwerbung*) took place. This activity of trade unions – deduced from “the nature of the thing” – was deemed by the Federal Constitutional Court as one which is indispensable at a workplace under

is a definite timeframe available for trade unions to exercise advocacy activity in the workplace, usually based on the actual number of employees.<sup>73</sup>

With the provision laid down in § 19 of the previous LC, trade unions became social organizations with a special legal nature. Namely, the legislator assigned to this provision a special collective legal relationship between the employer and the trade union. In particular, it meant that the employer had specific obligations towards the trade union, which – if not fulfilled – caused serious consequences to the employer’s legal acts or measures. Trade unions’ right to object was still in place, which suspended the execution of a decision planned by the employer until enforceable judgment was made about the objection. In addition, the employer had similar obligations towards the works council, and, in case of non-fulfilment, the employer’s action (legal act) was merely invalid.

To sum up, we can say that trade unions’ presence in the workplace – as a self-evident leeway – brought several problems to the surface that later overshadowed Hungarian labour law. Among others, this caused that no contractually based source system of Hungarian labour law has developed until today; thus, collective agreements have but a minor influence on the content of the employment relationship. In addition, there is the misunderstanding of the principle of applying the rule which is more favourable to the employee.<sup>74</sup> As a result, employers did not show any readiness to conclude collective agreements, and trade unions were unable to raise the employer’s negotiating obligation to the level of collective agreements.<sup>75</sup> This problem raises another question: if a trade union is a social organization, to what extent is it necessary or justified to regulate it?

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specific circumstances. However, trade unions are entitled to perform this activity only before the start or after the completion of work or during break-times. There is, however, a decision to the contrary, in connection with trade union propaganda, where the Federal Labour Court decided that the employer’s toleration of such activities in the workplace is not justified if other means (such as post or press) are also available for the trade union. Cf. BVerfGE 28, p. 295 (*Mitgliederwerbung I*).

<sup>73</sup> See ILO Convention, No. 135 in this connection with this.

<sup>74</sup> Belling, D.: *Das Günstigkeitsprinzip im Arbeitsrecht*, Berlin, Duncker & Humblot, 1983; Aliprantis, N.: *La place de la convention collective dans la hiérarchie des normes (Thèse Strasbourg)*, Paris, Dalloz, 1980.

<sup>75</sup> Failure of the system is demonstrated well by the amendment of the LC in 1999. According to this, pursuant to § 31, Section (2) of the LC, if there is no trade union representation at the employer, the employer and the works council may regulate all items under § 30, Paragraph (a) in a works agreement. § 30, Paragraph (a) of the LC refers to the normative part of the content of the collective agreement. According to this, the works council may agree with the employer on all questions concerning the rights and responsibilities deriving from the employment relationship, the exercise of these and the modes of their performance, as well as the order of procedure relating to them. The most important element of the normative part of the collective agreement is apparently the consensus reached in tariff wage and wage improvement, which is the task of the trade union in the dualistic structure of collective labour law simply because in this formula the trade union is in the possession of the means that make it a real negotiating partner – if appropriate conditions are met. The reason of this amendment was clear: the content and nature of regulation in the LC changed significantly. Basically, earlier the legislator had created several bilateral dispositive rules – instead of dispositivity laid down in § 13 of the LC –, with special attention to the regulation of working time. In places where a collective agreement was in force, this meant that the parties had the option to agree on a more flexible use of working time even to the detriment of the employee (as regards the length of the reference period, the maximum annual rate of overtime, etc.)

### 2.1.3. Formation of regulations on trade union rights: An opportunity or a compulsion?

In the above, I referred to the point that the regulation of trade unions in certain countries can be found in the LC or in other laws, while in some other countries it does not exist. I examine the necessity or constraint of regulation here from the perspective of Hungarian labour law. Act II of 1967 not only regulated trade unions' rights relating to "this act" in detail, but also laid down such unrealistic rights that primarily demonstrated trade unions' power from a law policy perspective, while the actual exercising of the rights did not come to the forefront. During the preparations of Act XXII of 1992 and in the course of the formation of trade unions' scope of activity, the issue of placing trade unions in the LC was raised. The discussions held back then are interesting even today, due to the following reasons. In case the legislator does not regulate trade unions' rights in detail, then these organizations – as social organizations – can attain a position that the other side with adverse interest is unable to annul on the basis of its representativity referred to above. Of course, this authority (or rather a power opportunity) obtained spontaneously is influenced by international agreements, as well as EU's labour law. Even in the absence of a comprehensive legislation,<sup>76</sup> the legislator provides substantial rights for employees' representations by laying down employers' obligations assigned to individual legal instruments. However, if the legislator regulates trade unions' rights and leeway in detail, he creates a specific legal relationship between the employer (employers' associations) and trade unions.

Since the LC of 1992 had eventually regulated the legal relationship between the employer and the trade union, the following questions arose. Is it allowed to deviate from the legal relationship of the employer and the trade union? In other words, is it possible to conclude a collective agreement that grants additional rights for trade unions to those provided in the LC? Further, what are the legal consequences if the employer violates some of his obligations (such as the obligation to inform)? Since the exercising of certain trade union rights has been made impossible by the employer (and here I primarily mean an economic organization), is it possible to restrict or even exclude these rights in a collective agreement?

These questions can be answered on the basis of the original content of the 1992 LC, but the dogmatic background of these problems is rather doubtful. Regulation of the previous LC had significantly limited trade unions' leeway, and as a result employers did not want to conclude agreements later that would have been more favourable for the trade unions. The original version contained certain *lex imperfecta* rules that later ceased to exist – with the simultaneous regulation of trade unions and works councils

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Where there was no trade union – possibly because the employer resisted it –, there was no opportunity for a collective agreement and utilizing its advantages. The legislator tried to fill this gap with the extension of the subjective scope of the collective agreement. This construction was in force until 2nd July 2002. A similar solution is applied in the current LC as well, essentially for the same reasons.

<sup>76</sup> See in particular the instruments of collective redundancy and the change in the person of the employer.

–, and this put the employers in an even more difficult situation. Concerning the right of objection, taking it over from the LC of 1967 was based on law policy considerations instead of legal dogmatics; its existence during the validity of the previous LC had always been controversial.

To sum up, the regulation of trade unions in the Act of 1992 was a constraint and an opportunity at the same time. It was a constraint because – as a result of the economic processes (primarily the change of structure and approach that came about with privatization), as well as of the political attitude in the beginning of the 1990s, and also because of the lack of proper regulation – trade unions would not have had any opportunity to influence the content of the employment relationship.<sup>77</sup> Nevertheless, the regulation ensured a relatively consolidated cooperation between the employer, the trade union and the government, which was perceived as defeat by all three parties in certain periods.

## 2.2. Trade unions' collective contracting ability on the basis of the old LC: Catch-22

### 2.2.1. The reason and content of § 33 of the old LC

Definition of the collective contracting ability was a difficult task for the legislator in multiple ways. Because the LC's norms contained the so-called minimum standards, the legislator assumed that it would strengthen the instrument of collective agreements if the employee-side collective contracting ability was regulated in detail. Justification of the LC pointed out that there is no differentiation between collective agreements at or above work organization level; however, it defined contracting ability differently in this respect.

§ 32 of the LC only stipulates – as a general rule – that the trade union or employer advocacy organization that is independent of the other contracting party in respect of its interest representation activities shall be entitled to conclude a collective agreement. Based on this wording, an easy conclusion would be that – at the sectoral level – either a given employer association or several other employers could conclude a collective agreement, with any trade union as they wish. In accordance with rules of the market, under such regulation it had been most likely that parties of equal weight would conclude agreements, but it is also possible that this regulation would have caused tensions without proper control. The reason is that the legislator did not settle the special system of criteria which does not derive directly from coalition freedom, but which is indirectly necessary to conclude a collective agreement. It is another question, of course, that it was not a legislation issue that only a small number of sectoral collective agreements had been concluded.

<sup>77</sup> Nonetheless, later on trade unions sometimes protested against this very regulation, stating that it reduced the trade unions' leeway evolving in the background. (See the history of the regulations on employee responsibility for inventory shortage.)

For employer-level collective agreements, the legislator had chosen a completely different solution from the one discussed above. According to § 33 of the LC if a trade union has representation at the employer, he has collective contracting ability only if his candidates have acquired more than 50% of votes at the works council election. If more than one trade union has representation at a given employer, there are two solutions. The legislator's intention was to have trade unions create a coalition in order to reach greater support from employees. This is expressed in the rather categorical provision of Section (3): if more than one trade union has representation at an employer, the collective agreement may be concluded jointly by all trade unions. This requires that the candidates of these trade unions jointly obtain more than half of cast votes at the works council elections. If there is no way to conclude a joint collective agreement, trade unions considered to be representative can conclude the collective agreement on the basis of Section (2) of § 29 of the LC, with the condition that candidates of these trade unions meet the quota specified for the works council election. Alternatively, if the joint signing of the collective agreement by representative trade unions is not possible, then one single trade union may also sign the collective agreement with the employer, on condition that candidates of the given trade union obtain more than sixty five percent of votes cast at the works council election.

Not only has this solution left many loose ends behind, it also proved to be a conceptual mistake. § 33 of the LC comprised the following problems. The provision was cogent both in its system of conditions and in its sequence. In practice, this downright paralyzed collective contracting several times, especially in respect of Sections (3) and (4) of § 33.<sup>78</sup> Judgment of the criterion of collective contracting ability was even more crucial. In national legislation, the only criterion is the result reached at the works council election. This also means that, in determining collective contracting ability, it is not the aspects connected to the purpose of coalition that matter. In this system – let us add: necessarily –, aspects like membership headcount, financial background or exertion of pressure (realistic negotiation skills) are out of the question.

With consideration to the structure of Hungarian collective labour law, this solution was unjustified, and it involved risks. The legislator had followed the model of German (and, partly, Austrian) labour law where the coalition-tariff systems, along with the works constitutional system (*Betriebs/Arbeitsverfassung*), were institutionally separated. Definition of the German *Tariffähigkeit* is directly independent from works constitutional law. At the time of creating the LC of 1992, in the beginning of trade union pluralism, similar

<sup>78</sup> At one of our dominant strategic companies, representative trade unions were supposed to conclude a collective agreement jointly, in accordance with § 33, Section (4) of the LC. Candidates of two representative trade unions – out of three – obtained more than half of the votes cast for membership in the works council. The third representative trade union, however, did not want to conclude the collective agreement with the given content. Since law enforcement interpreted the referred provision closely, the collective agreement signed by two trade unions was not valid. In an extreme case, this could easily mean that the collective contractual will of two trade unions, with representation of 45% each, may be prevented by a trade union with representation of 10%.

criteria should have been established in connection with the definition of the collective contracting ability – criteria that would have made the support of individual trade unions measurable in a relatively precise way. However, this proved to be impossible in practice at that time. Nevertheless, the adopted construction contradicts the purpose of coalitions and leads to the distortion of collective labour law as a whole. This is well demonstrated by the absurd intertwining of §§ 33 and 65 of the previous LC.

### 2.2.2. The heterogeneous features of representativity

Mixing, while seemingly separating but in fact conceptually equalizing so-called representativity and collective contracting ability, is rather controversial. Seemingly, the LC of 1992 defines the criterion of representativity in respect of exercising the right to object. Accordingly, a trade union should be considered representative if its candidates obtain at least ten percent of votes cast at the works council election. Since this criterion did not prove to be “appropriate” in a given case, the legislator decided that a trade union should also be considered representative if at least two-thirds of employees belonging to the employer’s similar employment group (profession) are members of the trade union in question. It is obvious that, due to actual political reasons, so-called representativity was bound to different case types, and in the absence of any dogmatic considerations. Beyond that, this provision could have led to peculiar solutions. In this way, a trade union with very low headcount, if two-thirds of its members are from the same employment group, has the same representativity as a trade union with gets itself measured at the works council election.

The artificial separation of representativity and collective contracting ability, along with the almost arbitrary definition of the criteria of representativity, could happen only because the legislator was not in the position to define collective contracting ability – one of the most important institutions of collective labour law – in accordance with the purpose of coalition. Tying this ability to the result of the works council election could even have been acceptable, at least provisionally. However, nobody wanted to bother the status quo thus reached. Therefore, an entirely artificial solution got conserved, which was, so to say, alien to the system. Due to other reasons as well, collective labour law has not yet been able to work as intended; some of its components have been exclusively, and rather autonomously, adjusted according to the legislator’s actual will. In this system, trade unions did not do their coalition activity, as it is apparent from the history of interest reconciliation.<sup>79</sup>

<sup>79</sup> Ladó, M.–Tóth, F.: *Helyzetkép az érdekegyeztetésről, 1990–1994 (General Survey on Interest Reconciliation 1990–1994)*, Budapest, ÉT Secretariat, 1996; Héthy, L.–Ónódi, I.: *A Gazdasági és Szociális Tanács, 2004–2007 (The Economic and Social Council 2004–2007)*, Budapest, Szociális és Gazdasági Hivatal, 2008; Héthy, L.: *Civil beszéd vagy “párt-beszéd”?* (*Civilian Speech or “Party Talk”?*), Budapest, Napvilág Kiadó, 2010.



### 2.2.3. The anomaly of §§ 33 and 65 of the old Labour Code

The substantive anomaly of the labour law system after the change of regime can be revealed by comparing § 33 and § 65, Section (1) of the 1992 LC. Under § 33 of the old LC, collective contracting ability – except for Section (6) – was connected to the result of the works council election. Pursuant to Section (6), if in cases under Sections (2) and (3) the trade union or its candidates do not obtain more than half of the votes at the works council election, the negotiation to conclude the collective agreement has to be conducted, but employees' consent is required to sign the agreement. Employees have to vote on this. Voting is valid if more than half of the employees entitled to elect the works council participate.

In other words, if for any reason there was no works council operating at a given employer, any trade union with representation at such an employer had practically no collective contracting ability. Due to the principle set forth in § 13 on the application of working conditions that are more favourable for employees, employers were not interested in concluding collective agreements with trade unions which had no collective contracting ability. The legislator did not urge the employer to do so at a later stage either, but he allowed agreements with the works council instead. Electing a works council and the success of its candidates were therefore in the essential interest of the given trade union. This situation in itself provided grounds for the structural and functional mingling between the two elements of collective labour law.

With its rather comic history, § 65 Section (1) of the LC stood on the other side of the examined structure. The structure of the text was originally the following: “Works councils shall have the right of codetermination with regard to the use of welfare funds, and the utilization of welfare institutions and real estate property of such nature, as specified in the collective agreement”. In the context of this wording, the following question inevitably rises: why is it necessary to identify the existence and content of the collective agreement as a condition for exercising this particular right of the works council?<sup>80</sup> This position was not endorsed by law enforcement. According to the position of the Supreme Court, the right of codetermination of works councils in respect of institutions and real estates dedicated to and actually used for welfare purposes existed even if the collective agreement did not provide for this.<sup>81</sup> The different position of legislation and law enforcement elicited debate between works councils and trade unions, followed by the amendment of the statute. After its amendment in 2007,<sup>82</sup> the structure of the new text of the LC was as follows: “Works councils shall have the right of codetermination with regard to

- (a) the appropriation of welfare funds, and
- (b) the utilization of welfare institutions and real estate property of such nature, specified in the collective agreement.”

<sup>80</sup> In this context, justification of the LC only laid down the following: “...the works council has a co-decision right in connection with the use of funds allocated for social and welfare purposes, as defined in the collective agreement. Decisions beyond this scope may be made by the employer, independently.”

<sup>81</sup> Supreme Court Mfv. II. 10.292/2004, EBH 2004, p. 1148.

<sup>82</sup> See § 1 of Act XIX of 2007.

According to the justification of this text, “the amendment of the act does not mean any textual change, it only makes it unambiguous, for practical purposes, that the term ‘specified in the collective agreement’ refers to both real estates and financial resources of welfare purposes”. To this end, it splits the text of the provision into points (a) and (b). Consequently, if works council elections were successful for the trade unions, the financial resources for welfare purposes as well as their size, number, value, function, etc. was to be included in the collective agreement that will be concluded. In the absence of this, the employer was in the position to make a decision without the involvement of the works council.<sup>83</sup>

To sum up, the previous LC maintained the dysfunctional system of collective labour law, where the two qualitatively distinct elements were mingled. The possibility of the simultaneous fulfilment of employers’ obligations was added to this under § 21, Section (2) and § 65, Section (3) of the LC. The omission of both resulted in very serious consequences. Interest reconciliation played an important part in this system as trade unions tried to enforce their interests at the highest possible level, with considerable success during that period of time. This process was practically interrupted by resolution 124/2004 (X. 14.) of the Constitutional Court, which declared the most important pillars of interest reconciliation anti-constitutional and annulled them accordingly.<sup>84</sup>

## 2.3. The regulation of trade unions in the current Labour Code in force

### 2.3.1. Starting point: Evaluation of the objective of collective labour law

Compared to the previous perception, the LC in force conceptually re-evaluated collective labour law, including the role of trade unions. The approach of the legislator was considered by trade unions as a substantial retreat, through which they were, so to say, “outsourced” from the world of labour. The shift in emphasis, compared to the previous LC, can be measured in the structural transformation of collective labour

<sup>83</sup> The legislator reinforces this process with § 165, Section (1) of LC, according to which employers may support the fulfilment of the employees’ cultural, welfare and health care needs and improvement of their living standards. The benefits and their extent shall be specified in the collective agreement. However, employers may also provide additional support to employees. This provision of the law and its rather anachronistic justification are both confusing. In the legislator’s view, “the form and overall extent of social support is defined in a normative way. Its due form is the collective agreement. The employer is not obliged to provide such benefits, but if he allocates money for this purpose – and not for individual matters –, regulation of the collective agreement becomes necessary.” Apart from the fact that the legislator does not answer the question what to do if there is no collective agreement, or what is more, there is no trade union either that could conclude the collective agreement, this interpretation is contrary to the provisions of § 30 of the LC that stipulate no binding content for the collective agreement.

<sup>84</sup> See Kiss, Gy.: Az Alkotmánybíróság döntése az érdekegyeztetésről szóló törvényjavaslatok tárgyában (Decision of the Constitutional Court on Bills about Interest Reconciliation), *Pécsi Munkajogi Közlemények*, 2009, No. 1, pp. 141–148.

law as well. Chapter XIX of the LC provides for the general rules of labour relations rather summarily – basically in accordance with Directive 2002/14/EC on the general framework for informing and consulting employees in the European Community. Coalition freedom is also mentioned here, and from this perspective there is one remarkable provision in § 231, Section (3) of the LC, where the legislator adopts the content of the previous regulation in connection with the workplace (work organizational) presence of trade unions.

In the subsequent part, the LC regulates works constitutional law in striking detail, and it seemingly puts great emphasis on the powers of the works council. In its § 264, LC provides a list of examples of decision areas where the employer has to request the opinion of the works council at least fifteen days prior to his measures. However, this rule is *lex imperfecta*, as the legislator does not attach any legal consequences to failure of doing so. In an international comparison, Hungarian works constitutional system – if there is one at all – is totally ineffective, at least from the perspective of employee involvement and rights to influence.<sup>85</sup> On the other hand, an important provision is set forth in § 268 of the LC, providing for the so-called works council agreement if there is no collective agreement, practically with identical reasons of the similar solution of the previous LC.

The legislator reduces trade unions' rights to the minimum that a social institution, operating in the interest of a specific objective, is generally entitled to. (I do not mention here the provision on the protection of trade union representatives.) The regulations in the current LC filled the legal relationship between the employer and the trade union with minimum content: trade union rights can be characterized as practically limited to the right for information and consultation.

Since neither the coalition-tariff system, nor the system of works constitutional law contain sufficient counterweight against the unilateral constituting right of the employer, several individual labour law instruments are in a vacuum, so their functioning in the system of an agreement-based branch of law is uninterpretable.<sup>86</sup> It is not an exaggeration to say that not even the current LC could create the unity of individual and collective labour law.

### 2.3.2. Judgment of the legal nature of trade unions on the basis of Act CLXXV of 2011

On the basis of Act CLXXV of 2011 on the right of association, non-profit status, and the operation and funding of civil society organisations, a trade union is an association according to its legal status. The law applies to foundations, associations and non-profit

<sup>85</sup> See, in particular, the German constitutional system for works councils. Cf. Hoyningen-Huene, G.: *Betriebsverfassungsrecht*, München, Beck, 1993.

<sup>86</sup> See analyses of § 96, Section (1) of the LC.

organizations as defined in the CC, as well as to other organizations established on the basis of the right of association. According to § 2 Section (6) Paragraph (b) of the Act, the trade union – along with the party and the mutual insurance association – is not a civilian organization. An association is an organization created on the basis of the right of association. The Act may establish different rules than those applicable to associations, for the various special forms, such as federations, parties, trade unions, as well as for associations conducting activities under the effect of a separate law. It is not a requirement to indicate the denomination of the type or form of the association in the name of the association (association of special form). An association (association of special form) can be created and operated with a denomination which contains a phrase referring to exercising the right of association. § 5, Section (1) of the Act says that a community created by natural persons on the basis of the right of association shall not be deemed an association if its operation is not regular, or if it does not have a registered membership or an organizational structure defined in the provisions on associations.

It is evident from the above that the legal nature of trade unions has basically not changed compared to the previous regulations. In this context, it is appropriate to look at the relevant provisions of CC. Pursuant to § 3 Section 63 of the CC, associations are legal persons with registered members, created for the purposes defined in their statutes in order to achieve their common objectives on a continuous basis. Associations may not be formed with the objective of performing economic activities. Associations are authorized to perform economic activities only if these are directly related to the achievement of the association's goals.

### 2.3.3. Trade union rights

The justification attached to the regulation of trade unions clearly marks the conceptual change compared to the previous regulation. The legislator stipulates the following:

While the Act does not contain any novelties – compared to the previous regulation – in the field of the general regulation of trade unions' legal status (within the framework of the Fundamental Law), it fundamentally alters the position of the so-called workplace organ of the trade union (with representation at the employer), as well as the obligations of the employer in this respect.

The justification perfectly reflects the shift in the legislator's standpoint. Two of the trade union rights, which were considered important in the previous regulation, were omitted from the LC, as they generated fierce debates. One of them is § 25, Section (5); the other one is § 23 of the previous LC. The first case is the instrument of financial compensation of working time reduction for trade union officials. In order to ensure that trade unions exercise their rights properly, the legislator provides certain benefits for trade union officials. No specific problem arises with this part of the regulation; this

instrument – even if not necessarily with this method and content – can be considered quite common.<sup>87</sup> Originally, the legislator provided for the working time reduction only.<sup>88</sup> The controversial provision was enacted in 1995,<sup>89</sup> and the legislator did not attach a meaningful justification to it. This provision was contrary to the principles of applying freedom of association in labour law, even if the intention of the legislator did not embrace this correlation back then. However, sustaining the contractual principle built on the requirement of the enforcement of private autonomy at the level of collective labour law is possible only if coalitions, representing conflicting interests, are independent of each other. The requirement of independence from the social partner representing adverse interests – as a characteristic of coalition – can also be deduced from the requirement of

<sup>87</sup> In Great Britain, it is usually based on an agreement – TUC of 1971 provided a major impetus for this. In addition, the Advisory, Conciliation and Arbitration Services (ACAS) released a document that drafted the minimum requirements in this respect. According to this, it would be appropriate that officials are entitled to be exempted from work by employers for the duration of their tasks, and also to receive remuneration as if they had performed their work. Typically, officials in question may bring an action against the employer with the industrial tribunal in the case of refusal. Note, however, that in practice remuneration is only due for the duration of the exemption if the official fulfils advocacy activities in respect of the employer of his/her own. However, if he/she is a member of a national organization, he/she is only entitled for the exemption from work during performing his/her activity outside the company. In Germany, the situation is more complex due to the consistent dualism of labour law. German law projects benefits to works councils that operate at an organizational level. This solution has become a source of tension within the triangle of the employer, the works council and the trade union. Working time allowance of trade union officials is usually subject to a tariff agreement, however, in practice their advocacy activities are not performed in relation to one specific employer. Also, several committees are established within the framework of work organizations, in which trade unions try to strengthen their influence. However, from the prevailing standpoint of German employers, the provision of working time allowance as a major rule does not embrace the activities of these committees. Note, however, that there are several agreements among stakeholders in this area, too.

In France, members of *délégués personnel* are given a maximum of 15 hours per month that is remunerated by the employer. However, the provision that this cannot be to the detriment of the employer was interpreted in some places to mean that the employer prevented communication during working time. In contrast, members of the *section syndicale* are not entitled to this type of benefit, according to a law enforcement decision.

In Italy, members of the *consiglio di fabbrica* are granted a paid annual leave to participate in the sessions of committees to which they were elected. If an employee was elected into a works council of a city different from the seat of the employer, he/she may request the employer to compensate his/her loss of earnings for the time spent on fulfilling his/her duties. Ten hours per year are allocated to hold the so-called works session (*assemblea*), which are remunerated by the employer.

In Spain, there are several agreements in this respect under which the different advocacy organizations and institutions of employees are granted a certain monthly time frame in order to fulfil their task.

In Austria, finally, one member of the works council has to be exempted from work if there are at least 150 employees working at the employer, but beyond this provision, officials are entitled to several other benefits as well, on the basis of a separate agreement.

See this summarized in *Szakszervezeti*, 1991, pp. 23–82.

<sup>88</sup> On the basis of the content of the regulation, it is not so difficult to spell out the intention that in places where employees are organized at an adequate level, the trade union representative should be granted a working time allowance that corresponds to the status of the so-called “independent” trade union official, well-known in the previous system.

<sup>89</sup> See § 5, Section (2) of Act LV of 1995.

volunteering. The requirement of independence of social partners is expressed in international labour law norms as well. ILO Convention No. 98 on the application of the right of association and the principles of collective bargaining, as already discussed before, deals with the prohibition of influencing coalitions in detail.<sup>90</sup> However, the requirement of prohibiting external influence is not only relevant in respect of the partner with adverse interest, but also in the relation of third persons. This means that the coalition, first and foremost, must be independent of all influence by the state. This problem is not only important in respect of coalition freedom, but it may also cause tension in the case of certain types of support granted by the state.

§ 25 Section (5) can be judged from the perspective of the general purpose of such benefit. This benefit is merely the exemption from work for a shorter or longer period of time, during which the official is entitled for remuneration. The legislator obviously assumed that the elected trade union official is in an employment relationship with the employer. However, this cannot be set as a requirement and could not be deduced from either the Etv. (Act on the right of association) or the new Act on the right of association. Consequently, this construction could have been applied only if the trade union official had been in an employment relationship with the particular employer with whom other members also created employment relationships.<sup>91</sup> However, from the aspect of judging the instrument, this is just one of the problems. It is more important that exemption from work was also assigned to a purpose if the objective of the benefit had been the proper performance of advocacy tasks.<sup>92</sup> However, § 25, Section (5) provides for the financial compensation “for any unused portion of work-time allowance”. This amount can be used by the trade union solely for the purposes of employee interest representation activities. The content of this provision is none other than the support of employees’ coalition by the party of adverse interest.

As for the trade union’s right to object, the legislator sets out that there is no intention in the Act to maintain this instrument any longer. The reasoning is that objection “is a legal instrument basically built on the specific role of trade unions in the socialist

<sup>90</sup> According to § 2 of the agreement, the coalitions of employees and employers must be provided adequate protection against any intervention by the other as far as their establishment, activity and management is concerned, no matter if this happens directly or through their employees or members. Thus, all measures shall be considered as an intervention whose objective is to create an employee organization under the control of a given employer or employer organization or to support employee organizations financially or by other means, with the intention of placing these organizations under the control of a given employer or employer organization. Obviously, § 25, Section (5) does not infringe directly the provisions of the agreement, but during the time period when financial compensation of working time allowance was based on the agreement of the parties concerned, there were several cases in which the employer was willing to agree with certain trade unions but not with others. That is why I referred to the claim that the legislator’s intention had not been to influence trade unions from the employer side, nonetheless, this became possible later on – despite the legislator’s will.

<sup>91</sup> In some cases, the employer terminated the employment relationship of the trade union official, who remained an elected trade union official even afterwards and thus demanded entry to his previous employer on the basis of § 19/A.

<sup>92</sup> See justification attached to § 25 of the LC.

economic and political system, and its regulation by the law is irreconcilable with market economy; it unduly and dysfunctionally restricts ownership rights of the employer with private law status". The Justification refers to contradictions brought to surface by the previous practice. However, the following sentence of the Justification is important: "The law does not exclude opportunities for collective agreements – without restrictions in this circle." The legislator obviously refers to the obligatory (contractual) part of the collective agreement that settles the relationship of parties concluding the collective agreement.

Other trade union rights are included in § 272 of the LC. Below, I will examine Sections (4) and (5) in a non-exhaustive manner. Pursuant to Section (4) the trade union may request information from the employer on all issues related to the economic and social interests of employees in connection with their employment. The law does not define the concept of "employment-related economic and social interest". If there is a collective agreement between the parties, this can be settled in the obligatory (contractual) part. The wording of Section (4) is a good example of minimizing, with special attention to the content of Directive 2002/14/EC as well as the *lex imperfecta* nature of employer's obligations towards the works council. Section (5) sets out that the trade union is entitled to express its opinion to the employer concerning any employer actions (decisions) or relevant drafts, as well as to initiate consultations in this connection. But this rule has a flaw: the employer's obligation to information towards trade unions is not regulated in the LC.

It seems from the above that the statutory regulation of trade unions completely fits the legislator's intention to reduce the influence of collective labour law. In my view, it is not the regulatory minimizing of trade unions that causes problems in this system, but the handling of collective labour law as a whole, with special attention to the pointless provisions on the law of workers' participation.

## 2.4. Trade unions' collective contracting ability on the basis of the current Labour CodeC

### 2.4.1. The reasons of conceptual change

At the end of the analysis of the previous solution my conclusion was that the definition of the trade unions' collective contracting ability had been alien to the system, and it had practically made the enforcement of collective labour law unfeasible. Regulation in the former LC had nothing to do with the coalition-type operation of trade unions. What is more, it mingled the systems of coalition-tariff and works constitutional law.

During the preparation of the current LC, the necessity of conceptual change became evident. The legislator's intention was to approximate the criteria generally accepted in European countries. However, it was impossible to neglect the period that elapsed since the change of regime, along with the politicization and depoliticization of trade unions. Finally, a certain compromise was reached, whose essence can be summarized as follows.

The legislator differentiates between trade unions made up of natural persons only and trade union associations. In the former case, the trade union has collective contractual

ability if the number of its members with employment relationships at the employer reaches ten percent of the total number of employees. If an employer's advocacy concludes a collective agreement with such a trade union, collective contracting ability requires that ten percent of the employees under the effect of the collective agreement be members of the given trade union.

§ 276, Section (3) is important here, according to which if a trade union association concludes a collective agreement, at least one of its member organizations with representation at the employer must comply with the criteria, and its member organizations must empower them to do so.<sup>93</sup> This rule explicitly intends to significantly facilitate the conclusion of higher level collective agreements.

The legislator's further intent was to ensure that the trade union concluding the collective agreement has a high level of support. Experience shows that at employers where there is a chance to conclude a collective agreement, more than one trade unions are in operation. In light of § 276, Section (4), trade unions entitled to conclude a collective agreement pursuant to Section (2) may jointly conclude the collective agreement.

#### 2.4.2. The freedom vs. compulsion of coalition

The dogmatic and historical development of labour law verifies that labour law can be represented only in the unified approach of individual and collective relations. These two parts of labour law are not independent legal categories loosely linked to each other, but they are a system of elements in a correlative relationship. It is appropriate to say in this context that individual labour law characteristically illustrates that the regulating function of private autonomy proved to be insufficient to display social relationships that are subject of the regulation. The aim of the collective norm material had been to cease this "obvious insufficiency," and this experiment of historical importance was undoubtedly successful.<sup>94</sup> Some say, though, that the appearance of actual labour law can be connected to the appearance of collective legal instruments.<sup>95</sup>

It is apparent that the legislator was challenged to decide the extent he should intervene in the autonomy of the parties within the individual contractual relation. However, this intervention was necessary because only this gave hope for sustaining the contractual principle. As noted earlier, the recognition of collective legal instruments was necessary for the survival, or in some cases, for the development of private autonomy. As the objective of labour law's collective instruments is to sustain power levelling between the subjects of employment relationships, the key burden of collective labour law is its purpose limitation.

<sup>93</sup> See § 15, Section (1) of Act LXXXVI of 2012.

<sup>94</sup> Migsch, E.: *Die absolut geschützte Rechtsstellung des Arbeitnehmers*, München–Salzburg, Fink Verlag, 1972, pp. 12–13.

<sup>95</sup> Camerlynck, G-H.: *Traité de droit du travail*, Paris, Dalloz, 1968, p. 12.



The correlation of individual and collective labour law instruments means that both of them have to be built on the same principle – that of private autonomy –, and, as a consequence, “collective labour law” cannot surpass, nor become independent of the opportunities deriving from self-determination that define individual relations.<sup>96</sup>

The term *coalition freedom* in the title is associated with constitutionalism, the idea of the rule of law and fundamental rights. Coalition freedom – that is, the freedom of association – is unquestionable today in the system of fundamental rights of a state governed by the rule of law. However, in this context, coalition constraint is not a constitutional law category as it serves to express that the balance system of labour law cannot be sustained without employee coalitions, the most important system of collective labour law. One of the basic objectives of the current LC was to strengthen the contractual sources of labour law and, in this context, to create the conditions for concluding collective agreements. Thus, the existence of large employee coalitions would be highly desirable from the perspective of the development of Hungarian labour law. Hungarian trade unions have apparently moved towards this direction: the Hungarian Trade Union Association was established on 6th December 2013.<sup>97</sup>

### 3. Summary

As the title of this study shows, I have tried to summarize trade unions’ law dogmatic position and law policy opportunities on the basis of the current LC. Along with other Acts, the LC clarified the legal status of trade unions. The legislator’s intention to strengthen contractual sources of labour law has been expressed in several legal instruments. Thus, the relationship between law and collective agreement has changed: (bilateral) dispositivity prevails as a main rule. As a consequence, more opportunities have become available for the parties to form the content of the employment relationship more flexibly. A significant change has taken place in the regulation of trade unions’ collective contracting ability as well, which, in my view, provides greater opportunity for trade unions and trade union associations to force collective bargaining negotiations and to conclude such agreements. Eventually, it can be concluded that the legal status and law dogmatic position of trade unions are suitable to effectively form the content of the employment relationship.

<sup>96</sup> Kiss, Gy.: *A piac és az emberi tényező (The Market and the Human Factor)*, Budapest, Balassi Kiadó, 1995, p. 168.

<sup>97</sup> The founding members of the new federation are: Autonóm Szakszervezetek Szövetsége (ASZSZ) (Association of Autonomous Trade Unions), a Magyar Szakszervezetek Országos Szövetsége (MSZOSZ) (The National Association of Hungarian Trade Unions) és a Szakszervezetek Együttműködési Fóruma (SZEF) (The Cooperation Forum of Trade Unions). According to Point 2 of the Charter of the Association, “[t]he aim of the federation is to promote and protect the interests of members of member organizations (including members of member associations as well; hereafter together: members of member organizations) regarding the employment relationship as well as the comprehensive representation and enforcement of the social, economic and cultural interests of current, prospective and former employees.”

However, the entire system of collective labour law regulations practically abolishes or deteriorates this opportunity. The structure of collective labour law, along with the quantity of regulations also indicates that the legislator intends to assign a greater role to employee participation – the so-called works constitution – instead of trade unions. However, legislation is *lex imperfecta*, as it formally contains elements that can generally be found in regulations of similar nature, but the employer's default has no private law consequences. Further, the legislator used again the instrument of works agreement to replace the collective agreement.<sup>98</sup> This method gave rise to debates even at the time of amending the previous LC, and the current solution is far from perfect too. This legislation will undoubtedly contribute to utilize the advantages of dispositivity mentioned above. However, there is a risk that agreements that are unilaterally advantageous for the employer will be concluded.

In conclusion, the regulation of trade unions had rather mixed results, and now – without any law policy tailwinds – it depends solely on trade unions how effectively they are able to participate in framing working conditions.

<sup>98</sup> See amendment of the previous LC in 1999.